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

5332

AND

A DIGEST OF THE PRINCIPAL MATTERS

REPORTED UNDER THE AUTHORITY OF

THE LAW SOCIETY OF BRITISH COLUMBIA

BY

E. C. SENKLER, K. C.

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JUDGES

OF THE

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

During the period of this Volume.

JUSTICES OF THE COURT OF APPEAL.

CHIEF JUSTICE:

THE HON. JAMES ALEXANDER MACDONALD.

JUSTICES:

THE HON. PAULUS ÆMILIUS IRVING.
THE HON. ARCHER MARTIN.
THE HON. WILLIAM ALFRED GALLIHER.
THE HON. ALBERT EDWARD McPHILLIPS.

SUPREME COURT JUDGES.

CHIEF JUSTICE:

THE HON. GORDON HUNTER.

PUISNE JUDGES:

THE HON. AULAY MORRISON.
THE HON. WILLIAM HENRY POPE CLEMENT.
THE HON. DENIS MURPHY.
THE HON. FRANCIS BROOKE GREGORY.
THE HON. WILLIAM ALEXANDER MACDONALD.

LOCAL JUDGE IN ADMIRALTY:

THE HON. ARCHER MARTIN.

COUNTY COURT JUDGES:

HIS HON. JOHN ANDREW FORIN, - - - - - - - West Kootenay
HIS HON. FREDERICK McBAIN YOUNG, - - - - - - - Atlin
HIS HON. PETER SECORD LAMPMAN, - - - - - - - Victoria
HIS HON. JOHN ROBERT BROWN, - - - - - - - - - Yale
HIS HON. FREDERICK CALDER, - - - - - - - - - Cariboo
HIS HON. DAVID GRANT, - - - - - - - - - - Vancouver
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HIS HON. GEORGE HERBERT THOMPSON, - - - - - East Kootenay
HIS HON. SAMUEL DAVIES SCHULTZ, - - - - - - - Vancouver

ATTORNEY-GENERAL:

THE HON. WILLIAM JOHN BOWSER, K.C.

MEMORANDUM

On the 19th of April, 1915, Herbert Ewen Arden Robertson, Barrister-at-Law, was appointed a Judge of the County Court of Cariboo, and a Local Judge of the Supreme Court of British Columbia.

ERRATUM

In the Table of Cases Reported in Volume XVIII., B. C. Reports, p. VIII., "Land Registry Act, *In re*; *In re* Lots 820 and 825" should read "Bogardus v. Hill."

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Downing Street,
21st May, 1913.

The King has been pleased to approve of the use and recognition throughout His Majesty's dominions during tenure of office of the title of "Honourable" in the case of the Chief Justice of Canada, the Judges of the Supreme and Exchequer Courts of Canada and the Chief Justices and Judges of the undermentioned Courts in the several Provinces of Canada:—

Ontario.—The Supreme Court of Ontario.

Quebec.—The Court of King's Bench, the Superior Court, and the Circuit Court of the District of Montreal.

Nova Scotia.—The Supreme Court of Nova Scotia.

New Brunswick.—The Supreme Court of New Brunswick.

Manitoba.—The Court of King's Bench and the Court of Appeal.

British Columbia.—The Court of Appeal and the Supreme Court of British Columbia.

Prince Edward Island.—The Supreme Court of Prince Edward Island and the Chancery Court.

Saskatchewan.—The Supreme Court of Saskatchewan.

Alberta.—The Supreme Court of Alberta.

A similar recognition of the title will be accorded in the case of any retired Chief Justices and Judges of the above-mentioned Courts who may receive His Majesty's permission to bear it after retirement.

Canada Gazette, 1913, Vol. 46, p. 4596.

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

MACKENZIE v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

COURT OF APPEAL

1914

Jan. 6.

MACKENZIE v. B.C. ELECTRIC RY. CO.

Negligence—Application for nonsuit—Contributory negligence—Legal evidence to go to jury.

At about eight o'clock on the evening of the 8th of January, 1912, during a slight fall of snow, the plaintiff started across Main street (on which was a double track street-car line running north and south) from the south-west corner of Main and Dufferin streets in Vancouver. A team of horses, with waggon, coming out of Dufferin street, east, was to his left, crossing the tracks and turning north on the west side of Main street. Plaintiff crossed the west track and, on reaching the west rail of the east track, looked to his left, past the rear of the waggon as it cleared the track, and saw a car coming south on the east track, about 30 feet away. He stopped and turned, and on taking two or three steps back, was struck by a car going north on the west track and was knocked about 13 feet across the east track, sustaining a broken leg and other injuries. There was a conflict of evidence as to the speed at which the car that struck the plaintiff was going, ranging from six to 30 miles an hour, and the witnesses who saw the accident testified that they saw no car going south on the east track, as stated by the plaintiff. On the trial the jury disagreed, and the motion for judgment by way of nonsuit was dismissed.

Held, on appeal (MCPHILLIPS, J.A. dissenting), affirming the trial judge, that there was evidence upon which the jury must pass, and there must be a retrial.

COURT OF APPEAL

1914

Jan. 6.

MACKENZIE v. B.C. ELECTRIC RY. CO.

APPEAL from the judgment of MORRISON, J. of the 28th of May, 1913, dismissing the defendants' motion for judgment by way of nonsuit after the jury had disagreed. The facts are set out in the headnote and reasons for judgment.

The appeal was argued at Vancouver on the 10th of November, 1913, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

McPhillips, K.C., for appellant: The jury disagreed and the defendants' application for nonsuit, which was adjourned until the case was finished, was dismissed. The evidence is conflicting on the question of speed, and as to the gong, there is evidence that there was a gong, whereas there is no evidence that there was no gong. The question comes down to whether the plaintiff should not have continued on when he got as far across the tracks as he did, instead of turning back, as this no doubt was the cause of the accident. *Brenner* v. *Toronto R. W. Co.* (1907), 13 O.L.R. 423; 15 O.L.R. 195; (1908), 40 S.C.R. 540, is distinguishable. The plaintiff was the only witness who saw a car going south on the eastern track at the time of the accident.

George Duncan, for respondent: The evidence is that the plaintiff was as far as the first rail of the second track when he saw the car coming at an excessive speed about 30 feet away, and he was justified in turning back: see *Ruddy* v. *London and South-Western Railway Company* (1892), 8 T.L.R. 658.

McPhillips, in reply: The evidence shews he was on the east rail of the east track when he turned, therefore, the *Brenner* case, *supra,* applies: see also *Grand Trunk Railway* v. *McAlpine* (1913), A.C. 838; 13 D.L.R. 618.

Cur. adv. vult.

6th January, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: At the close of the argument I had no doubt that the learned judge was right in refusing to dismiss the action. I thought there was legal evidence to go to the jury, and further consideration of it has only confirmed the opinion I then held. This being so, I shall not, as the case must go

back to the jury, make any further observations with respect to it.

I would dismiss the appeal.

MARTIN, J.A.: In my opinion it is impossible to say that if this case is allowed to be retried (owing to the disagreement of the jury), there are no facts to be left to the jury on the question of the contributory negligence of the plaintiff. While it is true that the Privy Council lately said in *Grand Trunk Railway* v. *McAlpine* (1913), A.C. 838 at p. 845; 13 D.L.R. 618 at p. 623, that

> "There is no such rule of law in England as that if a person about to cross a line of railway looks both ways on approaching the track, he need necessarily not look again just before crossing it,"

yet their Lordships also say that "in a case of this character" the plaintiff's negligence or contributory negligence "are questions of fact to be decided in each case on the facts proved in that case." Now, in the case at bar there are two important elements which were absent in the *McAlpine* case, *viz.*: here there is "something abnormal in the state of the atmosphere," it was snowing, "coming down, but not severe," and the car was sworn, by one witness at least, to be running at an outrageous rate of speed, 30 miles an hour, in his opinion, instead of the moderate rate of 5 to 6 miles in the *McAlpine* case. It is obvious that a man might not discharge his duty to look before crossing a track in the case of a nearby car going at a proper rate in one state of circumstances, but might do so in another in the case of a car which was a long way off and yet, unknown to him, was really approaching at a very high rate of speed, thereby causing him to miscalculate his real position in regard to it, and put himself in jeopardy. As I understand the judgment in the *McAlpine* case, there is no rule of law that governs the matter of how often one should look before crossing, but it is a question of fact to be passed upon by the jury in the particular circumstances of each case.

MARTIN, J.A.

I need only add that if it had been established, as was contended on the argument, and which at first impressed me, that the plaintiff had reached the east rail of the east track before

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1914
Jan. 6.

he turned back, I do not think he could be absolved from contributory negligence.

GALLIHER, J.A. concurred with MACDONALD, C.J.A.

MACKENZIE v. B.C. ELECTRIC RY. CO.

MCPHILLIPS, J.A.: In this case, tried before MORRISON, J. with a jury, the jury disagreed, and leave was reserved by the learned trial judge, and consented to at the close of the plaintiff's case, for the defendants to move for judgment as of nonsuit. This was the course recently adopted by Ridley, J. in the recent case of *Dobson* v. *Horsley* (1913), 30 T.L.R. 148. The trial having taken place on the 14th of February, 1913, the motion for judgment for the defendants was made on the 21st of February, 1913, and refused by the learned trial judge on the 28th of May, 1913. From this judgment the appeal to this Court is brought.

I think it may be said to be well settled that if there was not evidence sufficient to go to the jury upon which a jury could reasonably find a verdict of negligence against the defendants, the case should not be submitted to the jury, and whether the jury disagree or render a verdict, judgment may be entered for the defendants by the judge or the Court of Appeal. For this proposition I would refer to *Turner* v. *Bowley* (1896), A.C. 402; *Paquin, Limited* v. *Beauclerk* (1906), A.C. 148; 75 L.J., K.B. 395.

MCPHILLIPS, J.A.

In ordinary course, unless this appeal be allowed, there will be a new trial—should the plaintiff be so advised; but we are now asked, as the learned judge was asked, to enter judgment for the defendants.

The question now is: what are the admitted facts of this case? The appellant Company operates an electric street railway in the City of Vancouver, and the accident, the subject-matter of this action, occurred upon Main street, at the intersection of Main and Dufferin streets, the Company having two lines of rails side by side on the level upon Main street. The course of Main street is about due north and south, and Dufferin street intersects at about a right angle from the west, but takes a course south-easterly upon the further side of Main street. The accident took place in the evening, between eight and nine

o'clock on the 8th of January, 1912. It was snowing at the time. The plaintiff, having reached the south-east corner of Dufferin street, parted with his friend Watson (a witness called by the plaintiff), with whom he was walking home, at the south-west corner of Dufferin street. The plaintiff noticed a team coming from Dufferin street from the east side of Main street, making its way across Main street to the west side.

[The learned judge, after referring to the evidence, proceeded]:

It is clear from the evidence that the plaintiff is alone in his statement that there was a car on the east track bearing down upon him, which impelled him to turn around and step back on the track which, according to all the other evidence, was the only car passing at the time. It is not at all surprising, upon these facts, that the jury disagreed. In my opinion, though, the jury were entitled to do more; they were entitled to give a verdict for the defendants upon the facts, as the plaintiff did not establish his case, or make out such a case as would admit of a jury reasonably finding a verdict in his favour. Even upon the facts as the plaintiff states them, if there was a car upon the east track, it was some 30 feet from him and he had perhaps four or five feet to make to cross the track; but he did not do this, he stepped back and into a car upon the west track. The motorman of this car stated he had observed the plaintiff clear the track, and naturally it was the last thing in the world that the motorman could have looked for to have the plaintiff turn around and step back upon the track.

At the trial it would seem that the action of the plaintiff in proceeding as he did was shrouded in mystery.

The plaintiff, it would appear, was at one time in the British Army, afterwards in the First Class Army Reserve, and is only thirty years of age, and a good athlete at the time of the accident. In what way can it be said that there was negligence by the defendant Company?

In making this enquiry, the case of *Brenner* v. *Toronto Ry. Co.* (1908), 40 S.C.R. 540, may well be referred to, and particularly what is said by Duff, J. at p. 556:

"It was no doubt this last mentioned act—the act of going upon the track along which she knew a car was, within a short distance, approaching

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1914

Jan. 6.

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—without first looking to see the position of the car, that in the opinion of the jury constituted the contributory negligence they attributed to the appellant. Given this finding—that this act of the appellant (by which she passed from a position of perfect security into a position in which, in the circumstances of the moment, a collision with the respondents' car was inevitable) was an act of negligence—I am unable to see any ground on which she could hope to recover. The principle is too firmly settled to admit, in this Court, any controversy upon it, that in an action of negligence, a plaintiff whose want of care was a direct and effective contributory cause of the injury complained of, cannot recover, however clearly it may be established that, but for the defendant's earlier or concurrent negligence, this mishap, in which the injury was received, would not have occurred: *The London Street Railway Company* v. *Brown* (1901), 31 S.C.R. 642; *Spaight* v. *Tedcastle* (1881), 6 App. Cas. 217 at p. 226; *The Bernina* (1887), 12 P.D. 58 at pp. 88 and 89."

A very recent case in the Privy Council is also very much in point—that of the *Grand Trunk Railway* v. *McAlpine* (1913), A.C. 838; 13 D.L.R. 618, where it was held that the duty incumbent upon a person who is about to cross a railway track at a highway crossing at grade to look for moving trains is not satisfied by merely looking both ways in approaching the track; he must look again just before crossing.

Now, what are the facts as we have them before us? The plaintiff proceeded to cross a street which is double tracked, the lines being laid close together, about 16 feet in width covers both tracks, and the intervening space between tracks five feet in width, and his evidence is that having cleared the west track, he saw a car within 30 feet of him on the east track, hurriedly turned around, stepped back on the west track, and was at once struck by the car. What does this postulate? It means, according to his story, two cars were bearing down from opposite directions, and were about to pass each other at the point where he was injured; therefore, he must have stepped upon these lines of electric railway with two cars in sight. If he did not see them it was his own default. Others round about, whose evidence has been referred to, saw one car, but, apparently, the plaintiff saw none until he was alarmed by what would appear to have been a "phantom" car, as no one else saw it. Can one wonder that the jury disagreed? My only wonder is, as previously remarked, that their verdict was not for the defendants, as, indisputably, here is a case of absolute and positive want of

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care. The plaintiff told a most improbable story. If the facts were as related by him, he should not have attempted to place a foot upon either of the tracks.

The safety of persons crossing the street railway lines must be cared for, but it is to be remembered that the electric cars can only proceed along the steel rails, and the service is one of public utility although carried on by a private company; and to discharge the duty owing to the travelling public, reasonable speed must be kept up, and it is not the law that other traffic is entitled to stay the passage of the cars unreasonably. The truth is that persons crossing railways at level crossings must exercise a high degree of care, and a casual glance both ways before proceeding to cross the street upon which lines of railway are situate does not discharge the duty incumbent upon persons crossing railways. The duty extends to apprising themselves of where the cars are, and to entitle them to cross means that they are at a sufficient distance to admit of it being done with safety. But here, two cars from opposite directions, upon lines of railway parallel to each other, and lying side by side, meet within the time the plaintiff takes to walk, say, 30 feet or less; the street in its whole width is 100 feet, and the plaintiff left the sidewalk to walk across. Such is the plaintiff's account, and the cars were unseen by him, save at the moment that he cleared the west track a car loomed up on the east track, a car of apparent imagination, as, were it not so, the plaintiff unquestionably would have been killed.

It is patent that if a car was coming south at the time the plaintiff states it was, within 30 feet of him when he turned, and that he was then struck by the car going north and thrown to the east, he would have been run over by that car going south, as he was picked up to the east of the east rail of the east track; he would, in fact, have been thrown right into that car. This demonstrates to a certainty that no car was coming down, as the plaintiff states, on the east track going south. It is manifest that this car he thought he saw was only in his imagination. Therefore, how impossible it is to establish any class of negligence against the Company when the car that struck him was proceeding north on the west track, which track the plaintiff

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had cleared to the knowledge of the motorman, and upon which track the plaintiff, for no reason other than a disordered imagination at the time, returned upon, to his own injury and the peril also of the passengers in that car, through possible derailment or other disaster.

It is right that street railways and railway companies generally should be held strictly accountable for negligence, but they are not insurers of the lives of the public, or even of their passengers. The public, as well as their passengers, must exercise reasonable care, and must not put themselves in peril. It is true, even if there be negligence, and notwithstanding that negligence the accident could have been avoided, and the car stayed in its way, there would be liability. But, upon the evidence in this case, could it be contended for a moment that there was any opportunity on the part of the motorman of preventing what may be said to have been, under the circumstances, an inevitable accident? It occurs to me that upon the facts of this case only one answer can be returned, and that is that the plaintiff has not made out such a case as, upon the admitted facts, would entitle him to recover, and if this be the situation of matters, judgment should be entered, as in my opinion it should be, for the defendant Company.

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I advert again to the case of *Grand Trunk Railway* v. *McAlpine* (1913), A.C. 838 at p. 846; 13 D.L.R. 618 at p. 623, where Lord Atkinson said:

"Where a statutory duty is imposed upon a railway company in the nature of a duty to take precautions for the safety of persons lawfully travelling in its carriages, crossing its line, or frequenting its premises, they will be responsible in damages to a member of any one of these classes who is injured by their negligent omission to discharge, or secure the discharge of, that duty properly, but the injury must be caused by the negligence of the company or its servants. If, as in the example taken by Lord Cairns in *Dublin, Wicklow and Wexford Railway* v. *Slattery* (1878), 3 App. Cas. 1,155 at p. 1,166, the folly and recklessness of the plaintiff, and not the admitted negligence of the company, be the cause of the injury to the plaintiff, then the negligence of the servants of the company in omitting to whistle, for instance, as the train approached a station or level crossing would be an *incura*, but not an *incuria dans locum injuriæ*. In *Davey* v. *London and South Western Railway Co.* (1883), 12 Q.B.D. 70, this principle was applied."

Davey v. *London and South Western Railway Co.* is very similar to this case. There the plaintiff admitted that before

crossing he looked to the right along the down line, but he admitted that he did not look to the left along the up line, and that if he had looked he must have seen the train coming. Owing to the position of certain buildings which stood by the line, it was impossible for anyone crossing from the down side to see a train coming until he got within a step or two from the down line, but a person standing on the down line on the six-foot space had a clear and uninterrupted view up and down the line for several hundred yards. It was held by Brett, M.R. and Bowen, L.J. (Baggallay, L.J. dissenting):

"That the nonsuit was right as, although there was evidence of negligence on the part of the defendants, yet, according to the undisputed facts of the case, the plaintiff had shewn that the accident was solely caused by his omission to use the care which any reasonable man would have used."

And see the judgment of Brett, M.R. at p. 71.

To demonstrate the plaintiff's negligence, even upon the hypothesis that there was a car coming from the north (which I think may be taken as a chimera), the plaintiff proceeded, as the evidence shews, to cross the tracks with a waggon with a hood upon it obscuring the view between him and his otherwise possible line of vision up the east track to the north.

Now, what is the duty of a foot passenger about to cross over street railway or railway tracks? In Beven on Negligence, 3rd Ed., p. 141, attention is paid to the care necessary to be exercised in the case of steam railways. No doubt, in the case of street railways traversing the streets of a city, especially in the congested portions, the speed of the cars should be such as due care requires; in less congested portions greater speed is allowable. But it must be now accepted, I think, that the use of the streets by street railways is not an extraordinary user, such as, for instance, their use by steam railways. The street cars carry the public not only to and from their homes within the city but from block to block in the varied business affairs of the public, and the cars can only pass over the fixed rails laid down upon the streets. To admit of the service being what it should be, and is intended to be, that is, one of public utility, there must be a common and reciprocal duty between the users of the streets, the foot passenger or person in charge of a vehicle, to exercise due care, and the cars to

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be also controlled with due care. There is the duty, though, as in the case of the steam railway, that the foot passenger, as well as the person in charge of a vehicle, should be alert to anticipate and avoid dangers. This is a requirement that is incumbent on all denizens of cities in these modern days.

It is interesting, when considering this phase of matters, to note the language of Meredith, J.A. in *Cooper* v. *London Street R. Co.* (1913), 9 D.L.R. 368 at p. 371, where the learned judge is directing attention to passengers alighting from cars and passing behind them where double tracks exist.

In the case of *Coyle* v. *Great Northern Railway Co.* (1887), 20 L.R. Ir. 409, the facts were that a workman who was employed by contractors near a station of the defendants' railway, erecting a signal-box, was killed by carriages on the railway running over him. It appeared from the evidence of the plaintiff's (the administratrix, the action being brought under Lord Campbell's Act) own witnesses that the view from the tool-box at which Coyle was standing, to the point from which the carriage began to retrograde, was unobstructed; that they were visible during the whole of the shunting to any person at the tool-box; that they were retrograding in the direction of the workman when he started across the line, and that he must have seen them moving had he looked towards them, and that there was nothing unusual in what took place that morning in the mode of shunting; and it was held

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"That the judge at the trial ought to have directed a verdict for the defendants, as the undisputed facts shewed affirmatively that C., in crossing the line, acted negligently, and that his negligence, if not the sole, was at least a contributory, cause of the accident."

See also the judgment of Palles, C.B. at p. 418.

I would again refer to *Cooper* v. *London Street R. Co. supra,* judgment of Meredith, J.A. at p. 369, as an authority that there can be a nonsuit on a question of contributory negligence.

There is nothing in the appeal book to shew how long the jury were out, other than that the jury disagreed; we can fairly assume that the three hours and more elapsed and the end was a disagreement; that means that the jury were not able to even arrive at a majority verdict, where with us, out of a jury of eight in civil cases this is permissible. This is in itself a cir-

cumstance worthy of being noted, as it is a matter of rare occurrence for a jury to disagree in negligence actions. The fact is that the plaintiff's account of his actions is an impossible one, and clearly establishes contributory negligence on his part. On his own statement, it was the car proceeding south on the east track which impelled him to suddenly turn around and go back upon the west track. Now, this car he could not see, he admits, owing to the waggon, but yet he recklessly—his line of vision being impeded to the north up the west track—proceeds to cross the lines of street railway—double tracks lying side by side. Did he exercise "due care"? If he did not, he is not entitled to complain of the negligence of the defendants.

I concede that if it was that the plaintiff, in the sudden emergency, lost his presence of mind through the misconduct of the defendants, and while in such loss, and owing to it, fell into the danger, and was thereby hurt, he would not be guilty of want of due care, or of contributory negligence. Let us analyze this. The admitted facts are that he proceeded to cross the tracks without being able to see whether a car was coming along the east track; he is confronted with one, according to his story; he steps back upon the west track and is hit by a car on the west track, a car that he must have seen if he looked before crossing, as the other witnesses saw it. What can be said to be the misconduct of the defendants? None is established for this situation; the peril was created by the plaintiff's own act, a reckless act. Were this case like that of *The North Eastern Railway Company* v. *Wanless* (1874), 43 L.J., Q.B. 185, or within the principle there enunciated by Lord Cairns, there would be liability. There the gates to the line of railway were open, which by statute should have been closed. Lord Cairns at p. 187 said:

"The circumstance that the gate was open at the time amounted to a statement to the public that the line was safe to cross, and a person going inside the gate with a view of crossing the line, may well be supposed by a jury to have been influenced by the fact that the gate was open. When inside the gates, the boy who, as stated in the case, was injured, saw one train blocking up the line, so as to make it impossible to cross in spite of the open gate, and he may easily be supposed to have been embarrassed thereby, so that having his attention fixed upon that train, when he attempted to proceed after it had passed he failed to see the other train,

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and, in consequence, was knocked down by it and was injured. To say that he might have seen the other train only comes to this, that being brought on to the line by the fact that the gate was open, and finding himself stopped by a train, he became embarrassed and did not use his faculties as clearly as he might have done. The question is, might not a jury well consider that he was on the line through the negligence of the company?"

Now, what was the negligence on the part of the Company which brought the plaintiff upon the tracks? Not a particle of evidence; not even a scintilla. The plaintiff came upon the tracks without invitation, without anything being held out to ensure safety. It is true he needed no invitation; he had a right to cross the street and the tracks, but to do it with "due care." On the facts admitted, did he do this? The evidence is against the plaintiff upon his own story.

If there was a car on the east track bearing down on him, he went on the tracks recklessly, without being able to appraise himself of the fact by reason of the waggon obstructing his view; and if this was only a freak of imagination, and no car was on the east track, and bearing down upon him, he was the author of his own injury without negligence in the defendants, as to step back upon the west track, as he did, after once clearing it, and thereby assuring the motorman of the car that he was safely across, was to bring about inevitable accident through no misconduct of the defendants. The impact was instantaneous; there was no time or room for the pulling up or staying the way of the car.

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I conclude with the words of Palles, C.B. in the *Coyle* case, *supra,* at p. 418, which are peculiarly applicable to the facts of this case.

"If the case be so clear that the determination of those two questions [whether the act of the plaintiff was negligent, or, secondly, whether the circumstances render reasonable an inference of fact that the defendant by due care could have obviated the plaintiff's negligence] involves no inference of fact, it is for the judge and not for the jury."

In my opinion, it is clear, beyond dispute, that the plaintiff was negligent, and the injury was one, owing to that negligence of the plaintiff, inevitable and immediate, not admitting of any possible opportunity of being obviated.

It follows that, in my opinion, the appeal should be allowed, and judgment entered for the defendant Company.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellants: *McPhillips & Wood.*
Solicitor for respondent: *George Duncan.*

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Master and servant—Death of servant—Workmen's Compensation Act, R.S.B.C. 1911, Cap. 244—Employed as fan-tender—Coal mine—Snowslide—Abnormal conditions—Accident arising out of employment—Findings of arbitrator—Stated case.

While deceased, employed as a fan-tender for a colliery company, was attending to his duties within a shelter house built on the side of a gulch under a cliff for the protection of the workmen, a snowslide coming down in an unusual direction and under abnormal conditions, smashed in the shelter house and killed him.

Held, on appeal (MARTIN, J.A. dissenting), that in the situation in which he was placed in the course of his employment, he was exposed to risk not common to others in the locality not so employed, and the applicants were entitled to compensation.

The fact that there were abnormal conditions of weather does not affect the liability.

Judgment of MURPHY, J. affirmed.

APPEAL from the judgment of MURPHY, J. upon a case stated submitted for his opinion by THOMPSON, Co. J., acting as an arbitrator under the Workmen's Compensation Act, 1902. The applicant applied for compensation on behalf of the widow of the deceased, who was employed by the respondent Company as a fan-man at Coal Creek, near Fernie. Near where the deceased worked was a shed, erected for the protection of the workmen in cold weather. A snowslide came down the moun- Statement

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tain, covering and smashing in the shelter shed where the deceased then was, killing him. On a final hearing of the arbitration, the arbitrator stated that he would hold that persons within the shelter ran no special risk from an ordinary snowslide, but that this accident was caused by a snowslide occasioned by abnormal conditions of weather, and in this way the risk was not incidental to the employment.

He submitted the following questions:

"1. Is it a question of law that the cause of death of the deceased was not an accident within the meaning of the Act?

"2. If the above question is one of law, would I be right in holding that the cause of the death of the deceased was not an accident within the meaning of the Act?

"3. Is it a question of law or fact that the risk incurred by the deceased was not connected with or incidental to his employment?

"4. If the above question is a question of law, would I be right in holding that the risk incurred by the deceased was not one connected with or incidental to the employment?

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"5. Is it a question of law or fact whether the cause of the death of the deceased arose out of his employment?

"6. If the above question is one of law, would I be right in holding that the causes of the death of the deceased did not arise out of his employment?"

A. Macneil, for applicant.

P. E. Wilson, for respondents.

11th July, 1913.

MURPHY, J.: In this case I have some difficulty in determining just what are the findings of fact made by the learned arbitrator. He states first that had the snowslide been occasioned by normal causes, there is no doubt but that he could and would have assumed that the deceased came to his death by accident arising out of and in the course of his employment. In other words, he would have made an award in applicant's favour. Then he concludes his findings:

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"The question before me, and upon which the whole case turns, is: Was the shelter in which the man stood, and where he had a perfect right to be at the time, in the course of his employment, so situated that persons standing therein ran a peculiar risk from snowslides? I would hold, if the matter were before me for a final hearing, that persons within the shelter ran no special risk from an ordinary snowslide, and that the accident was caused by a snowslide occasioned by abnormal conditions of weather, and I would, therefore, dismiss the application."

Apparently, therefore, the learned arbitrator has directed

himself that as a matter of law, because the snowslide was not occasioned by "normal causes," but by "abnormal conditions of weather," therefore he was bound to dismiss the application. I think this is an error. The case relied upon, *Warner* v. *Couchman* (1911), 1 K.B. 351; 80 L.J., K.B. 526, has been before the House of Lords (1912), A.C. 35; 81 L.J., K.B. 45, and the decision sustained on the express ground that a finding of fact had been made that the man was not specially affected by the severity of the weather by reason of his employment. Earl Loreburn, L.C. cites with approval Fletcher Moulton, L.J. as follows:

"'It is true that when we deal with the effect of natural causes affecting a considerable area, such as severe weather, we are entitled and bound to consider whether the accident arose out of the employment, or was merely a consequence of the severity of the weather to which persons in the locality, and whether so employed or not, were equally liable. If it is the latter it does not arise 'out of the employment,' because the man is not specially affected by the severity of the weather by reason of his employment.'"

If the learned arbitrator had made a straight finding that the deceased was not specially affected by reason of his employment by the abnormal weather occasioning the snowslide, that would be, I think, a finding of fact with which I could not interfere He has found that the cause of the accident was a snowslide, and that had it been occasioned by normal causes the applicant should succeed. He could only succeed, I take it, because he would be specially affected by reason of his employment, that is, exposed to extra hazard because he was at work where he was. How that condition of affairs can be altered by the snowslide being caused by abnormal conditions of weather I fail to see, since the governing factor is the special exposure, which would be as operative in the second instance as in the first. I would remit the case to the learned arbitrator with a direction to find for the appellant.

The appeal was argued at Vancouver on the 7th of November, 1913, before MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Bodwell, K.C. (*J. J. Martin,* with him), for appellant: The arbitrator intended to find that the man was killed by a snowslide which had the same relation to life as an earthquake, and

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was not to be classed as a case that comes in the ordinary course of his work: see Ruegg's Employers' Liability, 8th Ed., p. 338; Beven's Employers' Liability, 4th Ed., p. 380; *Andrew* v. *Failsworth Industrial Society* (1904), 2 K.B. 32 at p. 35; 73 L.J., K.B. 510 at p. 511. In *Warner* v. *Couchman* (1911), 1 K.B. 351, referred to by MURPHY, J., Fletcher Moulton, L.J. gave the dissenting judgment.

Maclean, K.C. (*A. Macneil,* with him), for respondent: This is a question of law, not one of fact: see *Fenton* v. *Thorley & Co., Limited* (1903), A.C. 443 at p. 453. The whole question is whether the accident arises out of and in the course of his employment. For the appellants to succeed, they must override *Andrews* v. *Failsworth Industrial Society* (1904), 2 K.B. 32. He referred to *Ismay, Imrie and Co.* v. *Williamson* (1908), 24 T.L.R. 881.

Bodwell, in reply.

Cur. adv. vult.

6th January, 1914.

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MARTIN, J.A.: As I now come to understand the finding of fact of the learned arbitrator (though it would probably have avoided this appeal if he had made his meaning quite clear, as it ought to have been made, for our guidance at least), the shelter built at the mine entrance to warm the fan-men, including the deceased, engaged in ventilating the mine, in severe weather, was not in the path of snowslides at all, as appears by the evidence of Shanks, which is accepted by the arbitrator as correct. That shews that the only snowslide in that neighbourhood for five years was in the spring, in March, 1912, in a thaw, and that it had come down and followed the course of the gulch or ravine, at least 20 or 30 feet away from the shelter, whereas the slide in question occurred in the winter, in February, in zero weather, and came over the cliff 1,000 feet right above the shelter, and was caused by a high wind knocking down dead trees, which rolled down, carrying the snow with them. The shelter was about 80 feet from the bottom of the gulch, on a bench under the cliff, and "in a sheltered position as far as snowslides were concerned," and was a safe place under ordinary circumstances; it was not built to protect the men from

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snowslides, as it was considered to be out of their path. These slides take, as is common knowledge, a well-defined course and track, necessarily conforming to the configuration of the country. On the facts, the arbitrator finds that the accident was caused by "abnormal weather conditions," and such being the case, there is nothing before us to shew that the deceased was not equally liable with all other persons who happened to live or be employed in that vicinity to the consequences of the severity of the weather, and, consequently, it is impossible to say that he was specially affected by it. Any one who happened to be living or working in or further down the gulch, near to, but out of the path of an ordinary snowslide, might have been overtaken and injured by this unprecedented one coming from a totally different direction. That is the only inference I can draw from the arbitrator's findings, and if I am right, there is no dispute that on the law, and cases cited, the plaintiff cannot recover. So far as this particular snowslide is concerned, she is in no better position than if the dead trees that caused it had been blown down in summer time and rolled over the cliff, without any snow, but carrying down rocks and earth which killed the deceased.

MARTIN, J.A.

The appeal should, in my opinion, be allowed.

GALLIHER, J.A.

GALLIHER, J.A.: I agree with MURPHY, J. that the fact that the conditions which caused the slide which resulted in the death of Culshaw being abnormal does not affect the liability, in the circumstances of this case. The fact that the deceased, in the situation he was placed in the course of his employment, was exposed to risks not common to others in the locality not so employed, takes it out of the principle enunciated in the cases cited to us on behalf of the appellants. In order for Culshaw to perform his work it was necessary for him to be where he was, and that was not necessary or usual for others not so employed.

I would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This is an appeal from MURPHY, J., who, upon a case submitted by the learned arbitrator, held that even with the finding of fact that the snowslide at Coal Creek

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which caused the death of Joseph Culshaw was caused by abnormal conditions of weather, the applicants, the widow and infant daughter of the deceased, being dependants, are entitled to be allowed compensation under the Workmen's Compensation Act, 1902, and the learned judge remitted the case to the arbitrator to proceed thereon in accordance with such decision.

In all claims for compensation the question to be answered must always be: Was the personal injury one of accident arising out of and in the course of the employment?

This Court has no jurisdiction to deal with the facts, that is, it is not a Court upon questions of fact, but upon questions of law alone. It is to be observed that MURPHY, J. had some difficulty in determining what facts the learned arbitrator did find.

The Full Court, in *Armstrong* v. *St. Eugene Mining Co.* (1908), 13 B.C. 385 (HUNTER, C.J. and IRVING and MORRISON, JJ.), defined what the arbitrators must do in stating a case. MORRISON, J. (who delivered the judgment of the Court), at p. 388, said:

"The proper course in stating a case is for him to find, not only that the deceased met his death by accident, whilst in the employment of the defendant, as he has done, but to go further and find as a fact (a) whether or not that accident arose out of and in the course of that employment; (b) that the deceased was guilty or not guilty of serious and wilful misconduct, or serious neglect, and then allow or disallow compensation as the case might be."

MCPHILLIPS, J.A.

We have here no specific finding in the stated case covering (b), but we have the arbitrator's findings before us, and we have therein this language:

"Was the shelter in which the man stood, and where he had a perfect right to be at the time in the course of his employment, so situated that persons standing therein ran a peculiar risk from snowslides? I would hold that if the matter were before me for a final hearing, that persons within the shelter ran no special risk from an ordinary snowslide; and that the accident was caused by abnormal weather conditions, and I would, therefore, dismiss the application, following *Warner* v. *Couchman* and *Mitchinson* v. *Day Brothers*."

It may, therefore, be assumed perhaps, that we have sufficient before us to determine this appeal.

Upon careful perusal of *Warner* v. *Couchman* (1911), 1 K.B. 351; 80 L.J., K.B. 526, and in the House of Lords (1912),

A.C. 35; 81 L.J., K.B. 45, it will be seen that that case went wholly upon the fact that the man was not specially affected by the severity of the weather by reason of his employment; and MURPHY, J., in his judgment, properly distinguishes it from the facts of this case, and draws attention to this important consideration, that Earl Loreburn, L.C. did not agree with Fletcher Moulton, L.C. in his statement of the law.

It is worthy of notice that the learned arbitrator in this case has fallen into the error referred to by the Lord Chancellor in the *Warner* case, *supra,* that is, he deals with the subject-matter of the inquiry as being one of "accident." At p. 46 of the Law Journal report the Lord Chancellor says:

"I will only say this further, to be perfectly strict and accurate—it is somewhat lax to speak of this statute as though it referred to an accident. I am perfectly conscious that I myself as well as others have fallen into that *lapsus linguæ*, but at times it may be apt to confuse one's idea of what is enacted in this particular Act of Parliament. The Act of Parliament does not speak of an accident; it speaks of an injury by accident arising out of and in the course of the employment."

Here we have a man working for a colliery company in a mountainous country; he was a fan-man at the Coal Creek workings, and near by was a built shelter for the protection of the workmen in cold weather. It is not the case of a workman engaged in his work being affected by the severity of weather, only in the carrying on of his work, as all other workmen would be in a locality where workmen would be engaged at various pursuits. The situation here is quite different. The deceased was engaged at his work at a particular point, where evidently snowslides were looked upon as not impossible things in the arbitrator's findings. We have this stated as being the evidence of the superintendent of mines at Coal Creek.

It is, therefore, evident that the workman was within the horizon of danger from snowslides at the point where employed, and even were it an extraordinary event, or abnormal, his employment required his presence at this point—a possible and a proved zone of danger. How, then, can it be successfully contended that this is not a case for compensation? Is it not injury (here injury resulting in death) by accident arising out of and in the course of the employment? The learned arbitrator also relied upon *Mitchinson* v. *Day Brothers* (1913), 1 K.B. 603; 82

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L.J., K.B. 421, a decision of the Court of Appeal, but I do not consider that that case at all supports the learned arbitrator's view. I would call attention in particular to the language of Buckley, L.J. at pp. 609 and 425 respectively, where he said:

"The question, therefore, is whether the occurrence is such as that there has resulted personal injury by accident arising out of the employment. This means personal injury fortuitously arising out of the employment. To satisfy the words of the Act the occurrence must, in my judgment, be one in which there is personal injury by something arising in a manner unexpected and unforseen from a risk reasonably incidental to the employment. Nothing can come 'out of the employment' which has not in some reasonable sense its origin, its source, its *causa causans*, in the employment. That the injury must be one resulting in some reasonable sense from a risk incidental to the employment has, I think, been decided over and over again."

Can it be contended for a moment that the workman in the case before us was not exposed to a risk from snowslides? The answer that he was exposed to precisely that risk, by reason of his employment at the place where so employed, seems to me to be uncontrovertible.

Hamilton, L.J., in the *Mitchinson* case, *supra,* at p. 427 said:

"On the grounds, therefore, that the risk of this accident was not proved by evidence to be incident to the employment; that it was plainly on the evidence one to which any other person who crossed Parkes's path was equally exposed, whatever his employment; and that there is an entire absence of any authority for treating injury arising from a third party's crime as injury by accident arising out of the employment, except when the employment is special and involves an obligation to face such perils."

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Here we undoubtedly have exactly what Hamilton, L.J. admits would be a case for compensation under the Act—the workman's employment was special, and involved the obligation to face the peril of snowslides.

To further emphasize that this case is one that, in my opinion, calls for compensation being allowed, I would refer to *Nisbet* v. *Rayne & Burn* (1910), 2 K.B. 689; 80 L.J., K.B. 84. There, a cashier was employed by certain colliery owners, and it was part of his regular duty to take weekly large sums of money from his employers' office to their colliery by rail, for the payment of the wages of the colliers. Whilst he was thus employed he was robbed and murdered in the train. His widow applied for compensation. It was held that the murder was an "accident" within the meaning of the Workmen's Compensation Act,

1906, and that it arose not only "in the course of" but also "out of" the employment, inasmuch as the duty of carrying the money about subjected the cashier to the special risk of being robbed and murdered, which was, consequently, incidental to his employment, and that, therefore, the widow was entitled to compensation. Cozens-Hardy, M.R., at pp. 693 and 88 respectively, said:

"The case of *Andrew* v. *Failsworth Industrial Society* (1904), 2 K.B. 32, 73 L.J., K.B. 510, is an important authority on this point. Any man may be struck by lightning, and in many circumstances this would not entitle him to compensation. If, however, the nature of his employment exposes him to more than ordinary normal risk, the extra danger to which the man is exposed is something arising out of his employment. Thus a workman who was killed by lightning while working on a high scaffolding was held to have met his death by an accident arising out of, as well as in the course of, his employment."

Kennedy, L.J. in the same case, at pp. 695 and 89 respectively, said:

"In the case of *Falconer* v. *London and Glasgow Engineering and Shipbuilding Co.* (1901), 3 F. 564, 566, the Lord Justice Clerk said: 'It was against accidents incidental to the special employment that the benefit of this statute was given.'"

The meaning of the word accident, as contained in the Act, has been settled by the decision in *Fenton* v. *Thorley & Co., Limited* (1903), 72 L.J., K.B. 787. Lord Macnaghten at p. 790 said:

"I come, therefore, to the conclusion that the expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap, or an untoward event which is not expected or designed."

Lord Loreburn, L.C., in *Ismay, Imrie and Co.* v. *Williamson* (1908), 24 T.L.R. 881, said:

"In the case of *Fenton* v. *Thorley* (19 T.L.R. 684, (1903), A.C. 443), the meaning of the word accident was very closely scrutinized. That case stands as a conclusive authority, and I would not depart from it if I could, nor need I repeat what was there said."

Turning to the learned arbitrator's findings, and considering his language, "that the accident was caused by abnormal weather conditions," it follows that from this point of view alone it was an unlooked for mishap, an untoward event which was not expected or designed, and quite within the definition as given by Lord Macnaghten.

In my opinion, the workman met with the injury by accident arising out of and in the course of the employment, and the Act,

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in my opinion, plainly covers all injuries by accidents incidental to the special employment. Here the workman was engaged at a particular place in a most important work. He was a fan-man; a shelter was provided; there was the risk of snowslides; they were perils that might be looked for; one occurred—in fact, he so met with his death. It follows that this is a proper case for compensation.

I am, therefore, of opinion that this appeal should be dismissed, and that the stated case be remitted to the learned arbitrator with a direction to him to ascertain the amount of the compensation to which the respondent is entitled.

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellants: *Herchmer & Martin.*
Solicitor for respondent: *Alexander Macneil.*

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REX v. McGIVNEY.

Criminal law—Evidence—Indecent assault upon child—Complaint made by child to grandmother—Admissibility—Inducement—Lapse of time—Criminal Code, Secs. 292; 1003, Subsec. (2)—Canada Evidence Act, Sec. 16, Subsec. (2).

The accused was found guilty of an indecent assault upon a girl six years of age. The child's mother was dead, and she was cared for by her grandmother, who, while bathing her, noticed an inflammation and asked the child if she had hurt herself, to which she replied that she had not. About two weeks after the event, without being asked, the child described to her grandmother an indecent assault upon her by the accused. This was the first complaint she had made. The child testified to the assault and the accused and his wife admitted on examination that the child was at their home on the day on which the offence was alleged to have been committed, and the wife of the

accused admitted that the child was, on that day, in and out of the room in which the accused was in bed. The doctor who examined the child testified that the stage of the disease which she had was consistent with having contracted it at the time the offence was alleged to have been committed. The following questions were submitted by the trial judge for the opinion of the Court:

"1. Was I right in admitting as evidence the complaint or statement made by the child to the grandmother, charging the accused with the alleged offence?

"2. Was I right in holding that there was sufficient corroborative evidence in the case, under section 1003, subsection (2) of the Criminal Code, to justify a conviction of the accused for indecent assault?

"3. If I was wrong in holding that there was sufficient corroborative evidence to convict the accused of indecent assault, was there sufficient corroborative evidence under section 16, subsection (2) of the Canada Evidence Act to justify a conviction for common assault?"

Per MACDONALD, C.J.A. and GALLIHER, J.A.: Questions 1 and 2 should be answered in the affirmative.

Per IRVING, J.A.: Question 1 in the affirmative and question 2 in the negative.

Per MARTIN and McPHILLIPS, JJ.A.: Question 1 in the negative, and, *hæsitante*, question 2 in the affirmative.

In the result the conviction was upheld.

APPEAL from the judgment of SWANSON, Co. J. by way of a case stated on a conviction made by him on a charge of indecent assault. The facts are set out in the headnote.

Statement

The appeal was argued at Vancouver on the 4th of December, 1913, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and McPHILLIPS, JJ.A.

Argument

Armour, for the accused: The confession must be made on the first opportunity; here it was not made until two weeks after the event, and no confession was made at all voluntarily. He referred to *Rex* v. *Osborne* (1905), 1 K.B. 351; *Rex* v. *Barron* (1905), 9 Can. Cr. Cas. 196; *Rex* v. *Daun* (1906), 12 O.L.R. 227; 11 Can. Cr. Cas. 244; *Rex* v. *Jimmy Spuzzum* (1906), 12 B.C. 291.

On the second question, there was no corroborative evidence: *Rex* v. *Bowes* (1909), 20 O.L.R. 111, is distinguishable. On the question of whether there was sufficient corroborative evidence to justify a conviction of common assault, under subsection (2) of section 16 of the Code, he referred to Tremeear's

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Criminal Code, 2nd Ed., 977; *Radford* v. *Macdonald* (1891), 18 A.R. 167; *Rex* v. *Whistnant* (1912), 8 D.L.R. 468; *Reg.* v. *Vahey* (1899), 2 Can. Cr. Cas. 258.

W. M. McKay, for the Crown: In *Reg.* v. *Riendeau* (1900), 3 Can. Cr. Cas. 293, it was held that seven days was not a sufficient time to exclude the evidence: *Rex* v. *Pailleur* (1909), 15 Can. Cr. Cas. 339; *Reg.* v. *Kiddle* (1898), 19 Cox, C.C. 77. There was corroboration in the evidence of the accused and in that of his wife: *Rex* v. *Iman Din* (1910), 15 B.C. 476.

Argument

On the third question, he referred to *Rex* v. *de Wolfe* (1904), 9 Can. Cr. Cas. 38, and *Rex* v. *Burr* (1906), 13 O.L.R. 485.

Armour, in reply.

Cur. adv. vult.

6th January, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A. agreed that questions 1 and 2 should be answered in the affirmative.

IRVING, J.A.: To the first question I would answer: Yes. In *Rex* v. *Osborne* (1905), 1 K.B. 551 at p. 556 it is said:

> "In each case the decision on the character of the question put, as well as other circumstances, such as the relationship of the questioner to the complainant, must be left to the discretion of the presiding judge."

That disposes of the objection that the complaint was made in answer to an inquiry.

In 1906 I decided a case where a very similar objection was taken—*Rex* v. *Jimmy Spuzzum,* 12 B.C. 291.

As to the delay of ten days, I must admit that is a long interval, but I am not able to say that the evidence was improperly received.

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In *Reg.* v. *Ingrey* (1900), 64 J.P. 106, at the suggestion of the Chief Justice, evidence was not pressed when there was an interval of three days between the alleged outrage and the complaint.

To the second question I would answer: No. The evidence is not, in my opinion, sufficient. It does not tend to identify the accused as the person who committed the offence, nor establish that the offence was committed at the time or place mentioned by the child. In answering this question it is difficult to avoid dealing with the point as a question of fact. That line

is not open to us. Our decision must be, then, was there corroboration within the meaning of the statute, such as would justify the judge in allowing the case to go to the jury?

In *Rex* v. *Gray* (1904), 68 J.P. 327, the Court had before it a case under the Criminal Law Amendment Act, 1885 (48 & 49 Vict., c. 69). Lord Alverstone doubted whether any case ought to have been stated, because the question really was not a question of law at all, but a question of fact.

The case against the prisoner rests on the child's evidence as told in Court, corroborated as it is by the statement to her grandmother. That statement is not evidence to prove the truth of the facts, nor as part of the *res gestæ*, but as being evidence of the consistency of the child's conduct with the story told by her in the witness box, it is regarded as confirmatory of her testimony.

It must be conceded that an assault was committed on her. The statute requires that the child's testimony shall be corroborated "by some other material evidence in support thereof implicating the accused." Proof of the offence is one thing; identity of the offender is, or may be, quite a different thing. There is plenty of corroboration as to the commission of the offence, but what corroboration is there implicating the accused? The evidence of identity in this case is the child's direct evidence, and the corroborative proof relied on is that the prisoner had an opportunity of doing it at the time and place fixed by her. But there is no material corroboration that the offence was committed at that time or place. In *Rex* v. *Bowes* (1909), 20 O.L.R. 111, the condition of the child when she came home fixed the time, and so implicated the accused. The "other" material evidence may not be inconsistent with her story, but it does not implicate the accused.

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As a general rule, a Court will act on the oral testimony of a single witness, but in certain cases corroboration is required, *e.g.*, (1) treason; (2) perjury; (3) forgery (in Canada, but not in England); (4) to a certain extent where the evidence is given by an accomplice; (5) bastardy proceedings, and (6) where not on oath, as by a child. In most cases the rule is that where there is a substantial corroboration of the evidence of an

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interested party, it confirms not only the statements which are expressly supported by the corroborating evidence, but to all statements made: see *Minister of Stamps* v. *Townend* (1909), A.C. 633. That principle would be applicable to the corroboration spoken of in section 16 of the Evidence Act, but falls short of the "other" material evidence required by section 1003 (2). In *Reffell* v. *Morton* (1906), 70 J.P. 347, where the Court had to determine whether the evidence of the mother, who had been a guest at the alleged father's house, was corroborated in some material particulars by other evidence, it was proved that the woman had changed her room to a room next to the man's bedroom. Lord Alverstone and Mr. Justice Bray thought the corroboration necessary was as to the conduct of the man, not as to that of the woman, and Bray, J. points out that it was not a material particular that the man was sleeping alone that night, and that the woman was sleeping in the same house. "Of course," Bray, J. continues, "such a state of things tends to make the conduct alleged possible, but, in my opinion, that is not sufficient."

Best on Evidence, 11th Ed., at p. 598, after referring to the statutes dealing with the reception of unsworn testimony by children, says:

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> "Speaking generally, it may be said that where one witness only appears in support of an action or prosecution, where it is only a case of oath against oath, as it is said, or where the person against whom the testimony is given cannot controvert it by testimony of his own, the evidence of such a witness ought to be very jealously watched and carefully sifted."

It may be said that these remarks go to the weight; possibly that is so, but I think the Court should be exceedingly careful not to admit evidence, unless it is material, and unless it implicates the accused.

As to the third question, very different words are used in section 1003 (2) of the Criminal Code, and in section 16 of the Evidence Act, and no doubt the different words were purposely chosen. *Rex* v. *Pailleur* (1909), 20 O.L.R. 207, was a decision under section 16 of the Evidence Act. I think there was corroboration in that case that would have satisfied section 1003 (2), had that subsection been in point. This question I would answer in the affirmative, dealing with the point as a

question of law. As to the weight to be given to the evidence, I desire to express no opinion whatever.

MARTIN, J.A.: Two objections are taken on behalf of the prisoner to the admission of the statement of the child, aged 6 years, *viz.*: that (a) it was not voluntary, being brought about by leading or inducing questions of her grandmother; and (b) was not made at the first opportunity after the offence, but admittedly at least two weeks thereafter. The rule governing both points was laid down by the Court of Crown Cases Reserved in *Rex* v. *Osborne* (1905), 1 K.B. 551, 74 L.J., K.B. 311, at p. 561, thus:

"It applies only where there is a complaint not elicited by questions of a leading and inducing or intimidating character, and only when it is made at the first opportunity after the offence which reasonably offers itself."

On page 556 examples of questions are given which would not prevent the admission of the statement, and also examples which would do so, followed by these observations:

"In each case the decision on the character of the question put, as well as other circumstances, such as the relationship of the questioner to the complainant, must be left to the discretion of the presiding judge. If the circumstances indicate that but for the questioning there probably would have been no voluntary complaint, the answer is inadmissible. If the question merely anticipates a statement which the complainant was about to make, it is not rendered inadmissible by the fact that the questioner happens to speak first."

The child's evidence of how she came to make the statement to her grandmother (who had charge of her since the death of her mother) is as follows:

"I told my mother (*i.e.*, grandmother) one day—not next day—I can't say how many days.

"I told my grandmother, because she wanted to know if I had ever been hurt there.

"She wanted to know what McGivney done—

"She just wanted to know who hurt me—

"I said McGivney.

"It was while she was bathing me she asked me, and I told her all about it—

"He hurt me when he was doing this in the bedroom.

"I didn't scream at all—"

Now this account clearly, to my mind, shews that the statement was not admissible, according to the above rule, but it is sought to strengthen the position by referring to the grand-

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mother's version. I pause here to say that, obviously, this is a course which should be scrutinized very narrowly, because any material conflict between the Crown witnesses as to the manner in which such a statement came to be made must of necessity raise at the outset a serious doubt about the propriety of its reception, if, indeed, it should in such circumstances be received at all. But assuming we would be justified in referring to the grandmother's account to contradict the child, this is what she says on examination-in-chief:

"I bathed the little girl—

"I didn't think about her having such a disease—

"I asked Bessie if she had got hurt, climbing or so, and she said she hadn't hurt herself—

"After a few days I was bathing her, getting her ready for bed.

"I wasn't asking her any questions at all—

"She looked up at me and told me what had been done.

"She said, grandma, McGivney," etc. (detailing circumstances).

But on cross-examination she gives this testimony:

"I noticed discharge on her clothes—

"I asked if anything had happened to hurt her and she didn't seem to know anything about it.

"Her parts were then a little inflamed at that time—

"I asked her if anyone had hurt her there—

"I didn't mention McGivney; I never thought of him—

"Her father was home then—

"I didn't tell him for a couple of days later.

"I can't say how many days after the child told me.

"I couldn't say if it would be as long as a week—

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"It was several days.

"I told the father something was wrong with Bessie and we would have to have doctor—

"Doctor was there before she told me.

"It was some days after doctor examined her that she told me.

"The doctor told Mr. Weaver what he suspected and Mr. Weaver said to me if it could be possible any men were bothering Bessie and I said I didn't think so, and it was after this she told me.

"I couldn't say how many days after Mr. Weaver told me this that Bessie told me.

"I don't think I asked her.

"She told me one evening.

"I wasn't asking her any questions.

"I had been bathing her—getting her ready for bed.

"I had been using wash.

"I think I asked her one day if anyone had hurt her.

"She said she hadn't been hurt.

"I wasn't saying anything to her at time she told me story.

"I think I had just got through bathing her."

This shews that after the grandmother noticed the discharge and inflammation, she asked the child the leading and suggestive question "if anyone had hurt her there?" to which the child replied that "she hadn't been hurt," and, apparently, on another occasion, in answer to the same question, "she didn't seem to know anything about it." Then a couple of days afterwards the father is informed and the doctor was called in on the 3rd of September (the offence having been committed on the 20th of August), and not for some days after that did the child make any further statement. I have no doubt whatever that in such circumstances this complaint cannot be regarded as voluntary, and is inadmissible. And I am also of the opinion that it cannot be said to have been made at "the first opportunity after the offence which reasonably offered itself." That opportunity here was manifestly, at the latest, when her grandmother first challenged her attention by asking her who had hurt her, and her answer, in effect, was that no one had done so. Whatever could be said to excuse her silence before that time, nothing could excuse it thereafter. To admit evidence of that nature in such circumstances would, in my opinion, be more than dangerous. While we may be justified in making due allowance for the actions or conduct of young children, yet, at the same time, it must be remembered that their minds, often highly imaginative, are singularly open to suggestion, and the limit should be placed upon that allowance and indulgence when prejudice to the accused is likely to result from a further extension thereof. When a reasonable first opportunity is established in the case of a child, there is no more justification for departing therefrom than in the case of an adult. If not the first, then why not the second, third, fourth or fifth? Where is the line to be drawn? As a matter of precaution, I do not wish it to be understood that I take the view that even if she had made the complaint at said latest opportunity it could be deemed to be within a reasonable time, because it is not necessary to decide that point, but I will say that I have very grave doubt about it, and, with all due respect, also about the soundness of the decision of Wallace, Co. J. in *Rex* v. *Barron* (1905), 9 Can. Cr. Cas. 196; and I have no doubt at all that the

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decision of the same learned judge in *Rex* v. *Charles Smith, ib.* 21, should not be followed. In cases of this class we should be, as was observed in *Rex* v. *Osborne, supra,* at p. 561,

"not insensible of the great importance of carefully observing the proper limits within which such evidence should be given."

I would answer the first question in the negative.

With respect to the second question, I have, after some hesitation, reached the conclusion that it should be answered in the affirmative in the sense that there was in law such corroborative evidence as could support the conviction, because, as Meredith, J. observed in *Rex* v. *Daun* (1906), 11 Can. Cr. Cas. 244 at p. 250:

"Whether the prisoner ought or not to have been convicted on the weight of evidence is a subject with which we have no right to concern ourselves."

See also *Reg.* v. *Bowes, supra,* at p. 115. In coming to this view I have, in general, applied the principles laid down in these two cases, and also in my own decision in *Rex* v. *Iman Din* (1910), 15 B.C. 476, which, though a decision on the Canada Evidence Act, section 16, subsection (2), with language not so strong as section 1003 of the Criminal Code, now under consideration, yet is of assistance, as are also the Australian cases of *Reg.* v. *Gregg* (1892), 18 V.L.R. 218; *Rex* v. *Smith* (1901), 26 V.L.R. 683; and *Rex* v. *O'Brien* (1912), V.L.R. 133, all decisions on a statute with the same wording as section 1003, in the last of which, at p. 139, it is said:

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"We think that implication of the prisoner ought to be by evidence of some direct kind, which would shew that he was more probably than any other person the man who did that which produced the physical effects on her which were there in fact, and which had been produced in such a way as she describes."

In my opinion, direct evidence of this nature is to be found in the case at bar in the testimony of the prisoner's wife, wherein it is admitted that the injured child was in the accused's bedroom that afternoon when he was in it, a fact which the accused would not admit, expressing ignorance thereof, but which, as was said in *Rex* v. *Bowes, supra,* p. 114, "tends to bring home" the offence to him. I may say that I do not understand the Court in the *Bowes* case to hold that the voluntary statement of the child would, standing alone, or in conjunction with the

medical evidence there given, be sufficient corroboration, and in my opinion it would not, either in that case or in this.

Holding these views, it is unnecessary that an opinion should be expressed on the third question, as the conviction may be sustained apart from it.

GALLIHER, J.A.: The accused McGivney was convicted before SWANSON, Co. J. of having committed an indecent assaunt upon a child of the age of six years and one month.

The learned judge reserved for the opinion of this Court three questions: [already set out].

I would answer the first and second questions in the affirmative, and in that view it becomes unnecessary to answer the third question.

Dealing with the first question: The child's mother was dead, and she was in charge of her father and grandmother, and when her father was absent, in the grandmother's charge solely, as happened at the time in question. It appears that the child made no complaint to any one until about two weeks after the alleged offence was committed. The grandmother, noticing that something was wrong, asked the child if she had hurt herself, to which she replied that she had not, and at a time subsequent, and not in answer to a further question, made the statements to her grandmother implicating the accused, as detailed in the evidence. It was objected by counsel for the accused that these statements were not admissible as being obtained in answer to a question, and were not voluntary, and also on account of the lapse of time since the alleged offence.

The question of the grandmother was a very natural one, and there was in it no suggestion as to who or any one being the cause. In fact, the grandmother says she never thought of the accused; so that I think it may very well be said that her statement as to what occurred, and that the accused was the cause of her condition, was voluntary.

As to the length of time which elapsed before the statement was made, I think we must consider the youth of the child, the fact that she would not appreciate the full nature of the offence, and, perhaps, the fear of punishment. Lapse of time might be

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very serious in the case of a person of more mature years, where the question of consent was involved, but in the case of this child it must be regarded in a very different light.

On the second question: There is the evidence of the accused and his wife that the child was at their house on the day in question, that the accused was in bed in a room of the house, that the girl Bessie Weaver was in and out of this bedroom when the accused was there (this latter is denied by the accused but admitted by his wife), and then there is the evidence of the doctor who examined the child as to the development of the disease which ensued, which development was consistent with the time at which the offence was alleged to have been committed. I think this evidence, taken together, is such corroboration as satisfied section 1003, subsection 2 of the Criminal Code.

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In *Rex* v. *Burr* (1906), 13 O.L.R. 485 at p. 486, Moss, C.J.O., in dealing with the question of corroborative evidence implicating the accused, says:

> "This does not necessarily make it incumbent on the Crown to adduce testimony of another or other witnesses to the acts charged. To do so would be to virtually render a conviction impossible in the majority of cases like the present. It is enough if there be other testimony to facts from which the jury, or other tribunal trying the case, weighing them in connection with the testimony of the one witness, may reasonably conclude that the accused committed the act with which he is charged."

The same question came up for decision in *Rex* v. *Daun* (1906), 12 O.L.R. 227, 11 Can. Cr. Cas. 244: see remarks of MacLaren, J.A. at p. 247. See also the remarks of MacLaren, J.A. in *Rex* v. *Pailleur* (1909), 20 O.L.R. 207 at p. 214.

MCPHILLIPS, J.A.

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

Conviction affirmed.

CUNNINGHAM v. ST. PAUL FIRE AND MARINE INSURANCE COMPANY.

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Insurance, marine—Constructive total loss—Repairs undertaken by insurer—Sufficiency of—Insured must shew insufficiency of repairs before refusing to accept.

In determining whether a damaged ship can be treated as a constructive total loss, the test is, would a prudent uninsured owner repair her, having regard to all the surrounding circumstances?

Where an insurance company, having insured a boat, is entitled to take possession for repairing, and has substantially made the repairs within a reasonable time, the insured is not justified in refusing to accept the boat, without having objected to the sufficiency of the repairs and pointed out the deficiencies, so that the same may be made good.

ACTION tried by MACDONALD, J. at Vancouver on the 18th of November, 1913, for the recovery of the full amount of a marine insurance policy for the constructive total loss of the plaintiff's motor boat, Sterling C. The facts are set out in the reasons for judgment.

Statement

E. A. Lucas, and *Bucke,* for plaintiff.
Pugh, for defendant Company.

14th January, 1914.

MACDONALD, J.: Plaintiff, on the 29th of April, 1912, insured his motor boat Sterling C. for one year with the defendant Company in the sum of $3,500. The boat was of an admitted value of $4,500. It received slight damage through a collision and was, apparently with approval of plaintiff, being repaired by defendant Company under terms of its policy when, on the 9th of December, 1912, it received further substantial damage through fire. C. P. Sargent, on behalf of the insurance Company, came from Portland, Oregon, to adjust the loss. He appears to have had full power to represent his Company, and his statements and actions throughout are, in my opinion, binding upon the defendants. After viewing the extent of the loss, Sargent interviewed parties as to cost of repairs,

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and a meeting was arranged with the plaintiff at the local office of the Company. There is considerable contradiction as to what actually took place at this interview. Plaintiff contends that no conclusion was arrived at and that he was anxious first to see the extent of the loss. I do not think this knowledge was material from his standpoint if Sargent agreed to put the boat in as good condition as it was prior to the fire. However, from the events which immediately followed, it is not necessary to come to any definite conclusion as to the result of this conversation. If it be judged upon the basis of probabilities, it is likely that Sargent's account is, as to its main features, correct. On the 17th of December, plaintiff telegraphed Sargent at Portland that it was impossible to replace the boat in her former condition and, as an alternative, he was willing to take the engine in part settlement. Sargent was asked for his suggestions to this proposition. On the 18th of December he replied, reciting his recollection of the recent conversation and taking the ground that, as he had let a contract for repairs to Taylor & Young, Limited, it would have to be proceeded with. This contract could have been rescinded at this time without damages ensuing, as no work had been performed, and, according to Young, was eventually completed at a loss. Solicitors for plaintiff, on the same date, wrote the local agents of the defendant Company that their client understood that the Company was proceeding with the repairs on their own account and that the Company proposed to pay plaintiff the amount of the insurance and, as far as possible, recoup itself by sale after the boat was refitted. They desired to know if this understanding were correct. The local agent replied that they were unaware of the arrangement referred to, but were forwarding the letter to Sargent for his consideration. Before receiving any reply from Sargent, solicitors for plaintiff wrote him on the 26th of December more clearly setting forth their position. They abandoned the boat and requested payment of the full amount of insurance. A further letter was written to the same effect on the 30th of December to M. C. Harrison, general agents of defendant Company at San Francisco, but before this letter could have been received by such agents, they wrote directly to the plaintiff

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repudiating any liability for total loss. They referred to the conversation with Sargent and that, on the strength of this, the boat was being repaired, and, when finished, the Company would pay in proportion as covered by its policy, and invited litigation if this were not satisfactory to the plaintiff.

Suit was commenced by the plaintiff on the 14th of January, 1913, for full amount of insurance. By amended statement of claim delivered the 12th of September, 1913, plaintiff seeks to recover under the policy for a constructive total loss.

Applying the test, referred to by Lord Shand in *Sailing Ship "Blairmore" Company* v. *Macredie* (1898), A.C. 593, as to whether in fact a constructive total loss has or has not occurred, I find under the circumstances such query should be answered in the negative. Plaintiff would not, as a prudent owner, if uninsured, have abandoned this boat, but would have sought to have it repaired, as it is quite evident the cost of such repairs would have been less than the value of the property. Plaintiff, as an alternative, contends that, by the events which followed his notice of abandonment, a constructive total loss resulted through the acts and conduct of the defendant Company.

Assuming that this policy of insurance is similar to the one considered in *Peele* v. *Suffolk Ins. Co.* (1828), 24 Mass. 254, it would appear that the defendant Company had a right to keep possession of the boat in order to repair it, if such work were accomplished within reasonable time. I consider there was not an unreasonable time occupied in repairing the boat, so that the act of repairing does not support an acceptance of the abandonment.

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Plaintiff has cited *Hudson* v. *Harrison* (1821), 3 Br. & B. 97, and *Provincial Insurance Company of Canada* v. *Leduc* (1874), L.R. 6 P.C. 224, as authorities in support of his position, but the facts in these two cases distinguish them from the case at bar. The first-mentioned case is referred to by Lord Penzance in *Shepherd* v. *Henderson* (1881), 7 App. Cas. 49 at p. 62, where he points out that the question in *Hudson* v. *Harrison, supra,* was "whether the underwriters, by lying by, ... induced the assured to believe that the abandonment was acquiesced in." He then draws a distinction which is applicable

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to the present case. Referring to the fact that it was admitted in the argument more than once that the underwriters distinctly repudiated the abandonment and said they would not accept it, and adds:

"Therefore, the very matter upon which the Lord Chief Justice relied in *Hudson* v. *Harrison* is absent from the present case . . . . It is obvious enough that if the underwriters act in such a way as to induce the owner to believe that they have accepted an abandonment, and the owner's position is thereby altered for the worse, it may very well be as a matter of law afterwards that the underwriters shall not be allowed to say (for it comes rather by way of estoppel) that they did not accept it."

Lord Blackburn, in the same case, also refers to the difference between acceptance of abandonment in fact and acceptance by operation of law, and that an insurance company may not really intend to accept an abandonment, but may be precluded from denying such acceptance, and the effect would probably be the same as if they had really accepted. Even in this view of the law, in my opinion, the facts do not support such a contention raised on the part of the plaintiff. The correspondence between the solicitors clearly outlines the position taken by each party as to the possession of the boat for purposes of repair.

There is another aspect of the case, however, which might under certain circumstances assist the plaintiff, and that is as to the sufficiency of the repairs. According to the cross-examination of Sargent, it is sought to prove by him that the plaintiff was not compelled to take the boat unless "he was satisfied with the repairs." This contention is not borne out by the evidence, but the correspondence and evidence on the part of the defendant Company shewed that the repairs were to be satisfactory, and I conclude from this that the insurance Company was, instead of paying the loss, purporting to carry out its contract by placing the boat in as good condition as it was in before the fire. It then remains to consider whether the defendants, having undertaken such repairs, completed them in a satisfactory manner and, if there be any deficiency, whether this simply gives a right of action for the cost of any additional work, or enables the plaintiff to contend that by such failure, however slight, the defendants have rendered themselves liable for the full amount of the insurance, on the basis of a total constructive loss. I find that

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the tenders for the necessary repair work on the boat ranged from $300 to $1,300, and that the boatbuilders under a contract at $300 stated they lost money. There was a substantial performance by the defendant of its undertaking to repair the boat, but still an appreciable deficiency has occurred. In coming to this conclusion, I am not satisfied that the subsequent sinking of the boat, and consequent total loss, resulted from insufficient caulking or defective work of repair. It is worthy of notice that the boat, after its repairs, floated for some time. The parties did not, apparently, consider it advisable or necessary to definitely account for the final destruction of this valuable piece of property.

In coming to a conclusion as to the result which follows from my finding that the defendant did not fulfil its bond of indemnity as to repairs, I have followed American decisions, and am led to take such course in this insurance action by the remarks of Lord Justice Brett in *Cory* v. *Burr* (1882), 9 Q.B.D. 463 at p. 469:

> "If I thought that there were American authorities clear on this point, I do not say I would follow them, but I would try to do so, for I agree with Chancellor Kent, that with regard to marine insurance law it is most advisable that the law should, if possible, be in conformity with what it is in all countries. I must therefore add, that although American decisions are not binding on us in this country, I have always found those on insurance law to be based on sound reasoning and to be such as ought to be carefully considered by us and with an earnest desire to endeavour to agree with them."

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In connection with the liability that follows from unreasonable delay in making repairs by the insurance Company, the matter is fully considered in *Copelin* v. *Insurance Company* (1869), 9 Wall. 461. While delay cannot be set up in this case as a ground for preventing the insurance Company from returning the boat, still the sufficiency of the repairs was considered in the case referred to. It would appear that the deficiency in repairs was substantial and amounted to $5,000. Counsel for the plaintiff in that case, in referring to *Reynolds* v. *Ocean Ins. Co.* (1839), 39 Mass. 191, contended that by such authority the insured was bound to point out the deficiencies in the repairs, but the law of

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the case was not so declared. The Court simply declared the consequences that should follow if the defects were pointed out by the assured and not supplied by the underwriters. According to a portion of the headnote to the *Reynolds* case it was decided that if, at the time the insurance company offers to restore the vessel as fully repaired, the assured points out deficiencies which actually existed, and the insurance company refuses or unreasonably neglects to supply such deficiencies, then the assured is not bound by the tender. Suppose, however, the assured, as in the present case, refrains from pointing out any deficiencies, or from objecting to the work in such a manner as to enable the insurance company to perform any further work or complete its indemnity, what result follows? This matter was considered by Miller, J. in *Copeland* v. *Security Ins. Co.,* Woolw. 278 at p. 289; Beech on Insurance (1895), Vol. 2, section 948. The learned judge refers to the necessity for the insurance company fully carrying out the necessary repairs to a boat which it has insured, and in one portion of his judgment inclines to the opinion that the insured is not bound to point out the deficiencies that may exist in the repairs, and that a clear obligation exists as to fully indemnifying the owner for his loss. He then adds:

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> "The conditions of these policies, supported by the law, require that the vessel, when tendered, should have been in such a condition that the [assured] when receiving her should have full indemnity. . . . . Had the stranding been accidental, and the repairs a particular average (and this was evidently the assumption of the companies), the [assured] might have been bound to take the vessel back; but under the circumstances, the tender could not be made without at least an offer to pay the costs of such repairs as were rendered necessary by her stranding."

On the facts in this case, I am satisfied that if the plaintiff had pointed out to the representative of the insurance Company any deficiency in the repairs that it would have been made good. If they had not done so, they would have rendered themselves liable. I do not think it would have been an idle ceremony on the part of the plaintiff to ask for such further work of repair. Notwithstanding any support that the plaintiff might receive from the judgment in *Copeland* v. *Security Ins. Co., supra,* I prefer to follow the decision in *Marmaud* v. *Melledge* (1877), 123 Mass. 173. It was in that case

decided that where the insurance company had refused to accept abandonment of a stranded vessel, it was entitled to take possession for the purpose of repairing and restoring it to the owner. If the company, with reasonable diligence, proceeded to make such repairs, at a cost less than half her value when repaired, and then tendered her in this condition to the owner, who refused to receive her, but made no objection to the sufficiency of the repairs, and did not point to any deficiencies, that there was no acceptance of the abandonment. It was also held that there was no constructive total loss of the vessel, although it afterwards appeared that the repairs were not fully made. The judgment cites with approval a portion of the opinion of Shaw, C.J. in *Reynolds* v. *Ocean Ins. Co., supra,* dealing with the liability of the insurance company and the duty cast upon the assured as to pointing out deficiency, and then decides, at p. 178, as follows:

"If the underwriters have conducted themselves in the manner pointed out, and within a reasonable time tendered the vessel to the assured, who makes no objection to the sufficiency of the repairs, and points out no deficiencies, he is bound to accept her, and the underwriters cannot be treated as having accepted the abandonment. Whether the assured accepts or not, the question is settled that there is no constructive total loss of the ship.

"If it should afterwards appear that there are deficiencies in the repair, the acceptance of the vessel does not preclude the assured from claiming further damage, and, according to the principles of the contract securing to the assured an indemnity, an action might be brought, after such acceptance, to recover for any such deficiency or unrepaired damage, as a partial loss."

Judgment

I find that the defendant Company was entitled to take possession of the boat for repairing the same, and having carried out repairs substantially within a reasonable time, that the plaintiff was not justified in refusing to accept the boat or, at any rate, was not justified without having objected to the sufficiency of the repairs and pointed out the deficiencies, so that the same might be made good. The subsequent destruction of the boat thus has to be borne by the plaintiff, unless the defendant Company, while the boat remained in its possession, was guilty of such negligence as would create a liability. In this connection I find that the defendant Company took, under the

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circumstances, all reasonable care of the boat and was not answerable for its loss.

The action is dismissed, with costs.

Action dismissed.

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VANCOUVER LAND AND IMPROVEMENT CO. v. PILLSBURY MILLING CO.

THE VANCOUVER LAND AND IMPROVEMENT COMPANY, LIMITED v. PILLSBURY MILLING COMPANY, LIMITED.

Vendor and purchaser—Agreement for sale of land—Payment by instalments—Purchaser's failure to complete payments—Abandonment by purchaser—Forfeiture of payments made.

Where, a purchaser being in default, the vendor sues upon a covenant to pay the balance due under an agreement for the sale of land, and in the event of failure to pay, for cancellation of the agreement and forfeiture of the payments made, and it appears that the purchaser has abandoned the agreement, the Court will order cancellation of the agreement, and forfeiture of the payments made.

Statement

APPEAL from the order of MURPHY, J. made at chambers in Vancouver on the 1st of December, 1913, dismissing the defendant Company's application that the judgment recovered herein by the plaintiffs on the 30th of September, 1913, be set aside and the defendants allowed in to defend. The facts are that under an agreement for sale of the 3rd of August, 1911, the defendants agreed to purchase from the plaintiffs certain lots for $250,000, payable as follows: $15,000 on date of agreement; $35,000 on the 3rd of November, 1911; $66,666 on the 3rd of May and on the 3rd of November, 1912; and $66,668 on the 3rd of May, 1913. The first two payments were duly made, and one of the lots was conveyed to the purchasers under a special clause providing that after $50,000 had been paid on the purchase price the vendor would convey to

the purchasers individual lots upon payment of $5,000 for each, which was to apply on the final payment. The lot thus conveyed was not included in the subsequent proceedings. The purchasers were in default in their last three payments and action was commenced on the 6th of August, 1913, for the balance due under the agreement and in default of the defendants paying the amount so due within 30 days from judgment that the agreement for sale be declared cancelled and void and the defendants foreclosed out of all interest thereunder, and that all moneys paid in respect thereof be declared forfeited; or in the alternative that the lands comprised in said agreement be sold in and towards the satisfaction of the sum due. The defendants not having filed an appearance or statement of defence, judgment was given in default on the 30th of September, 1913, and an account was ordered to be taken by the registrar as to the amount due the plaintiffs under the agreement of the 3rd of August, 1911, that the amount so found should be paid by the defendants to the plaintiffs and that after one month's default in making said payment, the agreement for sale should be cancelled. On the 26th of November, 1913, the defendants gave notice of motion for an application to set aside the judgment and to be allowed to defend. The defendants appealed.

Statement

The appeal was argued at Victoria on the 16th of January, 1914, before MACDONALD, C.J.A., IRVING, GALLIHER and MCPHILLIPS, JJ.A.

Todrick, for appellants (defendants): If the Court is of opinion that the defendant has a substantial ground of defence it must find that the judge below exercised his discretion wrongly and we should be allowed to defend: see *In re Hartley* (1891), 2 Ch. 121. We say we have a substantial defence to that part of the plaintiffs' claim asking for forfeiture of moneys paid. The judge below refused the application on the ground that from the circumstances he inferred abandonment; abandonment is not pleaded. As to whether or not there is abandonment is a question of fact that can only be decided on a proper trial of the action. Mere lapse

Argument

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of time does not amount to abandonment: see judgment of Duff, J. in *Bark Fong* v. *Cooper* (1913), [49 S.C.R. 14 at p. 21]; 5 W.W.R. 633 at p. 637.

The provision in the agreement providing for the forfeiture of all moneys paid on default of the purchaser is a penal provision and should be relieved against: see *Verma* v. *Donahue* (1913), [18 B.C. 468]; 26 W.L.R. 257; *Laird* v. *Pim and Aspinall* (1841), 10 L.J., Ex. 259, where an agreement for sale was repudiated by the purchaser and he recovered money paid on account of purchase price.

The provision for forfeiture only takes effect after default. There has been no default here under the provisions of the agreement, because the notice provided for in the agreement has not been given; until this notice has been given there can not be said to be any default under the agreement: see *Bark Fong* v. *Cooper, supra, at* pp. 634-7; 641 and 643. Until there has been default under the express provision of the agreement the plaintiffs cannot claim the relief provided for under the agreement. Plaintiffs may be entitled under the general law to rescind the contract, but they cannot under such rescision claim forfeiture of the moneys paid on account of the purchase price: see *Bark Fong* v. *Cooper, supra,* at p. 637; *Cornwall* v. *Henson* (1900), 2 Ch. 298 at p. 302; *In re Dagenham (Thames) Dock Co.* (1873), 8 Chy. App. 1022; 43 L.J., Ch. 261; *Boyd* v. *Richards* (1913), 29 O.L.R. 119; *March Brothers & Wells* v. *Banton* (1911), 45 S.C.R. 338 at p. 339; *Labelle* v. *O'Connor* (1908), 15 O.L.R. 519 at p. 550; *Butchart* v. *Maclean* (1911), 16 B.C. 243; *Kilmer* v. *British Columbia Orchard Lands, Limited* (1913), A.C. 319.

Argument

There is no right to foreclosure under the agreement except after strict compliance with its terms. Before foreclosure can be brought, all the legal estate must be vested in the plaintiff and only the equitable right to redeem should remain in the mortgagor: Halsbury's Laws of England, Vol. 21, pp. 272 and 276. Here the plaintiffs did not take the requisite steps to revest the legal estate in themselves before bringing their action for foreclosure. The effect of an agreement for sale is to vest the

legal estate in the land in the purchaser. This must be revested in the vendor before he can bring a foreclosure action: see Halsbury's Laws of England, Vol. 25, p. 364.

Davis, K.C., for respondents (plaintiffs): An agreement for sale is security for the balance due from time to time. He referred to the judgment of Jessel, M.R., in *Lysaght* v. *Edwards* (1876), 2 Ch. D. 499 at p. 506. They admittedly say they have no intention of paying the balance due, therefore they have abandoned the agreement.

Todrick, in reply.

MACDONALD, C.J.A.:

MACDONALD, C.J.A.: I think the appeal must be dismissed. It is apparent from the statements of counsel for the purchaser that he is not desirous of carrying out the contract—in fact abandons the contract. Under such circumstances, where the vendor is seeking to cancel the contract on the ground of default, the purchaser cannot recover back the purchase money paid, owing to the fact that he had repudiated or abandoned the contract.

IRVING, J.A.:

IRVING, J.A.: I agree.

GALLIHER, J.A.:

GALLIHER, J.A.: I agree. Even if this be treated as an action for cancellation there has been abandonment, and in such case there cannot be recovery back of the moneys paid. This Court has decided that following the English cases.

MCPHILLIPS, J.A.:

MCPHILLIPS, J.A.: I cannot agree with the opinion of my learned brothers. In my opinion the judgment as entered is wrong and should be set aside *ex debito justitiæ.* The plaintiffs cannot have a decree of foreclosure, cancellation of the agreement of sale and forfeiture of the instalments of purchase money. There could be at most the retention of the deposit. Mr. *Davis* argues and cites authority for the analogy to foreclosure under mortgage. The decree of foreclosure may merge the mortgage, but there is no order of cancellation, and subsequent acts of the mortgagee may re-open the foreclosure. But here we have the agreement of sale cancelled and all rights thereunder foreclosed, and all payments of purchase-money for-

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feited. Further, the 30 days' notice to even admit of the contention that there could be forfeiture and cancellation was not given. I would refer to Williams on Vendors and Purchasers, 2nd Ed., Vol. 2, p. 1017, note (*d.*) and p. 1055, note (*f.*), and the judgment of Mellor, J. in *Clough* v. *The London and North-Western Railway* (1871), 41 L.J., Ex. 17 at p. 24:

"No man can at once treat the contract as avoided by him, so as to resume the property which he parted with under it, and at the same time keep the money or other advantages which he has obtained under it."

This is the law save, perhaps, where a contract otherwise provides, and then it is a matter of evidence and questions of compliance or non-compliance. The agreement of sale should not have been cancelled by the decree or judgment, or the moneys forfeited whether later the defendant Company would be entitled to any remedy or relief. That is a matter I do not wish to say anything about now, leaving that for the trial judge. I would also refer to *March Brothers & Wells* v. *Banton* (1911), 45 S.C.R. 338.

I would allow the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellants: *Fillmore & Todrick.*

Solicitors for respondents: *Davis, Marshall, Macneill & Pugh.*

WILSON v. HENDERSON *ET AL.* (No. 1).

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1914

Jan. 23.

WILSON v. HENDERSON

Practice—Notice of appeal—Style of cause headed "In the Court of Appeal"—Notice sufficient to give Court of Appeal jurisdiction to amend.

On an application to the Court of Appeal to amend the notice of appeal regularly filed and served, but which was intituled "In the Court of Appeal:—

Held (GALLIHER, J.A. *dubitante*), that the notice of appeal was sufficient to give the Court jurisdiction to deal with any defect in it.

Notice amended on payment of costs incurred through error.

Hepburn v. *Beattie* (1911), 16 B.C. 209, distinguished.

MOTION to amend the notice of appeal herein, which had been regularly filed and served, but was entituled "In the Court of Appeal" instead of "In the Supreme Court of British Columbia." Heard on the 23rd of January, 1914, at Victoria, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Statement

Harold B. Robertson, for the application.

Arnold, contra.

MACDONALD, C.J.A.: In my opinion notice of appeal in this case was sufficient to give this Court jurisdiction to deal with any defect in it. That being so, the question is whether or not an amendment should be made in the circumstances of the case, and if so, whether we ought to grant an adjournment of the appeal because Mr. *Arnold* may be taken by surprise and be not prepared to go on with the argument. Then we have to decide whether or not we ought to rectify the defect in the notice. In my opinion we ought to do so. This case differs from other cases referred to—*Hepburn* v. *Beattie* (1911), 16 B.C. 209, for instance. What the Court said in that case was that a notice of appeal entituled: In the Supreme Court of British Columbia, was correctly so entituled. But we did not, nor did my learned brother who gave reasons in that case on this point, go further. He did not say that a notice of appeal which was

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incorrectly entituled was ineffectual to found jurisdiction in the Court of Appeal to deal with an informality in the notice.

I think Mr. *Robertson's* motion should be acceded to. We should amend the notice and proceed with the appeal.

IRVING, J.A.: I agree.

GALLIHER, J.A.

GALLIHER, J.A.: I am not absolutely clear in this matter myself, but I will not dissent from my learned brothers, because they may be quite right. Just at the moment I do not feel that I can altogether accede to their judgment.

Motion granted.

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Jan. 26.

WILSON v. HENDERSON

WILSON v. HENDERSON *ET AL.* (No. 2).

Practice—Trial by jury—Application for—Common law action—Prolonged examination of documents—Marginal rules 429 and 430—Schedule to affidavit for discovery—Not included in record on appeal—Effect of.

The defendants applied for an order for a trial with a jury on the ground that the pleadings shewed a common law action. The plaintiffs relied upon their affidavit for discovery in answer, the schedule of documents setting forth 900 documents. The application was dismissed. On appeal, the schedule of documents was not included in the record.

Held, that as it might appear from the schedule that the trial would involve a prolonged examination of documents, the Court cannot review the order in its absence.

Statement

APPEAL by the defendants from an order made by HUNTER, C.J.B.C. at chambers in Vancouver, on the 19th of November, 1913, refusing an application for an order for trial by a judge with a jury.

The appeal was argued at Victoria on the 26th of January, 1914, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Harold B. Robertson, for appellants.
Arnold, for respondent.

The judgment of the Court was delivered by

MACDONALD, C.J.A.: We think the appeal must be dismissed. It is perhaps regrettable that proper material was not brought before the learned Chief Justice. The facts were plain enough. The defendants made an application for trial by jury, resting it upon the pleadings which they alleged shewed the action was a common law action and, therefore, that they could have a jury as of right. That right may be displaced by the other party shewing that the case was one which involved a prolonged examination of accounts. The only material relied upon by the plaintiff was the affidavit of documents, which sets forth in the schedule something like 900 documents. Now the appeal book comes up to us without that schedule and, therefore, we have no enlightenment from it. But it was before the learned Chief Justice, and so far as we know the parties may have acquiesced in what was done.

Judgment

It might be apparent to the learned Chief Justice from the schedule that this trial would involve a prolonged examination of documents. In the absence of the schedule, we cannot review that judgment.

Appeal dismissed.

Solicitors for appellants: *Hamilton & Wragge.*
Solicitor for respondent: *C. S. Arnold.*

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Jan. 22.

WALSH v. MASON

STEVENS v. MASON

WALSH v. MASON.
STEVENS v. MASON.

Mechanic's lien—Mechanics' Lien Act, R.S.B.C. 1911, Cap. 154, Secs. 25 and 26—Cancellation of liens thereunder without security—Jurisdiction of judge.

A judge has no jurisdiction upon a summary application under sections 25 and 26 of the Mechanics' Lien Act to order the cancellation of a lien without the giving of security, because he thinks the lien is unsustainable.

The giving of security is a condition precedent to the making of the order

Statement

APPEAL from two similar orders made by GRANT, Co.J. at chambers in Vancouver on the 13th of November, 1913, for the cancellation of the plaintiffs' liens filed against lots 7 and 8, block 50, district lot 264, Vancouver, the property of the defendant, under the Mechanics' Lien Act. The facts are set out in the reasons for judgment.

The appeal was argued at Victoria on the 22nd of January, 1914, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A

Bray, for appellants (plaintiffs).
Bass, for respondent (defendant).

The judgment of the Court was delivered by

Judgment

MACDONALD, C.J.A.: I think the appeal must be allowed. The facts, shortly, are that liens were filed by the plaintiffs in these two cases against the property of the owner. Subsequently actions were commenced to enforce the liens, and later applications were made to the learned trial judge purporting to be under sections 25 and 26 of the Mechanics' Lien Act. Section 26 empowers the judge to cancel a lien either in whole or in part upon the applicant for the cancellation giving security for the amount claimed under the lien, the idea being that the security given should take the place of the security which the plaintiff had in the property by reason of his lien. The giving

of security is made a condition precedent to the cancellation of the lien. Now what the learned judge did here was not to cancel the lien on security being given and permit the action to proceed, but to cancel the lien without such security, apparently under the misapprehension that he could deal with the matter in his discretion without reference to the strict terms of the statute, that is to say, that he had a summary jurisdiction in any case where he thought the lien unsustainable to order the cancellation of it.

It has been suggested that the defendant might apply to the Court to dismiss the action for want of prosecution. That, however, was not done. The summons was taken under sections 25 and 26 of the Mechanics' Lien Act. Had an application been made to the Court to dismiss the action it would, no doubt, where a case had been made out, have had power to do so and if it did so the lien would fall with the action.

It has also been suggested that the judge could at any time during the trial, if he thought the lien was not sustainable, have vacated it and proceeded with the action for the recovery of the debt, but, again, that is not this case. We have not been referred to any authority either in the rules or statutes, or authority of any kind to sustain the course adopted below. The important point is that giving security is a condition precedent to the making of the order authorized by said section 26.

Judgment

Appeal allowed.

Solicitor for appellants: *J. A. Findlay.*
Solicitors for respondents: *Senkler, Spinks & Van Horne.*

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Criminal law—Murder—Joint trial of two accused—Refusal of separate trial—Admission of statement in writing made before trial of one accused—Not admissible as against the other—Failure of judge to caution jury—No substantial miscarriage—Criminal Code, Secs. 1017, Subsec. 3, and 1019.

The defendant and one C. were tried jointly on a charge of murder. C. had made a statement in writing, with respect to the crime, before trial. The Crown did not offer it in evidence, but, in the cross-examination of C., who testified on his own behalf, counsel for the Crown asked him if he had made a statement and he said that he had, but the contents of the statement were not disclosed. Counsel for the defendant then cross-examined C. to some length on the statement, and, on re-examination, C.'s counsel put the statement in, after objection by counsel for the Crown, but without objection by counsel for the defendant (he stating his reason for not objecting being that he did not wish to prejudice his client's case). There was nothing in the statement which had not already been brought out in the examination and cross-examination of C.

Held (MCPHILLIPS, J.A. dissenting), that the trial judge properly exercised his discretion in refusing a separate trial.

Per MARTIN, J.A.: Defendant's counsel not having availed himself (after leave granted) of the right to renew his application for a separate trial after the admission of the evidence, excusing himself on the ground that he did not wish to prejudice his client's case with the jury, has precluded himself from a similar application to this Court.

Held, further (MARTIN and MCPHILLIPS JJ.A. dissenting), that it would not be useful to send the case back to have question five restated; all that can be said upon it has already been said by counsel, and all the evidence bearing upon it has been brought to the attention of the Court, and in the circumstances, it is not a serious error not to have cautioned the jury that any admission or confession made by one of the accused, not in the presence of the other, is only evidence against the one making such confession or admission, and in any case it is manifest that there has been no wrong or miscarriage by reason of such warning not having been given.

Per MARTIN, J.A.: The Court should take advantage of the remedy provided by section 1017, subsection 3 of the Criminal Code, and send the case back to the learned judge below to have question five restated so as to raise the real point involved.

Per MCPHILLIPS, J.A.: As the written statement of C., admitted in evidence, was illegal evidence as against Davis, and may have influenced the verdict of the jury and caused him substantial wrong, a new trial should be granted.

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CRIMINAL APPEAL by way of case stated from a conviction by MORRISON, J. at the October (1913) assizes at Vancouver on a charge of murder. The appellant and one Clark were tried jointly and both found guilty of murder as principals. Clark had made a statement with respect to the crime before the trial. The Crown did not offer it in evidence; but in the cross-examination of Clark, who gave evidence, Crown counsel asked him if he had made a statement. This he admitted, but the contents of the statement, in so far as they had any relation to Davis, were not disclosed by counsel for the Crown. On cross-examination of Clark, counsel for Davis referred to the statement and cross-examined to some extent upon it. In re-examination, Clark's counsel put the statement in after objection from the Crown, but without objection by Davis's counsel. There was nothing in the statement which had not already been brought out in the examination and cross-examination of Clark in the witness box.

In the case stated, the learned judge set out the facts and the questions as follows:

"1. Did I properly exercise my discretion in refusing a separate trial to Davis?

"2. Should I have charged the jury as follows:

" 'You can readily see the incentive that Clark would have to escape from the clutches of the policeman if he could do so, and it is for you to say whether or not he had not a good chance for getting away while Archibald was searching Davis, and if he had that chance and didn't take it, then what conclusion may you reasonably and rationally draw?'

Statement

"3. I charged the jury as follows:

" 'The conflict as to which one did fire the fatal shot arises from the ghastly struggle between these two men for their own lives, for their self-preservation; and that is what we have been witnessing here the last two days, the struggle to the death between these two persons. Therefore, you must scrutinize their evidence very very carefully, as well as the circumstances in relation to their evidence, and if you conclude that only one of them used the revolver, as each one alleges, then I tell you, as a matter of law, that in order to make the other a principal in the deed it is not necessary that he should have inflicted the mortal wound; it is sufficient if he be present aiding and abetting, or assisting in the act. The one who does the act is the principal, and this is what the Code says as to principal, as to who are principals in an act just such as we are told this is: 'Everyone is a party to and guilty of an offence [say, the offence here] who actually commits it [the one who had the revolver and actually shot him, actually pulled the trigger, he is a principal] or does or omits an act

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for the purpose of aiding any person to commit the offence, or abets any person in commission of the offence, or counsels or procures any person to commit the offence. If several persons form a common intention to prosecute any unlawful purpose [any unlawful purpose], and to assist each other therein, each of them is a party to every offence committed [to every offence committed] by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose.'

"'They went out to burglarize and to hold up, fully armed. What was the probable consequence of the prosecution of that design? The probable consequence of that? 'Everyone who counsels or procures another person to be a party to an offence of which that person is afterwards guilty, is a party to that offence, although it may be committed in a way different from that which was counselled or suggested. Everyone who counsels or procures another to be a party to an offence is a party to every offence which that other commits in consequence of such counselling or procuring, and which the person counselling or procuring knew, or ought to have known, to be likely to be committed in consequence of such counselling or procuring.

"'A principal, therefore, may be the actual perpetrator of the act, that is, the one, as I have told you, who, with his own hands or through his own agent, does that act himself, or he may be the one who, if the act is done, does or omits something for the purpose of aiding someone to do it; he may be the one who is present aiding and abetting another in the doing of it; or he may be the one who counsels or procures the doing of it; or who does it through the medium of a guilty agent. Now, the actual perpetrator with his own hands means this also: 'To be the actual perpetrator of the act with his own hands, the offender may or may not be present when it is consummated. A person may be considered as a principal present aiding and abetting in the commission of an offence without his presence being such a strict, actual, immediate presence as would make him an eye or ear witness of what is passing. If a number of persons set out together or in small parties upon one common design, be it murder or any other offence, or for any other purpose of an unlawful nature in itself, and each takes the part assigned to him [each takes the part assigned to him], some to commit the act, others to watch at proper distances to prevent a surprise or to favour, if need be, the escape of those more immediately engaged, they are all, provided the act be committed, present at it, in the eye of the law; for the part taken by each man, in his particular station, tended to give countenance, encouragement and protection to the whole gang and to ensure the success of their common enterprise.'

Statement

"Was this a sufficient and proper charge on law of common purpose, and should I have instructed the jury that they must, in order to find both prisoners guilty, be satisfied that the prisoners were engaged in an unlawful purpose at the time the murder was committed, and that in the carrying out of such unlawful purpose the prisoners must have known that murder might be committed by one of them?

"4. Was there any evidence on which the jury could find that the persons were engaged in carrying out an unlawful purpose so as to make one of them guilty as a principal in respect of a murder actually committed by the other of them?

"5. Should I have told the jury that any admissions or confessions made by one of the accused, not in the presence of the other, is only evidence against the one making such confession or admission?

"6. The following is part of the evidence of Inspector McRae:

" 'Could you come over and demonstrate how that would happen?

" 'The Court: You might do it there.

" '*Maitland*: I thought yesterday, my Lord, maybe the jury could not see so well. Do you prefer it over there (addressing the jury)?

" 'Juror: Yes.

" '*Maitland*: Over there; that gun is not loaded; if you could demonstrate that.

" 'Juror: We can see from here.

" '*Jones*: The inspector might tell what different ways it could be done.

" 'Witness: Yes. Well, if it was on a level, the gun would certainly have to be held in that form.

" '*Maitland*: Up above the officer? Yes.

" 'That would be a tall man would have to do that? There; that I would have to hold this hand up that way.

" 'And this underneath here? It is underneath, yes, if he was up above; of course it would be quite natural.

" 'Yes. For instance, the way I am now.

" 'Now as to the searching; now, how about that? Well, in searching he would—I have searched a good many (proceeding to search counsel).

" 'The Court: Oh well, witness, don't do that.

" '*Maitland*: This is a demonstration I want to get.

" 'The Court: It is only guessing, because he didn't see. He might do something that would implicate the accused, you know.

" '*Maitland*: All right, my Lord.

" 'The Court: It is only guessing, you see, and it is really trying to shew the jury how it was done. Well, you could not do that.

" '*Maitland*: I see.

"Was my ruling proper on this evidence?"

Statement

The appeal was argued at Victoria on the 8th of January, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

R. L. Maitland, for accused: Six questions were reserved by MORRISON, J. As to the first question: Having referred to a statement made by the prisoner Clark, published in a newspaper, in our application for separate trial, the Crown, having such a statement in its possession, should have disclosed the same to the Court, and in not so doing, misled the Court, under which circumstances it was impossible for the Court to properly exercise its discretion; there should have been a separate trial: see *Rex* v. *Martin* (1905), 9 Can. Cr. Cas. 371; Bishop's Criminal

Argument

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Procedure, 4th Ed., Vol. 1, section 1034. As to when separate trials should be granted, see *Reg.* v. *Weir* (1899), 3 Can. Cr. Cas. 351.

Second question: The learned trial judge should not have stated this to the jury, as the jury may have inferred from such a statement that the failure of Clark to run away was evidence that there was common intention to resist the officer. We say that both of the accused were ordered to stay there.

Third question: The learned judge should have told the jury that they would have to find that the unlawful purpose was still going on when the murder took place, and should have told them that they would have to pin the unlawful purpose down to the time of the killing; further, the jury should have been asked to find which one did the killing.

Fourth question: This case can be distinguished from *Rex* v. *Rice* (1902), 5 Can. Cr. Cas. 509 at p. 513; *Rex* v. *Collison* (1831), 4 C. & P. 565, and *Rex* v. *Hawkins* (1828), 3 C. & P. 392.

Fifth question: Certain statements were made by Clark not in the presence of Davis, and there was no warning. As to statements made, see the evidence of Levis: "Go with the gang, hang with the gang"; and in the evidence of Seymour:

"While in gaol you tried very hard to have Clark admit that he did the shooting, didn't you? Yes, sir.

Argument

"And in reply to your questions, what did Clark say? He never gave no answer on that point.

"In any event, he didn't admit it? No, sir, he didn't admit it."

Also a written statement by Clark is read to him, which statement was made in anticipation of death, before he attempted to commit suicide.

As to the duty of the judge to warn the jury, see Archbold's Criminal Practice and Pleading, 24th Ed., 400; Russell on Crimes, 7th Ed., Vol. 3, p. 2206; Taylor on Evidence, 10th Ed., Vol. 1, p. 612; *Rex* v. *Martin* (1905), 9 Can. Cr. Cas. 371 at pp. 378 and 386.

Sixth question: We were entitled to this demonstration. A demonstration had been allowed earlier in the trial which was unsatisfactory, and this demonstration from an expert on searching should not have been refused.

A. D. Taylor, K.C., for the Crown: On the first question, they practically abandoned their application for a separate trial. The statement made by Clark, the other prisoner, was not used until his cross-examination, and even then it was not put in, and its contents were not disclosed. He referred to *Reg.* v. *Hirst* (1896), 18 Cox, C.C. 374.

Cur. adv. vult.

21st January, 1914.

MACDONALD, C.J.A.: I would answer the first and second questions in the affirmative.

After setting out a portion of the learned judge's charge, the third question submitted is as follows:

"Was this a sufficient and proper charge on law of common purpose, and should I have instructed the jury that they must, in order to find both prisoners guilty, be satisfied that the prisoners were engaged in an unlawful purpose at the time the murder was committed, and that in the carrying out of such unlawful purpose the prisoners must have known that murder might be committed by one of them?"

With regard to the first part of the question: "Was this a sufficient and proper charge on the law of 'common purpose'?" my answer is in the affirmative. I also answer the balance of the question, or what is really a subordinate question, in the affirmative.

I answer question 4 in the affirmative.

Question 5 is as follows:

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"Should I have told the jury that any admissions or confessions made by one of the accused, not in the presence of the other, is only evidence against the one making such confession or admission?"

The facts upon which it is based are not stated, but all the evidence is before us, and the argument proceeded on the assumption by both counsel that the question was to be answered with reference to the evidence to which they referred. No objection was taken by counsel for the Crown to the form or substance of the question. In these circumstances I think it unnecessary to send the case back to be re-stated by the learned judge, though it is regrettable that more care was not taken in framing the questions.

The appellant and one Clark were tried jointly, and both were found guilty as principals. It appears from the evidence that Clark had made a statement with respect to the crime

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some time before the trial. The Crown did not offer it in evidence, but on the cross-examination of Clark, who gave evidence, counsel for the Crown asked him if he had made a statement. This he admitted, but the contents of that statement, in so far as they had any relation to Davis, were not brought out by Crown counsel. On cross-examination of Clark, Mr. *Maitland,* counsel for Davis, referred to this statement and cross-examined to some extent upon it. In re-examination, Clark's counsel put the statement in after objection from the Crown, but without objection by Mr. *Maitland.* There was nothing in the statement which had not already been brought out in the examination and cross-examination of Clark in the witness box.

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In these circumstances, it would, in my opinion, not be useful to send the case back to have the question restated. All that can be said upon it has already been said by counsel, and all the evidence bearing upon it has already been brought to the attention of the Court, and from that, it appears to me manifest that in the circumstances of this case, assuming that the judge should have cautioned the jury, it was not serious error on his part not to have cautioned them that any admission or confession made by one of the accused, not in the presence of the other, is only evidence against the one making such confession or admission. In any case, it is manifest that there has been no wrong or miscarriage by reason of such warning not having been given.

Mr. *Maitland* made a motion to the Court to direct the learned trial judge to submit a further question, but after some argument that motion was abandoned.

IRVING, J.A.

IRVING, J.A.: I would answer the questions submitted in the same way as the learned Chief Justice has done, and I would sustain the conviction on the grounds stated by him.

MARTIN, J.A.

MARTIN, J.A.: I answer the questions submitted to this Court as follows:

Question 1: In the affirmative. It is admitted that on the first application for a separate trial (under sections 857-8), the learned judge properly exercised his discretion on the material

before him (so it is unnecessary to consider our right to review that discretion, and, moreover, the point is not raised), and at the same time he remarked to appellant's counsel:

"You are not prejudiced at this stage, and if anything develops you may renew your application."

But counsel did not avail himself of this leave, though he now suggests, something did later occur which made it desirable that his client should have had a separate trial, and he tells us quite frankly that though he had the matter in his mind, yet he did not make the application again because, to use his exact words:

"I didn't wish to prejudice my client's case with the jury."

We have, then, this extraordinary situation, that after the right to make an application was deliberately abandoned in the Court below because it would have been prejudicial to the prisoner's case to claim it, this Court of Appeal is now asked to grant a new trial because the prisoner has obtained benefit from the action of his counsel in electing to forego a privilege granted him by the learned trial judge. Simply to state the matter shews, when it is clearly understood, that it should not be countenanced or favourably entertained by this Court; there is no case in the books in any way resembling it. How can it be said to be "conducive to the ends of justice" (to use the language of section 857) that the prisoner should have had a separate trial, when he refrained from asking for it because he would have been prejudiced had he done so?

MARTIN, J.A.

Question 2 I answer in the affirmative. On the facts, the direction to the jury is unobjectionable.

Question 3: The same answer.

Question 4 I answer in the affirmative.

Question 5: Taken as it stands, and giving that answer to it as propounded literally, which it is our duty to do, there can be only one answer on a charge of this kind, *viz.*: in the affirmative, because, as is stated in Roscoe's Criminal Evidence, 13th Ed., p. 46:

"It is quite settled generally, that a confession is only evidence against the person making it, and cannot be used against others,"

and there can be no doubt that substantial wrong was occasioned (under section 1019) to the prisoner by the failure of the learned judge to direct the jury on so grave a point of evidence.

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The course to be adopted is so well known that I shall content myself by referring to the cases of *Rex* v. *Hearne* (1830), 4 C. & P. 215; *Rex* v. *Clewes, ib.* 221, and *Rex* v. *Fletcher* (1829), *ib.* 250, in the last of which Littledale, J. said, after deciding that the whole of a certain letter written by one of the prisoners, implicating and naming other prisoners, should be read to the jury:

"But I shall take care to make such observations to the jury, as will prevent its having any injurious effect against the other prisoners; and I shall tell the jury that they ought not to pay the slightest attention to this letter, except so far as it goes to affect the person who wrote it."

It is difficult to imagine how such an elementary and abstract question came to be stated at all, in the face of the established rule that a judge should not reserve a point unless he has some doubt about it, and surely there could be no doubt about this question. It was, indeed, admitted by both counsel before us that there was none, and the learned judge below himself recognized and stated the rule. With all due respect, I think he should have followed the usual course, which was, *e.g.*, adopted in *Reg.* v. *Letang* (1899), 2 Can. Cr. Cas. 505 at p. 510, and refused to state such a question, and he also should have refused to state it on the ground that it is really an irrelevant question: *Rex* v. *Walkem* (1908), 14 B.C. 1 at p. 8. But we were invited to consider the matter on the ground that in view of certain evidence that had been given, the learned judge was justified in refraining from giving the said usual and most necessary caution, and which, in answer to counsel's request, he said he would give "at the proper juncture" to the jury.

MARTIN, J.A.

It is apparent that the question, as submitted to us, is not a real, but a fictitious, irrelevant, and futile one, the answering of which can lead to nothing except to obscure the true and, to the condemned man, vital question which should have been reserved. I am strongly of the opinion, which I expressed at the hearing (indeed, on further consideration, still more so), that in such circumstances we should follow the course which has been before adopted by this Court of Criminal Appeal (when constituted as the old Full Court) in cases of much less gravity, and take advantage of the remedy provided by section 1017, subsection 3, and send the case back to the learned judge

below to have this question re-stated so as to raise the real point involved. As it is before us now, the learned judge has not pointed out the evidence or facts on which he relies to justify his action (though he has done so with the evidence connected with the other questions), and it is clearly not a proper course to adopt simply to send up to us an abstract question, accompanied by an appeal book of 353 pages, through which we must grope our way in an endeavour to find something to justify that which on the face of it is unjustifiable. And it is not sufficient, in my opinion, with all due respect for other views, to say that if counsel agree that the evidence or facts is or are so and so, then we can determine the matter upon their consent, because that substitutes the voluntary act of counsel for the duty of the judge, and probably the judge would not be prepared to accept counsel's statement as to what influenced him. My former experience of many years as a trial judge has taught me that it would be most unsafe to do so. It is, in short, due to the convicted men, to the judge below, and to this Court, in the discharge of its grave duty, to see that there is no element of uncertainty in these cases affecting the life and liberty of the subject, and to safeguard this, the Court below should now, as heretofore, certify to this Court the evidence and facts upon which it gave the ruling, or took the course complained of. This very case is an example of the danger of pursuing any other course, because I understood from counsel, and I remained under that erroneous impression until yesterday, that the statement in question (which is one exculpating Clark and incriminating Davis) was given in full in the appeal book, whereas I find the fact to be that said statement is only something which "was at the end of (Clark's) confession." But this document, *i.e.*, the confession, is not before us, not being either in the appeal book nor sent up as an exhibit, though it was given to the jury by the judge, at the trial, saying to them:

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"You will take the exhibits; you have full access to them, and endeavour to come to a determined conclusion."

We have no means of knowing what that confession contained; we have only the general observation of Clark that in it he was trying to tell his story of the killing of the constable, but we can see that it must have contained something apparently of the

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first importance to the appellant, because Clark refers to the statement in it "where he says that he held the guns in front of him." In short, we have just sufficient indication of its contents to shew how necessary it is that it should be before us. Again, we were informed by counsel that Clark, in the witness box on cross-examination by the appellant's counsel, covered all he said in the statement or confession, but the most superficial examination of Clark's evidence shews he did nothing of the kind, even as regards the final portion that is before us, which I call the statement, his evidence on that point being a short general remark that he "was trying to state clearly how the thing was," and that "Davis did the shooting," and a brief reference to the allegation that "Davis got the best of me after the first day of the trial by lying." So far as the preceding confession is concerned, no attempt was made to cross-examine on it, excepting the said unintelligible reference to the "guns," and the equally unintelligible reference to something apparently written on the back of it, which only emphasizes the uncertainty of the matter.

MARTIN, J.A.

I refer to these two points only to shew the necessity for caution herein, and of requiring a restatement of the question, and the ascertainment and certification by the judge below of the evidence and facts connected with and explanatory of the course he adopted, and until that is done, pursuant to the long-established practice, I feel that the only course open to me, in the best interests of justice, is to decline to answer this question. How can we tell whether or not it was proper for the trial judge to refrain from giving a caution respecting a written confession when that confession is not even before us? How can we form any estimate of the weight any document placed unreservedly in the hands of the jury may have upon them when we do not even know one half of what it contains? The mere fact that the author of the confession was cross-examined on a small portion of that one half is not of itself, in my opinion, sufficient to enable us to express a sound opinion as to the propriety of the course adopted by the learned judge. Before doing so, we must have all the facts before us, not only those upon which he acted, but also those upon which the jury may have done so.

The course which this Court has taken on prior occasions, of sending a case back to be restated, is that which has been adopted by other Courts. I refer to *Reg.* v. *Giles* (1894), 31 C.L.J. 33 at p. 34, where the Court of Criminal Appeal in Ontario, of its own motion, unanimously refused to hear a case which had been insufficiently stated by a County Court judge, saying:

"We cannot agree to proceed on this case. It must be remitted back to the judge to be restated. The judge must find the facts and specify the question of law as to which he is in doubt and reserves for our judgment."

And in *Rex* v. *Cohon* (1903), 6 Can. Cr. Cas. 386, Townshend, J., with whom Macdonald, C.J. concurred, at p. 393 said:

"I may add in conclusion that it is not competent for the judge below to submit such a question as the last, whether there is any legal evidence to sustain the conviction—and send up the whole evidence for us to review. He may state the effect of evidence given to sustain a certain charge, or give the material part of it, and reserve a question as to its sufficiency in point of law to convict, but it certainly was never contemplated that he could send up the whole body of the evidence, and ask if that evidence is sufficient to convict."

This Court is absolutely bound by the facts stated in the case, even though, as Stephen, J. said to the appellant's counsel in *Evans* v. *Hemingway* (1887), 52 J.P. 134, they "state you out of Court," which, be it noted, occurred after a case had been re-stated in the form there given. And in *Re County Council of Cardigan* (1890), 54 J.P. 792, the Queen's Bench Division held that:

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"We cannot entertain abstract questions on the construction of statutes. We must have specific facts which have actually arisen, and the decision come to upon those facts, and then we may be asked if the decision was right or wrong. The case must be dismissed."

And this was a decision on the Local Government Act (1888), 51 & 52 Vict. c. 91), section 29 providing for the stating of a case "if any question arises, or is about to arise," etc.

See also to the same effect the unanimous judgment of the Court of King's Bench of Quebec in *Rex* v. *Fortier* (1903), 7 Can. Cr. Cas. 417 at p. 425, wherein the Court refused to hear a question "asked in an abstract way without any statement of facts to which it can apply the law," and for that reason quashed the case that had been reserved.

Even in civil matters the Supreme Court of Canada has refused to hear a case improperly stated. Thus, in the case of

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Canadian Pacific Railway Co. v. *City of Ottawa* (1910), 48 S.C.R. 257 at p. 259, it is stated that "The Court, of its own motion, took objection to the form of the submission of the case by the board" of railway commissioners of Canada, saying:

"The majority of the Court is of the opinion that we cannot hear the appeal, at the present time at least, as the board has not submitted any question which, in the opinion of the board, is a question of law."

Furthermore, and apart from this appeal, it is high time, in my opinion, that this Court should take steps to see that these reserved cases are properly stated. The number of them is increasing rapidly, and the neglect to do so casts a heavy and unwarrantable burden upon the time of this Court, which is already fully occupied. The last example occurs in a case in which judgment was delivered in this Court a few days ago (the 16th instant), *Rex* v. *Winsby* (in which I did not sit), wherein two of my learned brothers refer to the insufficiency of the case, and one of them to the additional task thereby cast upon them "of examining the Criminal Code to see if the indictment is good under any other section." In the case at bar, as I have already said, it is impossible, in my opinion, to do justice without a restatement.

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It was, however, suggested to us that we could, and should, disregard the question submitted, and deal with the whole matter under section 1019, on the theory that in any event no "substantial wrong or miscarriage was thereby occasioned at the trial," and this was to be accomplished either by answering the abstract question in the affirmative, and then disregarding or explaining it away as having no effect on the assumed facts, or by refusing to answer it, and, after reading and considering the whole case, reach the conclusion that what was done could be upheld by section 1019. I first observe that this is, in my opinion, apart from all other matters, something we ought not to be called upon to do. If questions are submitted which are not real or material ones, they should be eliminated from the record, because it must be remembered that these capital cases have not only, under section 1063, to be reported by the trial judge "to the Secretary of State for the information of His Excellency the Governor-General," so that the pleasure of the Crown as to execution may be signified (which would not,

generally speaking, be done finally pending an appeal), but under section 1022, upon an application to the Crown for mercy on behalf of any person convicted of an indictable offence, which application may be made at any time, the Minister of Justice has the unusual power of ordering a new trial, and it is highly desirable that in the exercise of so delicate and onerous a duty, the Minister, as well as His Excellency in council, and likewise, the Supreme Court of Canada, should an appeal be taken from us, should have the record before them freed from all uncertainties and complications, so that the matter may be facilitated as much as possible. It seems to me that it is highly undesirable to, in effect, compel a Court of Appeal, or the Minister, or His Excellency in council, to begin at the end of the matter and take up so heavy a burden, when it could often be avoided by having a clear understanding of the real question from the beginning. If the Court will consent to answer one abstract and futile and irrelevant question (out of, say, four submitted) in favour of the prisoner, and then avoid the consequences by reading the whole record, in the effort to apply section 1019, what is to prevent the whole series of said four questions being submitted in the abstract and treated in the same manner? Where is the line to be drawn? If the most important of the six questions reserved in this case is to be treated in this manner, why not all? The result of this would mean that this Court would, with the assistance of counsel, be wholly disregarding the questions submitted and framing its own questions for itself to answer, which actually is what we are asked to do in the present case, in defiance of the statute, which directs that the questions reserved shall be stated by the Court below: sections 1014; 1016, subsection 6. This, in effect, renders nugatory the provisions of the statute.

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I am strongly of the opinion that section 1019 is only to be invoked after all other real questions have been stated and answered, and that we are not at liberty to resort to it before that has been done; to do otherwise is to invert and upset the whole order of long-established procedure on appeal, founded on the best and most practical reasons. There is also a final

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and weighty reason for not invoking section 1019 unless unavoidable, and it is that there is no more difficult duty for a judge to perform than to give due effect to it, because, as has been observed, it compels the Court to answer a question of fact, and substitutes it for the jury in that respect. It directs the Court not to set aside a conviction in specified circumstances unless, in its opinion, "some substantial wrong or miscarriage was thereby occasioned on the trial." Till recently I have, erroneously, no doubt, but, at least, in good company, understood this language to mean that unless the Court could affirmatively reach the conclusion that "some substantial wrong or miscarriage" had actually been occasioned, the conviction should stand. But a very different and far wider meaning has been attached to these words by the Supreme Court of Canada in *Allen* v. *Rex* (1911), 44 S.C.R. 331, an appeal from this Court (which my brother McPHILLIPS is considering at length in a judgment which I have had the benefit of perusing), wherein it was laid down that if the circumstances are such that it is impossible to say that the minds of the jury may not have been prejudicially affected by the evidence complained of, then a substantial wrong has been occasioned. This result is accomplished if what has been improperly done "may influence them (the jury) adversely to the accused upon a material issue": see the judgment of the Chief Justice, p. 341, and *passim* (with which Duff, J. agreed) and Anglin, J. at pp. 361-3.

MARTIN, J.A.

This interpretation is, of course, binding on us, and it is our duty to give effect to it. But it will be at once perceived that it is of far wider scope and consequences than the narrower one that this Court and other Courts have applied. It now will become our duty, if that stage of the matter should be reached, to hold that if what was done herein *may* have influenced the jury adversely, then there must be a new trial.

I confess that this is a duty I shrink from discharging, in a capital case particularly, unless it is unavoidable. Who can say, in many cases, with any reasonable degree of certainty, what act or omission complained of may not have adversely affected the mind of the jury? Take the case at bar for example. Who can say what the effect would be upon the

mind of only one man out of twelve, deliberating upon the guilt or innocence of the appellant, if a confession and statement charging him with murder were produced, unaccompanied by any caution from the Court as to its restricted application, signed by his accomplice, and garnished by all the artful and theatrical expressions which appear in the statement before us, with the added solemnity of their being made by one who was about to commit suicide, and therefore would be likely to tell the truth, as having no interest to wrongfully accuse another when upon the point of death. And would the force and sting of that dread accusation be wholly taken away if another juror were to recall the fact that the accuser had been cross-examined on a small portion thereof? I am thankful to say that at present, at least, this matter has not reached the stage where I deem it to be my duty to answer this question, and I do not think a judge should be asked to answer one so grave and anxious, in a capital case especially, unless no other course is open to him.

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There remains question 6. This I answer in the affirmative. Whatever might be otherwise said on this point, in my opinion, counsel did not finally press his contention, and in effect agreed with the learned judge that the suggested "demonstration" would not be of real assistance to his case.

The result is that, in my opinion, we should, for the reasons already stated, give effect to section 1017, subsection 3, and send this case back to the Court by which it was stated for the purpose of having the fourth question re-stated before we attempt to answer it in ignorance of the full facts.

GALLIHER, J.A.: I agree with the conclusions of the learned Chief Justice. I also agree that the learned trial judge should have warned the jury that the statement could only be evidence as against the party making it. But there is a step further, though it is true the case is not sufficiently stated to this Court. The Court perused all the evidence that could have been set out by the judge, and the same was brought to the attention of this Court by counsel when the case was heard by us, and notwithstanding the fact that there was an error in not giving that

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direction to the jury, we have to consider section 1019. That entitles us to examine the evidence. That was done, and having done so it becomes necessary for us to decide whether there was any substantial wrong or miscarriage of justice as affecting the accused under that section. In the light of the evidence at the trial—and the admission of the accused, given under oath, in his own defence—I can see no possible grounds for saying that what was omitted to be done constituted a miscarriage of justice, and for these reasons (although I am in accord with what my learned brother MARTIN has said with regard to these cases being properly and sufficiently stated by the judges in the Court below) there would be nothing gained by sending the case back, as the result to the accused would in the end be the same.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would answer the first question in this way: that as matters were presented to the learned trial judge, perhaps it was a right direction at the outset that the accused should be tried jointly, and refusing a separate trial to the accused Davis; but when the Crown counsel, in his cross-examination of the accused Clark, elicited that Clark had made a written statement, which was sent to the Attorney-General about ten days before the trial, then cause existed for a separate trial for Davis; but I do not observe that counsel for Davis renewed his application, nevertheless, by reason of the reference to this statement, and its being put in evidence later by counsel for Clark, and in its nature implicating Davis, and in that it was inadmissible evidence against Davis, this evidence may have influenced the verdict of the jury as against Davis, and caused Davis substantial wrong, and a miscarriage of justice took place by the trial of Davis jointly with Clark. It therefore follows that Davis should have had a separate trial, and it should have been, at the later time, so directed, in view especially of the omission by the learned trial judge to direct the jury that the statement was not evidence against Davis. This point is further dealt with in my answer to question 5.

I would answer question 2 in the affirmative, but qualified by my answer to question 5. That is, that in my opinion the

jury were, or may have been, misled by the omission of the learned trial judge to impress upon them that the written statement of Clark was not to be taken or considered as evidence as against Davis, that in other respects, in my opinion, the charge did not amount to misdirection, the case being fully heard by the jury.

I would answer question 3 in the same manner that I have answered question 2.

I would answer question 4 in the affirmative.

I would answer question 5 in the affirmative, but so far only, and with respect only, to the written statement of Clark. The question, of course, in the abstract, could only be answered in the affirmative. We have not been given a reference to the admissions or confessions that the learned judge had reference to when settling the stated case. This entailed perusal of the evidence, and possibly the better course would have been to send the stated case back for amendment. I am the more impressed now that this would have been the proper course in view of the very cogent reasoning so well brought out by my brother MARTIN in his judgment, just read. However, upon an examination of the evidence, in my opinion, the only error made by the learned trial judge by way of non-direction was his omission to impress upon the jury that the written statement of Clark was not to be taken or considered as evidence as against Davis, and his failure to do this has resulted, in my opinion, in a miscarriage of justice, in that without this direction, the jury may probably have been misled. Unquestionably, the written statement of Clark was not evidence against Davis, and could not have been got in evidence if counsel for the Crown had refrained from examining upon it, and thereby making it known and admitting of counsel for Clark introducing it in evidence. The statement was clearly inadmissible against Davis; it was never read over to him, nor did he make any confession following, as in *Rex* v. *Hirst* (1896), 18 Cox, C.C. 374. The statement in itself is a most concise and clever little melodramatic story of about 200 words, calculated to impress the jury, and unquestionably to implicate Davis, and when it is considered that this statement is an exhibit in the case, and that

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the trial judge said in his charge, speaking to the jury:

"You will take the exhibits; you have full access to them, and endeavour to come to a determined conclusion,"

and this statement went before the jury in their deliberations, in all its artful language, and coupled with the fact that it was written with a determination upon Clark's part to at once commit suicide immediately after writing it—an attempt he made and nearly accomplished—can it be for a moment thought that this did not work substantial wrong against Davis?

I feel greatly sustained in the opinion I have come to in a matter of such gravity by the case of *Allen* v. *Rex* (1911), 44 S.C.R. 331, and the judgment (which I trust I have read aright) to be found there of Fitzpatrick, C.J. at p. 339:

". . . . to dismiss the appeal we must ignore the well-settled rule that in a criminal case the verdict is to be founded exclusively upon such evidence as the law allows."

It cannot be gainsaid that the verdict against Davis is founded, among other evidence, upon evidence which was illegal evidence as against him, in the introduction of the statement of Clark, and the learned trial judge admits that he did not charge the jury that it was evidence only against Clark, who wrote the statement.

Now in the *Allen* case, *supra,* the learned Chief Justice said, at p. 333:

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"All the judges below find that there was ample evidence that the prisoner killed Captain Elliston and in that opinion we concur. The question to be determined, however, is with respect to the admissibility of the testimony quoted in the reserved case and its effect upon the verdict."

Here two men have been found guilty of murder. Unquestionably only one, I take it from the evidence, did the physical act of pulling the trigger and thereby sending the bullet on its mission of death. I, of course, do not say that under the law one may not be found guilty of murder upon proper evidence and a fair trial, even without any active participation in the discharge of the bullet which takes life; but we must see to it that all that has taken place is that which the law requires, and if there be a doubt as to this, and if it may be that substantial wrong has occurred, and a miscarriage of justice has intervened, then there must be a new trial.

It will be observed that it is not the province of the appellate

Court to try the case. This is clearly set forth by the Chief Justice in the *Allen* case, *supra,* at p. 337:

"It may well be that in our opinion, sitting here in an atmosphere very different from that in which the case was tried, the evidence was quite sufficient, taken in its entirety, to support the verdict; but can we say that the admittedly improper questions put by the Crown prosecutor, and the answers which the prisoner apparently very reluctantly gave, did not influence the jury in the conclusion they reached? We must not overlook the fact that it is the free, unbiased verdict of the jury that the accused was entitled to have."

It is to be observed that the Crown prosecutor in this case was the first to make an error. He examined Clark, when under cross-examination, upon a statement which was not admissible in evidence against Davis, admitting of counsel for Clark then introducing the statement in evidence, thereby implicating Davis; and this statement went to the jury without a proper charge thereon and may have prejudiced Davis upon his trial. It should never have been referred to, but if referred to, unquestionably should have been remarked upon, as the law requires, by the learned trial judge, and the fact that counsel for Davis did not call the attention of the learned trial judge to the omission matters not.

Let us note the cross-examination of Clark upon the statement:

"*Taylor*: Now, Clark, about 10 days ago you wrote out a statement in reference to this matter which you sent to the Attorney-General of the Province, or asked to be sent, did you not? I did.

"Yes, and in that statement you intended to give a full account? I did, sir.

"Of what occurred; and that statement you handed to one of the guards in New Westminster? To Mr. McArthur; yes, sir.

"And then a few minutes after making that statement you tried to commit suicide? I did, sir.

"Now, I suppose you have been thinking over this matter a good deal? Well—

"And made up this statement; is that right? Why, it was about three days before this I had been writing up this statement. My intention at the time of writing this statement was to give my side—my side of the case.

"Your side of the case? And being—

"Well, now, that was the first time that you had made what you call your side of the case? Yes.

* * * * * * * * *

"Now, you remember writing this long letter; that is your signature, is it not? Yes, sir.

"Now I see you say here—

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"The Court: That is his writing?

"Witness: Yes, sir.

"*Taylor*: That is your writing. Now, I see you say here at the end: 'Well, I think this closes my case. I have tried to make it as plain as I could because you won't be able to ask me no questions.' Now, your idea of saying that no questions should be asked you, that you were going to carry out your idea of committing suicide, was it not? Yes, sir."

Then we have counsel for Clark, upon re-direct examination of Clark, introducing the statement in evidence, and it was admitted against the objection of the Crown prosecutor, and rightly, as he had made it possible of being introduced, and, in effect, manufactured evidence—a specious and clever plea for Clark, and implicating Davis—gets before the jury by and through the action of the Crown prosecutor; it was not evidence against Davis, but went in as such, and without the jury being warned or charged that it was not evidence against Davis.

The statement went in in the following way:

"*Jones*: Now, my learned friend has questioned you regarding your confession. You changed your mind, you said, after your mother came to see you? I did.

"Now, why did you change your mind? I was disgusted with myself.

"And this was what was at the end of your confession: 'The reason you will—

"*Taylor*: That is most manifestly a leading question.

"*Jones*: My learned friend has put in—

"The Court: Don't talk both at once.

"*Taylor*: I referred to certain parts of this written statement which I didn't put in. Now, my learned friend, in re-examination of his own client, is going to read from this confession, say 'is this what you said?' It is most manifestly a leading question. You can't possibly put in this in re-examination.

MCPHILLIPS, J.A.

"*Jones*: I submit, my Lord—

"The Court: You may.

"*Jones*: 'The reason you will not be able to ask me no questions is this: My father is dead; I have no brothers or sisters, only a dear old mother. I have caused her so much worry, sorrow and heartaches that I am so downhearted and disgusted with myself that I am going to put an end to it. There are two crimes I have never committed, one is murder, and the other is leading an innocent girl astray, so I am not afraid to face the charge in the hereafter. I think you will agree with me in what I will do as it may be possibly a whole lot better for me to be dead than doing 20 years of a lifetime in prison. I would only cause my poor mother so many more heartaches all the time I am in prison. I hope this statement will help you to clear the case and the guilty man get justice. Davis got the best of me after the first day of the trial by lying. I knew I would get life anyway, so I said nothing. I close for good, remaining yours, H. F.

Clark.' Now, immediately after writing that, you handed this statement to the guard? Yes, sir.

"And immediately after handing the statement to the guard, what happened? I tried to see if I couldn't break my skull on the bars."

I would again call attention to the judgment of the Chief Justice in the *Allen* case, *supra,* at pp. 334-37 and 339.

Now, in this case it may be said that the Crown did not put in the statement. I think I am right in saying that in effect the statement was put in by the Crown, and, unquestionably, without the action of the Crown it would never have got in, and, adopting the language of the Chief Justice in the *Allen* case, *supra,* may have influenced the verdict of the jury and caused Davis substantial wrong.

Here it is not the case of non-direction or omission to charge the jury upon a question of fact; it is a mistake of law, and the introduction of illegal evidence against Davis. Many cases have occurred where there has been misdirection, non-direction, and omission to direct upon questions of fact and verdicts sustained. Upon this point it is instructive to read the language of Lord Alverstone, C.J. in *Rex* v. *Wann* (1912), 7 Cr. App. R. 135 at pp. 138-140.

The Lord Chief Justice, in the case last above cited, is in particular considering section 4 (1) of the Criminal Appeal Act.

MCPHILLIPS, J.A.

It will be observed that in England, owing to the state of the statute law there, and although the Court in the *Wann* case were not satisfied that there had been a miscarriage of justice in the ordinary sense, yet, being of the view that the appellant had been wrongly convicted, the result was that the accused went free, owing to the Court having no power to grant a new trial. This power we have—to punctuate the situation—if I am right in my opinion, and this case occurred in England, Davis would go free. As it is, if I am right in my opinion, a new trial follows—a trial upon legal, not illegal, evidence.

I would refer also to the judgment of Darling, J. in *Rex* v. *Ellsom* (1911), 7 Cr. App. R. 4 at pp. 7 and 12.

It is to be remarked that in this case it is not possible to say that that which the learned trial judge omitted to charge the jury may be safely assumed was in the minds of the jury. The

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jury are not to be assumed to know the law, and must receive instruction in the law, and that failure here, in my opinion, may have caused Davis substantial wrong. It is to be noted that counsel for the accused Davis did not object to the reception of the statement in evidence, nor did he ask the learned trial judge to direct the jury that the statement was not evidence against the accused Davis—but there is authority that a new trial will be granted, although no objection was raised by the prisoner's counsel. I would refer to *Rex* v. *Long* (1902), 5 Can. Cr. Cas. 493, relied on in *Rex* v. *Law* (1909), 15 Can. Cr. Cas. 382 at p. 395; 19 Man. L.R. 259 at p. 274.

MCPHILLIPS, J.A.

I would answer question 6 in the affirmative.

I, therefore, am of the opinion, upon careful consideration of the whole case, that the appeal must be allowed, the conviction quashed, and a new trial granted to Davis. The written statement admitted in evidence was illegal evidence as against Davis, and became possible of being adduced in evidence by the action of the Crown counsel, and this evidence may have influenced the verdict of the jury and caused Davis substantial wrong.

Conviction affirmed.

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J. A. FLETT, LIMITED v. WORLD BUILDING LIMITED, AND JOHN COUGHLAN & SONS

Mechanics' liens — Deliveries of material under contract — Subsequent deliveries under subsidiary contract—Enforcement of lien—Unity of contract—Date of filing.

F. contracted to supply the hardware for the construction of the defendant Company's building in accordance with the drawings and specifications of the architect at a contract price, subject to additions or deductions for alterations made by the architect's written order during the work. F. delivered the last of the material for which the fixed price in the contract was payable on the 2nd of November, 1912, but before such delivery a verbal arrangement was entered into between the parties for the purchase and delivery of additional goods in January, the last of which was delivered on the 15th of January, 1913. On the 14th of February following a lien was filed, to secure not only the amount due for the material supplied under the verbal arrangement, but for the balance due under the original contract.

Held, per MARTIN and MCPHILLIPS, JJ.A.: That the whole transaction was so linked together as to constitute a single cause of action, and the lien was filed in time for the balance due for the supply of materials in respect of the whole bill.

Per MACDONALD, C.J.A. and GALLIHER, J.A.: That the later deliveries of material were not embraced in the contract, which was not a continuing one, and the time for registration of the claim for lien in respect of the goods actually delivered under the contract ran from the last delivery made thereunder.

The Court being equally divided, the appeal was dismissed.

Statement

APPEAL from the judgment of GRANT, Co. J. in favour of the plaintiff, in an action under the Mechanics' Lien Act tried by him at Vancouver on the 29th of September, 1913. The facts are set out in the headnote and reasons for judgment.

The appeal was argued at Vancouver on the 5th of November, 1913, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Bodwell, K.C., for appellants: The plaintiff had a contract for supplying material and doing work, which was completed when the final certificate of the architect was given. The cost of the work was over $6,000, and the balance due on the com-

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pletion of the work was $950, for which a note was given Flett on the 2nd of October, 1912. About this time, under a distinct oral agreement, further goods were delivered on the 6th and 15th of January, worth $43.50. The first contract was to be carried out according to certain plans and specifications, and the goods for which the $43.50 was due are not in the plans and specifications, so that they are entirely distinct.

Argument

Dickie, for respondents: The contract was to the effect that the final certificate was to be given when payment was made, but the last goods were not delivered under the contract until the 2nd of October. In the meantime the arrangement was made for further deliveries in January, the last delivery having been made on the 15th of January. There was an understanding that Flett was to supply all the material for the building; that included what was supplied under the verbal arrangement towards the completion of the building. He referred to *Robock* v. *Peters* (1900), 13 Man. L.R. 124 at p. 136; *Coughlan* v. *National Construction Co.; McLean* v. *Loo Gee Wing* (1909), 14 B.C. 339 at p. 349, and *Morris* v. *Tharle* (1900), 24 Ont. 159.

Bodwell, in reply.

Cur. adv. vult.

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MACDONALD, C.J.A.

MACDONALD, C.J.A.: The original contract was a specific one, and was fully completed on both sides, on the one by the supply in full of the goods contracted for, and on the other, by the giving of the note for the full balance of the contract price. The subsequent order was for something outside that contract. It was a new and distinct contract, and could not affect the parties in respect of their lien rights under the first contract. It therefore follows that no lien could be claimed in respect of the first contract, because no claim of lien was filed within the prescribed time. It also follows, from the fact that no notice was given, as required by section 6 of the Mechanics' Lien Act, that a lien would be claimed in respect of the material supplied under this second order, that the plaintiff is not entitled to a lien in respect of the second contract or order.

I would allow the appeal and dismiss the action.

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MARTIN, J.A.: The plaintiff Company had a written contract to supply all the hardware for the building in question as "mentioned in the specifications," and did, as the trial judge finds, actually deliver the last of the material thereunder on the 2nd of November, 1912, though, for some unexplained reason, the final certificate for $975 was given on the 26th of September previous. This means, on the facts before us as found, that the contract was not really completed till the 2nd of November, and the lien existed for 31 days thereafter. But it is deposed to and found that before said last delivery under the original contract, an order was given for additional goods to be delivered in the month of January, 1913, as required, and three deliveries thereof were actually so made, extending up to the 15th of January. On the 14th of February the lien was filed, to secure not only this additional material, but the amount of the original contract—$950.

In view of these facts, as found by the learned trial judge, I think he took the correct view of the matter, and is supported by the decision of Killam, C.J. in *Robock* v. *Peters* (1900), 13 Man. L.R. 124 at pp. 135-7, wherein it is said, p. 136:

MARTIN, J.A.

"I agree with the reasoning of the Divisional Court in *Morris* v. *Tharle*. I think that, although the initial arrangement was not a binding contract for the supply of any definite kinds or quantities of materials, or even of all such as should be required, yet the whole transaction was so linked together as to constitute a single cause of action, and that the time for registration or bringing an action ran from the supply of the last of the materials in respect of the whole bill.

"It does not appear to me to affect the matter that the latest orders were at long intervals for small quantities of goods, after the bulk of the work had been done and the building occupied and used. These articles seem to have been *bona fide* required for small finishing jobs such as are usual in building operations, and which are frequently done after the owner is in occupation."

The case at bar is, indeed, stronger, because, as above stated, the initial contract was to supply all the material of a certain kind for the building.

The appeal should, therefore, be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: I cannot take the view that this was a continuing contract, hence the appeal must be allowed, as the plaintiffs were out of time in filing their lien as to the $950, and no notice was given as to the $43 claim, as is required by

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statute. It is admitted that the last goods under what is called the contract proper (but which I would term the first contract), were delivered in November, 1912. These were the goods called for in the plans and specifications referred to in the contract between the plaintiffs and defendants, the World Building Company, and by the terms of that contract no alterations, additions or substitutions were to be made to these plans and specifications without the knowledge and consent of the architect. Mr. Whiteway, the architect, was called, and stated that no changes were made, and that he had no knowledge of the goods ordered in November, 1912, and delivered in the following January, and that such goods did not fall within the terms of the first contract. Such being the case, we must treat these latter goods as under a separate contract, though in respect of the same building.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: The appellants appeal from the judgment of GRANT, Co. J., who held that the lien filed by the respondent was a valid and subsisting lien against the lands, and a sale was directed of the lands, or a competent part thereof, to satisfy the lien. The learned trial judge finds as facts: (a) that the last of the deliveries of hardware under the contract was not made until the 2nd of November, 1912; (b) that at that time, or very closely after that time, it was made known to the respondent by the appellants that further materials would be required; (c) that the further materials were delivered in January, 1913, and the last of them on the 15th of January, 1913; (d) that the lien was validly filed on the 14th of February, 1913; (e) that the appellants were entitled to judgment and to the enforcement of a lien for the amount of the claim, *viz.*: $993.50.

Mr. *Bodwell,* in a very careful argument attempted to shew that the materials last supplied could not be held to have been supplied in connection with, or having relation to the contract of the 13th of December, 1910, between the respondent, the contractor, and the World Building, Limited, the owner. It is to be noted that the contract was "for the supplying of the hardware for the World Building." Admittedly, the lien held

to be established was for the supply of hardware delivered at different times.

Upon a careful perusal of the contract it is plain that it was contemplated that there might be additions to that covered by the drawings and specifications which the contractor would be held to conform to and comply with. This is well demonstrated by article IX.:

"It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the contractor for said work and materials shall be $6,500, subject to additions and deductions hereinbefore provided....."

It is clear that the further materials were additions in the nature of materials, *i.e.*, hardware supplied in pursuance of the terms of the contract.

Mr. *Dickie* strongly relied upon, and I think rightly, the decision of Killam, C.J. in *Robock* v. *Peters* (1900), 13 Man. L.R. 124 at p. 136. Killam, C.J. in his judgment, referring to the particular facts of the case before him, states that:

"The initial arrangement was not a binding contract for the supply of any definite kinds or quantities of material or even of all such as should be required,"

whilst in the case before us I assume the specifications and drawings did shew the definite kinds and quantities (the specifications and drawings were not before us), and as to the supply of all the desired materials, we have the provision of the contract covering "additions"; therefore, in my opinion, nothing turns upon this which at first sight might be considered a material distinction in the facts.

MCPHILLIPS, J.A.

I unhesitatingly adopt the language of Killam, C.J. at p. 136, and, in my opinion, the reasoning is distinctly applicable to this case.

I do not consider that the appellant is in any way incommoded by the issuance of the final certificate, which would appear to have issued under date of September 26th, 1912, when admittedly materials were supplied under the contract on the 2nd of November, 1912, and as contended for by the appellant, are found by the learned trial judge to have been supplied as late as the 15th of January, 1913.

Upon turning to the contract we find the final certificate dealt with in article X., which reads as follows:

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"It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials."

In so far as the appellant is concerned, this final certificate would be available to him as against the owner to establish performance of the contract; but what are the facts? Plainly, materials were delivered after the date of the final certificate and orders given thereafter for the supply of further materials, being additions within the terms of the contract; and if the final certificate be looked at it will be seen that it is confined to the exact and original contract price, *viz.*: $6,500, not taking into account the additions thereto, the supply of which is clearly referrable to the contract. The appellant is in no way estopped, in my opinion, by the issuance of this stated to be "final payment"; it does not read "final certificate," but perhaps that is immaterial, as in article X. "final certificate or final payment" are mentioned.

It was contended that the notice given by the respondent, the contractor, to the owner and the appellants, was insufficient. This I cannot agree with, and in my opinion the notice was amply sufficient to entitle the respondent to have the full benefit of the Mechanics' Lien Act. Here we have to deal with a statutory remedy given to material men—a further remedy granted by Parliament for the recovery of debts. This statutory remedy is not to be denied unless it is manifest that to grant it would be against the plain language of the statute. I adopt the language of my brother IRVING in *Coughlan* v. *National Construction Co., McLean* v. *Loo Gee Wing* (1909), 14 B.C. 339 at p. 349:

MCPHILLIPS, J.A.

"I think the Act contemplated the allowance of a lien for goods actually furnished and used whether there is a lump sum agreement or not. An owner cannot defeat a lien by becoming bankrupt, or breaking off all relations with his contractor. The lien is given by virtue of supplying the goods, irrespective of the mode of payment."

In the case before us the right to the lien cannot be defeated by invoking the final certificate or final payment at a date which, if capable of being invoked, would defeat the lien, when the facts disprove finality, as goods were later supplied in plain

pursuance of the contract, which contract was still a living force, and spelled out a continuing relationship between the parties. Here we have materials supplied, being hardware, as set forth in the contract, the last of which materials are proved to have been delivered upon the 15th of January, 1913, and the lien filed on the 14th of February, 1913. What barrier stands in the way of the right to the enforcement of the lien? In my opinion none exists, as the furnishing and placing of the materials, in my opinion, was the carrying out of an agreed-upon relationship that the hardware was to be supplied, that is, furnished and placed, in and upon the building, to the end—that all hardware should be so supplied in conformity with the specifications and drawings, or as might be further ordered in addition thereto from time to time until the last of the materials required to be supplied should be so supplied, furnished and placed.

Section 19 of the Mechanics' Lien Act, R.S.B.C. 1911, chapter 154, in part is as follows:

"19. Every lien upon any such erection, building, railway, tramway, road, bridge, trestle-work, wharf, pier, mine, quarry, well, excavation, embankment, sidewalk, sewer, drain, ditch, flume, tunnel, aqueduct, dyke, works, or improvements, the appurtenances to any of them, material or lands, shall absolutely cease to exist:

"(1) In the case of a claim for lien by a contractor or sub-contractor, after the expiration of thirty-one days after the completion of the contract;

"(2) In the case of a claim for lien for materials, after the expiration of thirty-one days after the furnishing or placing of the last materials so furnished or placed."

It is clear that under the above-quoted section, and subsections, the lien attaches if, as in the latter subsections, due registration takes place of the lien, if such lien be filed before the expiration of 31 days after the furnishing or placing of the "last materials" so furnished or placed, and in my opinion the lien was effectually filed as, in my opinion, the furnishing or placing of the last materials was on the 15th of January, 1913, and the lien was a valid lien filed on the 14th of February, 1913, and properly covered the materials supplied, furnished and placed anterior to the 15th of January, 1913—that is, that the time for registration ran from the supply of the last of the materials.

I would, therefore, dismiss the appeal, with costs.

Appeal dismissed.

Solicitors for appellants: *Bodwell, Lawson & Lane.*

Solicitors for respondent: *Dickie, De Beck & McTaggart.*

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FORDHAM v. HALL

FORDHAM v. HALL *ET UX.*

Appeal—Notice of—Application to amend by adding ground of appeal—Want of merits—Standing on strict legal rights.

Where it appears that an appellant is standing on his strict legal rights and there is no merit in his case, a Court of Appeal will not assist him on an application to add a ground of appeal to his notice.

Statement

MOTION by the appellants to the Court of Appeal for leave to add a ground of appeal. Heard at Victoria on the 19th of January, 1914, by MACDONALD, C.J.A., IRVING, GALLIHER and MCPHILLIPS, JJ.A.

Martin, K.C., for the motion.
Bodwell, K.C., contra.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I do not think we should accede to this motion. It is quite apparent from what has been said that there is no merit in the appellants' case. They come here to insist upon their legal rights. We cannot help that. But when we are asked to allow an amendment to their ground of appeal, we say that we will not assist an appeal which, although grounded on good law, is without equity.

IRVING, J.A.
GALLIHER, J.A.

IRVING and GALLIHER, JJ.A. agreed with MACDONALD, C.J.A.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: My view is that this Court is not constrained or affected in the slightest degree by the points taken. We have the same powers as the Court of Appeal in England—where no grounds of appeal need be given at all. And if later on in this appeal it should appear to this Court that there are grounds, not taken, upon which the appeal should proceed, we have the right to consider them. Therefore, if this point becomes pertinent we can take it, and give effect to it. Whatever may be the grounds of appeal, the Court will endeavour to determine the matter without a new trial.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: We are not bound by the English rules but by our own rules. The rules require that the grounds of appeal shall be stated in the notice. There is power, of course, in the Court to allow an amendment of the grounds—to allow the grounds to be added to. In some cases it may be just and right that the power should be exercised, but I cannot subscribe to what my learned brother suggests. The amendment should be refused.

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McPHILLIPS, J.A.: I will only state, and this is my own view, that our powers are equally extensive as those conferred on the Court of Appeal in England: see Order LVIII., rule 4.

Martin: My lords, of course the Court is against me, but this is the reading of the rule: "Providing that the Court shall not refuse to consider the grounds of the appeal." They are bound to consider.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: There is no doubt the Court will always consider any ground that we want to consider, but here it is admitted there is no equity. If the appellants are entitled to proceed at all it is by reason of their legal rights without an iota of equity on their side. In such a case, while the Court is bound to give them their legal rights, we are not bound to give them any indulgence.

Motion refused.

ANTICKNAP v. SCOTT.

BARKER, CO. J.
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Evidence—Survey—Line dividing two lots of land—Testimony of surveyors—Not admissible when survey made by articled clerks—Mistrial.

In an action to determine the boundary line between two lots, two surveyors were called as witnesses, neither of whom had personally surveyed the lots in question, but testified from the plans and field notes of surveys made by their articled clerks, who ran the lines. The trial judge, after having a view of the ground, decided in favour of the plaintiff.

Held, on appeal, that the evidence of the two surveyors was improperly admitted, and there should be a new trial.

Statement

APPEAL from the judgment of BARKER, Co. J. in an action tried by him at Nanaimo on the 7th of November, 1913, for trespass, and for a determination of the boundary line between the plaintiff's and defendant's land. The facts are fully set out in the judgment of the trial judge.

V. B. Harrison, for plaintiff.
Bray, for defendant.

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29th November, 1913.

BARKER, CO. J.: This action is brought by the plaintiff for damages for alleged trespass upon the property of the plaintiff, and for obstructing a private road of the plaintiff leading from the plaintiff's land to the public road, and for an injunction to prevent further trespass and obstruction. There is also a counterclaim by defendant claiming damages for trespass and injury to the defendant's property.

The plaintiff and the defendant are owners of adjoining parts of lot 32, Wellington District, the defendant's part being immediately south of the plaintiff's. The dispute is as to where the defendant's north boundary line and the plaintiff's south boundary line should be, it being admitted that the north boundary of one and the south boundary of the other should be the same line in so far as the plaintiff's south boundary runs. The plaintiff's south boundary does not run so far to the east as the defendant's north line, as the defendant's property extends from the westerly boundary of lot 32 to the public road, and the plaintiff's land only extends a part of the distance to the said road.

The defendant purchased his land in July, 1903, as shewn by the certificate of title, and its location is shewn by a plan produced, and certified to by the registrar-general as a true copy of the plan in the parcels book in the office of the registrar-general, and it is sworn to be a true copy of the original plan attached to the original deed of the said parcel (which original plan seems to have been mislaid), and marked as exhibit H in this action. The plaintiff purchased her land and obtained a conveyance dated the 9th of March, 1912, and produces a certificate of title dated the 2nd of June, 1913, on which is a plan of her parcel.

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John B. Green, a provincial land surveyer, says that an assistant of his made this plan for the purpose of the conveyance to the plaintiff. Sometime a little later, a provincial land surveyor, Alfred G. King, was employed by the defendant to run his northerly boundary line. The two surveys did not tally at the east end of the said northerly line by some feet, Green's post being some feet to the south of King's post, but both agreed

upon the post upon the west boundary of lot 32, being the west end of the dividing line between the plaintiff's and the defendant's parcels, and Green afterwards personally checked over his assistant's survey, and says he found King's survey to be correct, and moved his easterly post to where King's was. The difference was that King made the angle between this line and the westerly boundary of lot 32, 90 degrees, measured on the south side shewn on the original plan of the Scott property, whereas Green's assistant made the same line at an angle of 90.09, measured on the north side, which would throw the east end of the line a little to the south of King's line. The plaintiff admits that King's line is correct, and Green corrected his line to tally with it, but the plan on the plaintiff's certificate of title has not been corrected. But it is King's line upon which the plaintiff relies in this action, and not on the line shewn by his plan, which would give him a few more feet at the east end of his property. The surveyors Green and King at all times agreed upon the south-west corner of plaintiff's property, and the north-west corner post of defendant's property, as being at the same point. The defendant refuses to take either Green's survey as corrected, or King's survey. He claims that his north-west corner post should be 22 feet north of a post shewn upon his plan, and which post is also upon the ground, and about which post all parties agree, whereas King and Green placed the post 22 links north of that post, which would be about seven and a half feet south of where defendant claims it originally was and should now be.

The dispute, then, narrows itself down to this: Where should the north-west corner post of defendant's land be? The plaintiff produces as witnesses the two surveyors above mentioned, and her predecessor in title, who say that the line put in by King is correct. The defendant produces several neighbours and the original owner of lot 32, who say that at the time defendant's land was surveyed the posts were where the defendant claims they should be, and say that the old post was there on the day before the trial. Defendant also produces a mine manager who says that King's line does not run due east, which is not material, as, by the plan, it is to run at an angle of 90

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degrees from the western boundary of lot 32, and that line is on the ground, and not disputed. The surveyors say that they found no post where defendant says it was, when they made the survey. There had been an old fence on or near that line, now torn down, and I am inclined to think that the post witnesses saw, if any, was the post of the fence.

There are several points upon which there is no dispute, namely, the south-west corner post of lot 32, and the post shewn upon the defendant's plan as 22 from his north-west corner, and the western boundary line of lot 32. There are thus two checks as to where the defendant's north-west corner should be, namely, the distance from the south-west corner of lot 32, shewn on defendant's plan as 11.92 chains, and the distance from the above old post on the west line, shewn by the plan as 22, which both surveyors say should be 22 links, for the reason that all the other measurements on the plan are in chains and links, and it would be extremely improbable that this measurement alone should be in feet, and which defendant says should mean 22 feet. I take it that the 22 means links and not feet. To make more sure, I had a view of the land, and had Mr. King, assisted by Mr. Budge, defendant's witness, a mine engineer accustomed to surveys, chain the line from the south-west corner post of lot 32 to the corner post put in by King and Green as the north-west and south-west corner posts respectively of defendant and plaintiff, and they made it 11.944 chains, being 2.4 links further than shewn by Scott's plan. A part of the line runs over a very rough bit of country, and I consider the fact that it tallied so closely with the old line as conclusive. Moreover, it was exactly 22 links from the old post still there, and whose location is admitted by all. I found no old post where defendant and his witnesses say there was one, but there was a small hole in the ground, where they stated it was the morning before.

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I am satisfied that the posts planted by King and Green are correctly placed, and that the boundary line known throughout the trial as King's line is the correct boundary line between the plaintiff's and defendant's property, and that the defendant was wrong in placing a wire fence over a portion of the land north of this line and obstructing the plaintiff's road. As to the

amount of the damages, I do not find that they were very material, but there was some trouble and annoyance caused. I shall place the damages at $25. Judgment will be for plaintiff for $25, and an injunction restraining defendant from interfering with plaintiff's land north of the line laid down by Mr. King, and costs, to be taxed on the scale of an action where the subject-matter is between $100 and $250. Counterclaim dismissed with costs, if any.

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The appeal was argued at Victoria on the 22nd of January, 1914, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Bray, for appellant (defendant).
V. B. Harrison, for respondent (plaintiff).

MACDONALD, C.J.A.: I am of opinion that there has been a mistrial. Though it is quite possible that the learned judge was right, on the other hand it is quite as possible that he was wrong. He has given weight to evidence which may be hearsay or may not, so uncertain is the record.

Strictly, the Court might allow the appeal and dismiss the action, but I am not in favour of doing this, because I am convinced there may have been a mistrial. The plaintiff should have made it clear by a survey, and by putting the surveyor who made it into the witness box, so that the Court could be satisfied where the true line is. What has apparently been lost sight of by counsel, and probably by the judge, was that there might be an appeal, and evidence quite intelligible to local people might be unintelligible to those removed from the *locus in quo.* An additional difficulty about this case is the evidence of King and Green. To my mind these two men have not shewn that they, or either of them, made the survey of the line, and were not merely speaking from the notes and from the survey of their articled clerks, who, they say, did run the lines. If they had run the lines themselves there would not be much difficulty about the case.

MACDONALD, C.J.A.

But the learned trial judge bases his judgment upon the evidence of these two witnesses. He assumes that these two witnesses either made the survey originally, or were able to

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speak from re-surveys made by them. But it does not seem to me that these witnesses did make a survey so as to be able to speak authoritatively. If that be so, their evidence was inadmissible. Their evidence apparently has influenced the learned judge's mind. He himself took a view, and to what extent his own view influenced him we are unable to say, but, since evidence was admitted which appears to have been inadmissible, and which, undoubtedly, affected his mind, then the only thing we can do is either to set aside the judgment and dismiss the action, or hold, as I think we ought to hold, that there has been a mistrial, and send it back. It is simply a matter of having a surveyor run a line and give evidence as to whether this fence was or was not on the plaintiff's land. Instead of this, a very clumsy and ineffective way was adopted to prove what could have been made certain by a survey. The appeal will be allowed, and a new trial ordered.

MACDONALD, C.J.A.

IRVING, J.A.

IRVING, J.A.: I am inclined to think the learned trial judge was right, but if there is to be a new trial I will not express any opinion. I cannot make up my mind on the appeal book one way or the other. The questions are asked and answered in such a way that no one reading the evidence can understand it. It is very badly taken down, and there are also clerical errors in the transcribing. I should think, if the parties got a good surveyor, there would be no necessity for a new trial at all.

GALLIHER, J.A.

GALLIHER, J.A.: It is unfortunate that the evidence is not on the record. You see that might have all been present to the Court below and to the counsel below, but it is not present to us, and we are asked to draw inferences which I am not myself prepared to do.

Appeal allowed and new trial ordered.

Solicitor for appellant: *H. R. Bray.*
Solicitor for respondent: *V. B. Harrison.*

IN RE HUDSON'S BAY INSURANCE COMPANY AND WALKER.

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IN RE HUDSON'S BAY INSURANCE COMPANY AND WALKER

Arbitration—Arbitrator appointed by one party—Action commenced by other—Defendant, after delivering defence, applies for appointment of second arbitrator—Refusal of—Arbitration Act, R.S.B.C. 1911, Cap. 11, Secs. 6; 8, Subsec. (e).

The plaintiff commenced action upon a contract containing a provision for reference to arbitrators of any dispute arising under the contract, and the defendants, who had appointed one arbitrator under a previous agreement for arbitration of the matters in dispute, made application, after filing their defence in the action, for the appointment of the second arbitrator.

Held, that the defence having been delivered, the Court has seisin of the dispute, and it is by its decisions alone that the rights of the parties can be settled. The Court should not, under such circumstances, make an order under section 8, subsection (*e*) of the Arbitration Act.

Held, further, that the rule applies whether such action relates to the whole or a part of the matters in dispute.

Order of HUNTER, C.J.B.C. affirmed.

APPEAL from an order made by HUNTER, C.J.B.C. at Chambers in Victoria, on the 15th of September, 1913, refusing to appoint an arbitrator to sit with the arbitrator already appointed by the Hudson's Bay Insurance Company.

Statement

The appeal was argued at Vancouver on the 7th of November, 1913, before MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Reid, K.C., for appellant Company: The learned Chief Justice dismissed our application because we took a step in the action: *i.e.,* we filed our defence. As to making an application for a stay of proceedings see Russell on Arbitration, 9th Ed., p. 51; *Smith* v. *City of London Ins. Co.* (1887), 14 A.R. 328; (1888), 15 S.C.R. 69. A settlement of this matter can only be arrived at by arbitration: see *Scott* v. *Avery* (1856), 5 H.L. Cas. 811; *Swift* v. *David* (1910), 15 B.C. 70. Section 6 of the Arbitration Act only applies on an application for a stay of proceedings in the action.

Argument

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Maclean, K.C., for Annie Kate Walker, the respondent: Under section 16 of the conditions of the policy we agreed to submit certain questions to arbitration, but that does not prevent us from recourse to this Court. Having taken a step in the action, they must go on; they cannot fall back on the agreement to arbitrate: *Doleman & Sons* v. *Ossett Corporation* (1912), 3 K.B. 257.

Reid, in reply.

Cur. adv. vult.

23rd February, 1914.

MARTIN, J.A.: It is clear from the decision of the Court of Appeal in England in *Doleman & Sons* v. *Ossett Corporation* (1912), 3 K.B. 257, that because the appellant Company herein has delivered a defence it has placed itself in such a position that the action brought against it by Walker must proceed, under section 6 of the Arbitration Act, and, therefore, as Fletcher Moulton, L.J. puts it at p. 269:

"The Court has seisin of the dispute, and it is by its decision, and by its decision alone, that the rights of the parties are settled. It follows, therefore, that in the latter case the private tribunal, if it has ever come into existence, is *functus officio,* unless the parties agree *de novo* that the dispute shall be tried by arbitration, as in the case where they agree that the action itself shall be referred. There cannot be two tribunals each with the jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. To my mind this is clearly involved in the proposition that the Courts will not allow their jurisdiction to be ousted."

MARTIN, J.A.

And the rule is not changed merely because a part only of the dispute is sought to be arbitrated; here, the value of the property apart from the liability. To allow a part of the proceedings to go on before the arbitrators concurrently with the balance of them before the Court is inconsistent with the idea that "the Court has seisin of the dispute," *i.e.,* the whole dispute. Fletcher Moulton, L.J. at p. 271, supports this view by saying:

"It is now necessary to turn to clause 32 of the contract between the parties in this case, in order to see whether it is wholly, or to some and to what extent, an arbitration clause."

Farwell, L.J. at p. 274, refers to the impropriety of the Court entering "upon a struggle for priority with the lay tribunal," and adds:

"Such a position is to my mind an impossible one, inconsistent with the dignity of the Court and with the construction of the Act. The King's Courts do not compete with arbitrators, or permit their own proceedings to be interfered with in any way by them; when the defendant has submitted to the jurisdiction, he cannot withdraw without the leave of the Court, or the consent of his opponent. If this is not so, what would happen if the action and the arbitration go on together, and the plaintiff succeeds in his action, but the arbitrator makes his award on the same day in favour of the defendant?"

But it is said this is not an application to stay proceedings under section 6, and that the learned judge should have made the order asked for under section 8, subsection (*e*), which directs that "the Court or a judge shall . . . appoint an arbitrator," etc.

MARTIN, J.A.

It is, however, clear that any Court or judge is justified in circumstances like the present in refusing to make an order which would be obviously abortive; if it did make the order it would thereby also make itself a party to a waste of the money and time of its litigants, and this arbitration has been "rendered abortive by the action" (page 268 of the *Doleman* case, *supra,*) for reasons above stated.

The appeal should, I think, be dismissed.

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

The plaintiff having instituted proceedings in the Courts, and having delivered her statement of claim, and the defendant Company, after appearance entered, having delivered its statement of defence, is, I think, precluded from availing itself of the provisions of section 6 of the Arbitration Act, R.S.B.C. 1911, Cap. 11.

GALLIHER, J.A.

The forum has been chosen, and the Court is seized of all the matters in controversy, and, as is pointed out in *Doleman & Sons* v. *Ossett Corporation* (1912), 81 L.J., K.B. 1092, in the judgment of Farwell, L.J. at p. 1102:

"If the defendant [as here] pleads to the action, and disentitles himself to apply under section 4 [our section 6], he thereby submits to the jurisdiction of the Court, which involves the same consequences as the refusal of an application under section 4 [our section 6] . . . . If this be not so, section 4 seems to me useless; if the arbitration can go on against the will of the plaintiff after writ, what is the object of applying to stay the action? If the action goes on, can it be said that the Court is to enter upon a struggle for priority with the law tribunal, and grant an injunction

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to restrain the arbitration proceedings, or entertain applications to advance the trial on the ground that they will be outstripped by the arbitrator? Such a position is to my mind an impossible one, inconsistent with the dignity of the Court and with the construction of the Act."

McPHILLIPS, J.A.: This is an appeal by the Company from the refusal of HUNTER, C.J.B.C. to make an order appointing an arbitrator to act with the already appointed arbitrator of the Company for the purpose of ascertaining and assessing the loss or damage sustained by the assured (Annie Kate Walker). The application made did not include an application for a stay of proceedings under section 6 of the Arbitration Act, R.S.B.C. 1911, Cap. 11.

It would appear that the assured did not upon her part take any steps to enforce the statutory condition of the policy providing for a reference to arbitration, but commenced an action on the 19th of April, 1913, against the Company for a fire loss under the policy of insurance. The Company entered an appearance to the action on the 29th of April, 1913, the statement of claim was filed on the 10th of May, 1913, and the statement of defence on the 20th of June, 1913, and it would not appear that a reply was filed, but by the effluxion of time the pleadings were closed on the 30th of June, 1913. On the 23rd of June, 1913, the Company, through its solicitor, served notice on the assured of the appointment of its arbitrator, and that if the assured did not appoint an arbitrator within seven clear days, an application would be made to the Supreme Court, or a judge thereof, under the Arbitration Act, to appoint an arbitrator on the assured's behalf, or a sole arbitrator. Not until the 12th of September, 1913, was this application made—the assured not having appointed an arbitrator. It is, of course, to be remembered that the months of July and August comprise the long vacation months, and the long vacation had commenced before the lapse of the seven days referred to.

The application came on to be heard by HUNTER, C.J.B.C. on the 15th of September, 1913, and the learned Chief Justice refused to make the order applied for, that is, refused to appoint an arbitrator to act for the assured along with the arbitrator already appointed by the Company.

The appeal by the Company is advanced upon the ground that arbitration is provided for by the 16th statutory condition, which is contained in the policy, and that the Company is entitled, notwithstanding the lapse of time between the filing of statement of defence and close of pleadings, to have the arbitrator appointed. For the respondent, the assured, however, it is contended that by reason of the state of the action and delay, there is no right in the Company to now have an arbitrator appointed.

This appeal brings up for consideration a somewhat debatable point, and one that as recently as during the year 1912 was under consideration by the Court of Appeal in England in *Doleman & Sons* v. *Ossett Corporation* (1912), 3 K.B. 257, where it was held that an award made pending an action was of no avail, and no bar to the plaintiff's claim in the action: see the remarks of Vaughan Williams, L.J. at p. 263, Fletcher Moulton, L.J. at p. 271, and Farwell, L.J. at p. 273.

It is to be remarked that the statutory condition providing for arbitration has not added to it what was added in the policy under consideration in *Guerin* v. *The Manchester Fire Assurance Co.* (1898), 29 S.C.R. 139 at p. 147, the policy in that case having these words added:

"It is furthermore hereby expressed, provided and mutually agreed, that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable in any Court of law or equity until after an award shall have been obtained fixing the amount of such claim in the manner above provided."

It was held in that case that no action would be maintainable against the Company for any claim under the policy until after an award was obtained, and that the award was a condition precedent to any right of action to recover a claim for loss under the policy.

Sir Henry Strong, C.J. said at p. 151:

"Further, the arbitration clause, added to the conditions by the variation to condition sixteen, provides that no action should be maintainable until after an award had been obtained pursuant to the terms of the conditions fixing the amount of the claim. The Court of review considered this provision void as tending to oust the jurisdiction of the Courts of law, and so, contrary to public policy. I do not think this view can be maintained. The law of England provides that any agreement renouncing the jurisdiction of legally-established Courts of justice is null, but nevertheless in the

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IN RE HUDSON'S BAY INSURANCE COMPANY AND WALKER

case of *Scott* v. *Avery* (1856), 5 H.L. Cas. 811, the House of Lords determined that a clause of this nature and almost in the same words as that before us, making an award a condition precedent, was perfectly valid and that no action was maintainable until after an award had been made. This decision, which has been followed in many later cases, though, of course, not a binding authority on the Courts of Quebec, proceeds upon a principle of law which is as applicable under French as under English law. This principle applies not merely to cases where the amount of damages is to be ascertained by an arbitrator, but also to cases where it is made a condition precedent that the question of liability should first be determined by arbitration. *Trainor* v. *The Phoenix Fire Insurance Company* (1891), 8 T.L.R. 37; *Kenworthy* v. *The Queen Insurance Company* (1892), *ib.* 211; *Lantalum* v. *The Anchor Marine Insurance Co.* (1882), 22 N.B. 14; *Dawson* v. *Fitzgerald* (1876), 1 Ex. D. 257."

Now, in the case before us the statutory condition remains unaltered, and it is not a condition precedent to action brought that an award be had.

The point we have to consider was dealt with in the case of *Cole* v. *Canadian Fire Insurance Co.* (1907), 15 O.L.R. 336, an appeal from an order staying all proceedings in the action until further order of the Court—an application under section 6 of the Arbitration Act, R.S.O. 1897, Cap. 62, a section similar to the one in our Act. Although it is right to remark that the application was made after notice of trial had been given, yet all the defences of the insurance company were withdrawn, and it was represented that the whole matter in dispute was the amount of the loss. The decision of the Court was that the application having been made after delivery of the statement of defence was too late. See the remarks of Riddell, J. at p. 338.

MCPHILLIPS, J.A.

Whilst it is true that in the case before us counsel explained that no application was made to stay the proceedings (in any case that could not be made after delivery of pleadings), yet we see that the Court in Ontario really dealt with the making of any award, and if that view be the correct one, then any award made would be abortive unless, of course, the assured assented to the arbitration proceedings, which is not the case, as we have counsel here opposing.

Therefore, under the decision of the Divisional Court in Ontario, and that of the Court of Appeal in England, both holding against the contention which was so ably advanced by

Mr. *Reid* on behalf of the appellant, I feel constrained to decide that in my opinion the opportunity for the appointment of an arbitrator on behalf of the assured by an order of the Court, and an award by arbitrators under the statutory condition is past, although I must admit that the reasonings of Vaughan Williams, L.J. in his dissenting judgment in the Court of Appeal impresses me very much.

It follows that in my opinion the appeal will stand dismissed.

Appeal dismissed.

Solicitors for appellant: *Bowser, Reid & Wallbridge.*
Solicitors for respondent: *Elliott, Maclean & Shandley.*

KELLY, DOUGLAS & COMPANY, LIMITED v. SAYLE *ET AL.*

Partnership—Agreement drawn up and signed—Evidence of actual intention of parties—Admissibility of—Finding of trial judge.

The defendant S., desiring to buy out his partner B. in the stationery business in North Vancouver, received an advance from the defendant D. of $2,150 for that purpose, and the sale went through. A year later, the $2,150 being still owing, S. and D. signed a partnership agreement in duplicate, each retaining one. S. shewed his (according to his own evidence) to his banker, who was not called as a witness. Later D. indorsed notes from time to time to assist in carrying on the business. Eventually the business failed and D. claimed the $2,150 he had advanced as a creditor, although this amount had been treated in the partnership agreement as his contribution to the capital. Both defendants testified that the agreement was never made operative, but was made solely for the purpose of protecting D. for his advance.

Held (MACDONALD, C.J.A. dissenting), that notwithstanding a partnership agreement having been drawn up and signed, the evidence shewed there was no intention that there should be a partnership. D., therefore, was not liable as a partner, and was entitled to claim as a creditor.

Judgment of MCINNES, Co. J. affirmed.

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Jan. 15.

KELLY, DOUGLAS & CO. v. SAYLE

Statement

APPEAL by plaintiffs from the judgment of McINNES, Co.J. heard at Vancouver on the 8th of November, 1913. Defendant Sayle carried on business by himself and in the course of same obtained certain financial assistance from defendant Dick. Ultimately a partnership agreement was drawn up between them, but never registered. The partnership name was the Leonard-Sayle Company. The defence was that the partnership was merely a form of security to defendant Dick for his advances. The trial judge dismissed the action as against Dick. Plaintiffs appealed.

The appeal was argued at Victoria on the 14th and 15th of January, 1914, before MACDONALD, C.J.A., MARTIN and McPHILLIPS, JJ.A.

Argument

Arnold, for appellants (plaintiffs): The evidence of both Sayle and Dick contradicts and varies a written document and should not be allowed in: *Harris* v. *Dunsmuir* (1902), 9 B.C. 303. The face of the document shews a partnership. The capital consists of the business carried on by Sayle, and the oral testimony is inconsistent with the document and should not be heard. As to who the Court will construe as a dormant partner see *Pooley* v. *Driver* (1876), 5 Ch. D. 458; and *Henderson* v. *Arthurs* (1907), 1 K.B. 10.

J. W. de B. Farris, for respondents (defendants): The evidence does not vary the document in any way and is admissible to shew that it never became operative. The evidence shews it was the intention that the document was to be held and not become operative until a certain contingency arose, which, as a matter of fact, never did arise.

Arnold, in reply: Sayle had access to Dick's safe where he kept his documents. Dick was a silent partner and therefore should be liable for the debts of the firm.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal should be allowed.

We have an extraordinary state of facts in this case. The respondent Dick advanced $2,100 to the respondent Sayle to buy out the former partner in the business that Sayle was carrying on. A year afterwards a partnership agreement was drawn

up between Sayle and Dick. That agreement, on its face, purports to be signed, sealed and delivered by the parties. Each carried away a counterpart of it. One of the parties, Sayle, took it to his banker: the banker was not called. Following that, Dick indorsed notes from time to time to assist in carrying on the business. Finally the business was a failure and now Dick decides to claim as a creditor of the firm for the $2,100 which he advanced, and which is treated in the partnership agreement as his contribution to the capital. His status as a creditor is allowed on this extraordinary evidence: he and Sayle get into the witness box, the only parties who could give any evidence on the point at all, and say that this partnership agreement never came into force at all, that it was given for the purpose of enabling Dick's executors on his death to shew that Sayle owed Dick this money. Now this partnership agreement is a perfectly futile document for that purpose and if produced by the executors it would shew nothing of the kind. It would shew that the deceased had been a partner from the date of that partnership agreement and that his executors were entitled to an account of his share.

MACDONALD, C.J.A.

On that extraordinary evidence it has been found that Dick was not a partner at all, but was entitled to put in his claim as a creditor. The banker, who was the only person who could verify this tale, was not called.

I decline to accept evidence of that kind. I decline to accept it in the face of the document, on the faith of a story utterly ridiculous, to my mind.

MARTIN, J.A.: The question has admittedly come down to the weight of evidence, and in view of the fact that the trial judge has specifically accepted as true the harmonious evidence of the only two persons who had knowledge of the matter, shewing that the contract was contingent only, I am unable to say that we would be justified in interfering with his verdict.

MARTIN, J.A.

MCPHILLIPS, J.A.: I must admit at the outset the situation is a strange one, and it may, perhaps, seem singular that a Court of law should come to the conclusion as against the

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writing, that there was no partnership, when in the writing a partnership is said to exist. But what has taken place does not necessarily constitute legal liability. For instance, one may sign a document—put one's name upon a negotiable instrument and retain same, but that does not constitute a legal liability. We must go further and establish the facts attendant upon the execution and delivery—that the document was delivered or the negotiable instrument was issued. I can quite readily understand that Sayle did not want to give a chattel mortgage. In my practice at the bar I many a time found people who were engaged in commercial business indisposed to give a chattel mortgage or such securities as would be noted by commercial agencies. Therefore, when it was suggested that something other than a chattel mortgage should be given, that was not exceptional and indicates truth. These two men, in a clumsy way, without legal advice, decided that a partnership agreement should be written out, but I do not find any evidence at all to satisfy me that it was really intended that there should be any partnership agreement. It was, after all, only to be evidence of the existing debt. Sayle thought it would assist in case of death. Dick does not say that. Dick treats it throughout as being merely an evidence of the debt. The plaintiffs frankly, through their counsel, state that they did not give credit upon Dick's worth or stability at all; they knew nothing whatever about the writing. I understand also that the only other person mentioned as having seen the writing was the bank manager, and if he did give credit upon the belief that Dick was a partner, nothing is owing to the bank. The indorsements of Dick would be evidence against there being a partnership, because if there was a partnership, the partnership signature would carry liability against Dick. It would rather preclude the contention that Dick was a partner.

MCPHILLIPS, J.A.

In the end it resolves itself into this: was there an agreement of partnership in fact? There is no magic in the words of the writing and the learned trial judge has undertaken to believe Sayle and Dick; it is a question of credibility.

I wholly agree with the trial judge that Dick is not liable for the debts of this partnership. I could only come to the con-

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clusion that there was liability upon the most positive evidence, evidence that I should be constrained to give effect to against the trial judge's finding of fact, and I see no such evidence. I think that to say there was no partnership is to rightly apply the law to a state of facts, though peculiar, still truthful and quite believable, believed in by the one best able to decide, the trial judge.

I would dismiss the appeal.

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

Solicitor for appellants: *C. S. Arnold.*
Solicitors for respondents: *Farris & Emerson.*

RE BHAGWAN SINGH.

MORRISON, J.
1914
Jan. 20.
RE BHAGWAN SINGH

Practice—Writ of habeas corpus—Obtained by suppression of material facts—Application to reverse order for issue of—Grounds for reversal.

Where an order is obtained *ex parte* for a writ of *habeas corpus*, granted through the suppression or omission of a material fact, it will, on application, be reversed.

Statement

APPLICATION made upon motion served upon R. J. Reid, Dominion Government immigration superintendent and inspector for the Port of Vancouver, requiring him to produce Bhagwan Singh before the Court on the 5th of January, 1914, and to make return to a writ of *habeas corpus* issued on the 19th of November, 1913. Heard by MORRISON, J. at Vancouver on the 20th of January, 1914. The facts are set out in the judgment.

Bird, for the application.
Ritchie, K.C., contra.

MORRISON, J.

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Jan. 20.

RE BHAGWAN SINGH

MORRISON, J.: On the 7th of October last, upon the application *ex parte* of Bhagwan Singh, a writ of *habeas corpus* was ordered to be issued to Malcolm J. R. Reid, Dominion Government immigration superintendent and inspector for the Port of Vancouver, B. C., directing him to have before a judge of this Court, presiding at chambers in Vancouver, forthwith on receipt of the said writ, the body of the said Bhagwan Singh, alleged to be detained in the custody of the said Reid. At the time this application was made, Bhagwan Singh was not in custody, having been released on sufficient bail. This fact was not disclosed in the material read in support of the application, nor by Mr. Steers, who then appeared for the applicant. This order lay dormant until November 19th, following. Bhagwan Singh in the meantime changed his solicitors. On the 19th of November the writ was issued but not served on Reid, but by means of wireless message the fact of its issuance appears to have been communicated to him whilst *en route* to Victoria.

After arrival at Victoria, whence Bhagwan Singh was taken for deportation to Hong Kong, pursuant to the provisions of The Immigration Act, Mr. Reid applied for and obtained an order for another writ of *habeas corpus* from my brother MURPHY there. This writ was issued and duly served on Bhagwan Singh. Notwithstanding all this, Bhagwan Singh was deported, and is now without the jurisdiction. Application is now made to me upon motion served upon Mr. Reid requiring him to produce Bhagwan Singh "before the Court on Monday, the 5th of January, 1914, and to make a return to the writ issued on the 19th of November, 1913." This notice is dated December 1st, 1913. On December 4th another notice of a similar character, dated December 4th, was filed and in due course served on Mr. Reid requiring him to appear on January 9th, 1914.

Judgment

From the material filed and submitted I am of opinion that the order of October 7th was obtained by the suppression or omission of a material fact, *viz.*: that Bhagwan Singh was not in custody at the time. In *Cox* v. *Hakes* (1890), 15 App. Cas. 506 at p. 517; 60 L.J., Q.B. 89 at p. 93, Halsbury, L.C., said:

"The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom."

And see Halsbury's Laws of England, Vol. 10, p. 42; and *Barnardo* v. *Ford* (1892), A.C. 326 at p. 335; 61 L.J., Q.B. 728.

Then as to the subsequent course of the matter, I think the applicant has prejudiced his right to a return; *per* Lord Watson in *Barnardo* v. *Ford, supra.*

As to the right to reverse an order obtained *ex parte,* see judgment of HUNTER, C.J.B.C. in *Morrison, Thompson Hardware Co.* v. *Westbank Trading Co.* (1911), 16 B.C. 33 at p. 35.

The incident referred to in the material filed, that I was interrupted in my sittings at the Vancouver criminal assizes by a solicitor on the applicant's behalf for the purpose of instructing the registrar to forward a message to Mr. Reid that the writ had been issued, cannot, I think, in any way be taken as a confirmation of my previous order. I merely told the registrar that if a writ had, in fact, been issued, I saw no reason why he should not state that fact in a telegram to whomsoever might be interested in that occurrence.

Considerable stress was laid on the affidavits filed on behalf of Bhagwan Singh upon the alleged contumely displayed by Mr. Reid when told of the proceedings leading to the issue of the writ, and which allegations are denied by him. As to that phase of this matter, all I have to say is that Mr. Reid is a responsible officer of a great department of government, and, doubtless, the minister in charge of that department will take proper cognizance of the incident if founded on facts. Under all the circumstances, I do not think I am called upon to display any undue sensitiveness concerning it. The dignity of the Court in such cases usually takes care of itself.

Judgment

The order of October 7th, 1913, upon which is based the writ of the 19th of November, 1913, is therefore set aside.

Order set aside.

MACDONALD, J.

1914

Jan. 8.

NELSON v. CHARLESON AND BALLINGER

NELSON *ET AL.* v. CHARLESON AND BALLINGER.

Conveyance of land—Given as security for loan—Sale of land by mortgagee—Rights of purchaser—Knowledge of claimant's rights—Assent of administrator of deceased—Rights of heirs—Estoppel—Laches.

The husband and children of N., deceased, brought action for the redemption of certain land, alleging that an absolute conveyance of the same made by N. in her lifetime, in 1902, to the defendant C. was merely security for a loan, in addition to a mortgage that she had previously given him on the land, and that the defendant B. purchased the land from C., in 1903, with actual knowledge of the plaintiffs' rights, N. having died in the interval. On the trial, C. admitted that he held the land as security only, and that B. knew this both from himself and from N.'s husband. He stated at the same time that the sale was made to B. at the husband's request, who was administrator of N.'s estate, and received a portion of the purchase money, equal to his share as one of the heirs-at-law of N.

Held, that the onus was on the plaintiff to shew that B. purchased the property with express or actual notice that C. was holding the land only as security, that upon the evidence they had satisfied that onus, and B. obtained by his purchase from C. only such rights as C. had.

Held, further, that the actions of N.'s husband barred his own rights as an heir-at-law of N. by estoppel, but would not defeat the claims of the other heirs-at-law, who were entitled as against B. to a decree for redemption.

Statement

ACTION for a declaration that an absolute conveyance of land was made as security for a loan only, and for redemption, tried by MACDONALD, J. at Vancouver on the 3rd of December, 1913. The facts are set out fully in the reasons for judgment.

E. A. Lucas, for plaintiffs.
Armour, for defendant Charleson.
S. S. Taylor, K.C., for defendant Ballinger.

8th January, 1914.

Judgment

MACDONALD, J.: Plaintiffs allege that a conveyance in fee of lot 7, block 50, subdivision of district lot 182, group 1, City of Vancouver, executed by Margaret Nelson to the defendant Charleson on the 5th of April, 1902, was simply given to him by way of additional security for a loan of $400 represented by

a mortgage dated the 4th of April, 1902. They contend that the defendant Ballinger on the 27th of October, 1903, purchased the property with full knowledge and actual notice that the ownership of the property was not vested in Charleson, but had reverted to the plaintiffs as heirs-at-law of Margaret Nelson. Margaret Nelson died on the 21st of October, 1902, leaving as heirs-at-law the plaintiffs, all of whom are of age, except Theresa Nelson. Amendment was allowed at the trial so that the pleadings conformed with the evidence as to certain of the children being now of age. Plaintiffs do not seek any redress against Charleson but ask for redemption as against Ballinger. Subsequent to the death of his wife the plaintiff, August Nelson, endeavoured to sell the property, but the then condition of the real-estate market in Vancouver was not favourable to a sale and eventually Charleson pressed for payment of his mortgage. Having received an offer for the purchase of the property he submitted it to Nelson, who was then living at Eagle Harbour, B.C. Nelson came to Vancouver and after negotiating with Ballinger a purchase price of $1,200 was agreed upon. The parties met in Charleson's office and a conveyance was executed by Charleson to Ballinger. This was done with the full knowledge, consent and approval of the plaintiff August Nelson, who received for his own use and benefit $216, as part of the purchase price. Examination of the registry office at that time would have shewn that Margaret Nelson was the registered owner of the property, subject to two mortgages executed by her and to a charge created by an application made on the 25th of November, 1903, to register the conveyance from Margaret Nelson to Charleson. It would appear that while Charleson thought it advisable to register the mortgage for $400 immediately after the execution thereof, he did not apply to register the deed taken as further security until some time after the death of Margaret Nelson, *viz.*: on the 24th of November, 1903. Charleson having acted as a broker in connection with the sale of the property to Ballinger and having the conveyance from Margaret Nelson, in order to complete the transaction, an application was made to register his title to the property and a conveyance made by him to Ballinger. This latter conveyance is

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dated the 27th of October, 1903. Application was made to register on the 12th of November, 1903, and registration was completed on the 25th of November, 1903. At the same time discharges of the mortgages given by Margaret Nelson to Luff and Charleson were also registered on application of the defendant Ballinger. In his statement of defence, Charleson alleges that the plaintiff August Nelson was appointed administrator of the estate of Margaret Nelson and that he, Charleson, in good faith and in consideration of the payment of the said mortgages, executed the deed to the property. He further alleges that both August Nelson and Ballinger were well aware that he was only the mortgagee of the property. Ballinger produced a certificate of title (absolute) and seeks the protection of the statute, also contending that he became the purchaser of the property for value without notice. The conveyance of Margaret Nelson to Charleson is absolute in form and, coupled with registration, the onus rests upon the plaintiffs to shew that Ballinger purchased the property with express or actual notice that Charleson was simply holding the property as security and was not the real owner thereof. In closing the transaction of purchase, Ballinger employed S. O. Richards, since deceased, to examine the title. The registry office was open to the inspection of such solicitor, and whether he fell into the error that was prevalent in the mind of Charleson, that August Nelson, as administrator, had power to sell the property or instruct Charleson to utilize the conveyance he had received from Margaret Nelson, it is impossible to say. If this misapprehension as to the power of an administrator occurred; such error, being a matter of law, is not capable of relief. A similar situation was discussed in *Smith* v. *Bonnisteel* (1867), 13 Gr. 29. Perusal of the application to register signed by Ballinger would certainly put the solicitor on enquiry, as to the state of the title and as to the different mortgages on the property. There are also, amongst the title deeds produced, two discharges from Charleson to Ballinger shewing payment by him of mortgages made by Margaret Nelson in favour of Maria Luff for $475, subsequently assigned to Charleson, and another mortgage of $400 by Margaret Nelson in favour of Charleson direct. Both

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these discharges appear to be in the same handwriting and bear the same date as the deed from Charleson to Ballinger. Aside, however, from whatever notice might have been afforded by the registry office, Charleson, in support of the allegations in his defence, gave evidence that he only held the property as security and that Ballinger knew this, both from August Nelson and himself. Charleson could not sell as mortgagee, but stated that, as August Nelson was the administrator of the estate, he felt justified in carrying out his request. Ballinger contradicted the statements of Charleson and asserted that he had no knowledge of the title except that he asked Charleson "if he had the title." Ballinger thought August Nelson was the owner of the property and he negotiated with him, although he states he paid the purchase price to Charleson and left with Richards the matter of the examination of the title. He doubtless was satisfied at the time that he was obtaining a good title to the property. I have considered the risk attendant upon a recollection of what took place so many years ago, and, while the onus of satisfying me as to notice rests upon the plaintiffs in this action, I accept the statement of Charleson as contained in his evidence and am satisfied that he informed Ballinger that he was not the owner of the property, but only held the same as security. If Charleson had at any time asserted that he was the owner of the property, or purported to act as such, I might have had more hesitation in coming to this conclusion. On the contrary, his conduct and correspondence shew consideration for the owners of the equity, and final settlement of the price having been arranged between Ballinger and August Nelson. If he were interested, otherwise than as a mortgagee, it would be unreasonable to assume that he would allow Nelson to determine this important feature in the sale of any property. Information as to the extent of this security could be obtained by Ballinger or his solicitor from the registry office, if not afforded by Charleson. Ballinger thus became (except as to the amount paid in excess of the security) as to the owners of the equity of redemption only the assignee of Charleson and obtained by his purchase the rights possessed by him. The actions of August Nelson

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could not defeat the claims of the heirs-at-law of Margaret Nelson.

It was contended that the plaintiffs' rights were barred through laches and estoppel. It is true there has been a considerable lapse of time since Ballinger went into possession of the property, but I do not consider that, as against the heirs-at-law of Margaret Nelson, this delay will operate as a bar to the right of redemption. As to estoppel, I do not think this principle should in any way operate against the plaintiffs, except the plaintiff August Nelson. He actively assisted in bringing about the sale and received for his own use an amount in excess of the sum due upon the mortgages, and in applying the equitable relief of redemption, I am of opinion that he should be precluded from obtaining recovery of the property or any interest therein. In the ordinary course he would be entitled to a life interest in one-third of the estate of his deceased wife. The amount received, in my opinion, would, at the time, readily have been accepted by him as his share or interest in the property.

I find that the interest of the defendant Ballinger is only such interest as Charleson would have acquired as a mortgagee in possession, and that, except as to the excess over the amount of the mortgages paid by him, there should be the usual judgment for redemption and that such relief be granted to the plaintiffs other than the plaintiff August Nelson. As to the interest of the plaintiff August Nelson in the property, it should be declared that the defendant Ballinger became entitled thereto, and this should be taken into account in determining rents and profits.

Judgment

I reserve the question of costs as between the plaintiffs and the defendant Ballinger until the report resulting from the taking of accounts is considered and dealt with.

The action should be dismissed as against the defendant Charleson with costs.

Judgment for plaintiffs.

JOHNSON v. THOMPSON *ET AL.*

GREGORY, J.

1914

Jan. 30.

JOHNSON v. THOMPSON

Company law—Suit by shareholder on behalf of himself and other shareholders—Purchase of assets of two companies—Payment of debts of old companies—Not authorized by new company—Actual intention of parties at the time of purchase of assets of old companies.

A new company, formed for the purpose of carrying out a scheme for the amalgamation of two old companies, purchased their assets, there being no provision in the purchase and sale agreements as to the payment of their liabilities. The officers of the new company, without specific instructions from their directors, paid the liabilities of the old companies with the assets of the new, carrying out what they believed was the real intent of the parties at the time the amalgamation scheme was entered into.

Held, upon the evidence, that all interested, except possibly the plaintiff, who was a shareholder, intended that the liabilities of the dissolving companies were to be assumed and paid by the defendant Company, that there was no wrong in the scheme of amalgamation or in carrying it out, and, therefore, there was no fraud on the part of the defendants.

Held, further, that assuming there was no authority under the agreements for the payment of the liabilities, the plaintiff cannot bring this action in his own name before asking the Company to proceed to recover the moneys so paid.

Foss v. *Harbottle* (1843), 2 Hare 461, followed.

Held, further, that the same principle applies with two companies as in the case of an agreement between two individuals. They may ignore a mutual mistake and carry out their agreement according to their real intention.

ACTION tried by GREGORY, J. at Victoria on the 19th of December, 1913. The defendant Company by agreements in writing, purchased "the assets and undertakings" of the British Columbia Sand and Gravel Company and of the Victoria Contracting Company, and in carrying out those agreements according to the real intent of the parties, the defendant Company paid the liabilities of these companies. This action was brought by a shareholder, on behalf of himself and all other shareholders of the defendant Company, to compel the repayment of the moneys so expended.

Statement

W. J. Taylor, K.C., and *Martin, K.C.*, for plaintiff.

McDiarmid, for defendants.

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30th January, 1914.

GREGORY, J.: The defendant Company, by agreement in writing, purchased "the assets and undertakings" of the British Columbia Sand and Gravel Company and of the Victoria Contracting Company, and in carrying out those agreements according to the real intent of the parties to them, the defendant Company paid the liabilities of those companies. This action is brought by the plaintiff on behalf of himself and all other the shareholders of the defendant Company to compel the repayment of the money so expended. At the trial plaintiff's counsel stated that he did not ask for any order against the individual defendants, but asked for a declaration against the defendant Company that the moneys so paid out were improperly expended. The moneys were actually paid out, without any specific instructions by the directors, by the officers of the Company in carrying out what both parties to the contract believed to be its terms.

The defendant Company was formed, and the agreement entered into, for the purpose of carrying out a scheme for the amalgamation of the British Columbia Sand and Gravel Company and the Victoria Contracting Company, the plan for which had been proposed by a person employed for that purpose and the plaintiff was at the time a shareholder in the Sand and Gravel Company. There is a strong resemblance of the personnel of those in control of all three companies.

Judgment

The plaintiff's contention is that as there is no specific mention in the agreements of the assumption by the defendant Company of the liabilities of the other companies, their payment was not warranted by the terms of the agreements themselves, and was therefore illegal, and a fraud upon the shareholders of the defendant Company; and it is in this sense only that the plaintiff alleges any fraud in the transaction, and I understood his counsel, at the conclusion of the trial, to withdraw all other charges of fraud, if any.

On the evidence before me, I have no hesitation whatever in finding that there was no wrong or fraudulent intention of any kind on the part of any of the defendants; either in the scheme of amalgamation or in carrying it out; and that all parties and

persons interested in it, except, possibly, the plaintiff, knew and intended that the liabilities of the dissolving companies were to be assumed and paid by the defendant Company. As to the plaintiff's knowledge of this I make no finding. He says he did not, but it is difficult to understand how, as a business man, with the material before him, he did not, and he certainly did know it when he actually received his shares in the defendant Company.

Assuming that there is no authority for the payment of the liabilities, under the strict interpretation of the agreements, it seems to me that the plaintiff falls within the principle of *Foss* v. *Harbottle* (1843), 2 Hare 461; and *Mozley* v. *Alston* (1847), 1 Ph. 790, which, with the later English cases, are discussed by MARTIN, J.A. in *Rose* v. *B. C. Refining Co.* (1911), 16 B.C. 215 at p. 227, and cannot bring this action in his own name, at least before asking the Company itself to proceed to recover the moneys alleged to be lost to it. There is no fraud on the part of the defendants. The agreements entered into were *intra vires* of the Company, and if under their legal form the defendant Company should attempt to avoid payment of these liabilities, it would be guilty of a fraud upon the other companies, and the agreements would be reformed by the Courts at the instigation of those companies upon it being made to appear, as is the now proved and admitted fact, that if the agreements do not now include the payment of the liabilities, it was intended by both parties to them that they should. In the case of an agreement between two individuals there is nothing that I know of to prevent them from ignoring any mutual mistake, and carrying it out as honest men according to their real intention. Is the position any different in the case of two companies?

Judgment

The attempt of the plaintiff to bring the case within *Burland* v. *Earle* (1902), A.C. 83; *Menier* v. *Hooper's Telegraph Works* (1874), 9 Chy. App. 350; and *Atwool* v. *Merryweather* (1867), L.R. 5 Eq. 464 (n) I think fails. In *Burland* v. *Earle*, Lord Davey says, at p. 93:

"The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company."

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There is no fraud here; the directors acted *bona fide* throughout, both in settling the terms upon which the other companies should be absorbed, and in carrying out those contracts. That there was authority to purchase or absorb those companies has not been questioned. The only suggestion that there was fraud or that this act of paying the liabilities was *ultra vires,* is based on the form of the contract, and the omission from the contracts of any clause expressly authorizing the payment of "the liabilities." In *Menier v. Hooper's Telegraph Works, supra,* there was direct fraud: see James, L.J. at p. 355, where he says:

"They [the defendants] have dealt with them [the shares] in consideration of their obtaining for themselves certain advantages."

Judgment

Atwool v. *Merryweather, supra,* was a clear case of fraud and collusion, and there had been a previous bill filed in the name of the Company, and the majority had used their power to have the bill taken off the file.

At the trial I expressed the opinion that there might be ground for refusing to give the defendants their costs, but on consideration I have concluded that there is no sufficient ground for doing it.

There will be judgment for the defendants with costs.

Action dismissed.

REX v. McINULTY.

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Criminal law—Indecent assault—Evidence of child not under oath—Corroboration required by statute—Criminal Code, Sec. 1003—Canada Evidence Act, R.S.C. 1906, Cap. 145, Sec. 16.

As section 16 of the Canada Evidence Act specially requires that a statement taken in Court from a child of tender years, not understanding the nature of an oath, must be corroborated by "some other material evidence," the testimony so taken from one child of tender years cannot constitute the kind of corroboration required by this section of the testimony similarly taken from another child of tender years.

Per MACDONALD, C.J.A.: The unsworn testimony, whether of one child or of several children, is not to be acted upon unless fortified by other material evidence corroborating it of a different character, *i.e.*, evidence which is legal evidence apart from this section.

A similar construction is placed upon section 1003 of the Criminal Code.

Rex v. *Iman Din* (1910), 15 B.C. 476, considered.

CRIMINAL APPEAL, by way of case stated, from SWANSON, Co. J. in the County Court Judges' Criminal Court, in a trial of indecent assault, tried by him at Kamloops, on the 5th, 6th and 8th of September, 1913. In his case for the opinion of the Court, the trial judge stated:

Statement

"The accused was charged, under section 292 of the Code, with committing an indecent assault on a little girl, Alice Howes, aged four and one-half years, on the 3rd of August, 1913, at Merritt, in this County. He elected for trial before a judge without a jury, and was tried before me at Kamloops, on September 5th, 6th and 8th last. At the conclusion of the trial I reserved consideration of the case and on 10th September, I found the accused guilty of common assault.

"At the trial I admitted the unsworn testimony of the child Alice Howes, and of another child, Kate Clark, aged 7 years, under section 1003 of the Code and section 16 of the Canada Evidence Act, these two witnesses being, in my opinion, of too tender years to understand the nature of an oath, but both children being, in my opinion, of sufficient intelligence to justify receiving the evidence, they both understanding the duty of speaking the truth, as I believed.

"The evidence of the child Alice Howes, on whom the offence was alleged to have been committed, and who testified to the commission of the offence upon her by the accused, was corroborated by the evidence of the child Kate Clark, who was with Alice Howes at the time.

"I was, however, of the opinion that there was not corroboration in the

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sense required by subsection 2 of section 1003 of the Code to justify finding the accused guilty of indecent assault. I was also of the opinion that there was in the evidence of Kate Clark sufficient corroboration of the evidence of Alice Howes to satisfy subsection 2 of section 16 of the Canada Evidence Act, and to justify a conviction of the prisoner for common assault?"

"I was impressed with the intelligence of the two children and with the truth of their evidence.

"The questions reserved for the opinion of the Court of Appeal are:

"(1). Was I right in holding that the unsworn evidence of Alice Howes could not be corroborated by the unsworn evidence of Kate Clark under section 1003, subsection 2 of the Criminal Code, to justify finding the accused guilty of indecent assault?

"(2). Was I right in holding that the unsworn evidence of Alice Howes was sufficiently corroborated by some other material evidence, *viz.*: the unsworn evidence of Kate Clark under section 16, subsection 2 of the Canada Evidence Act, justifying the finding of the accused guilty of common assault."

Statement

The appeal was argued at Victoria, on the 7th of January, 1914, before MACDONALD, C.J.A., IRVING, GALLIHER and MCPHILLIPS, JJ.A.

Macintyre, for the accused: The case rests entirely on the evidence of two young children, who were not sworn: see *Rex* v. *Whistnant* (1912), 20 Can. Cr. Cas. 322; *Rex* v. *Iman Din* (1910), 15 B.C. 476; *Rex* v. *Pailleur* (1909), 20 O.L.R. 207; 15 Can. Cr. Cas. 339. As to the distinction between sections 1003 of the Criminal Code and section 16 of the Canada Evidence Act, see *Rex* v. *Muma* (1910), 17 Can. Cr. Cas. 285.

Argument

Maclean, K.C., for the Crown: *Rex* v. *Whistnant, supra,* does not apply. In all cases, except indecent assault, the unsworn evidence of one child is sufficient to corroborate the unsworn evidence of another child.

Macintyre, in reply.

Cur. adv. vult.

23rd February, 1914.

MACDONALD, C.J.A.: The questions should be answered in the negative.

MACDONALD, C.J.A.

The first question, which relates to the construction of section 1003 of the Criminal Code, is academic and, therefore, ought not to have been submitted, the learned judge having informed us that he had acquitted the accused of the charge of indecent

assault, but as that section is in *pari materia* with the section of the Canada Evidence Act, upon which the second question is grounded, I do not decline to answer it.

In my opinion, no other interpretation could be given of section 1003 of the Criminal Code than that given of it in *Rex* v. *Whistnant* (1912), 20 Can. Cr. Cas. 322, that is to say, that the evidence of a child of tender years taken under the sanction of that section is not corroborated by the like evidence of another such child. Similar, but differing in phraseology, is section 16 of the Canada Evidence Act. The language of this section is not so clear as that used in said section 1003, but, in my opinion, it admits of no reasonable doubt that what is meant is that the evidence taken under it must be corroborated by some other material evidence of a different character. There are no authorities directly in point except the *dictum* of Harvey, C.J. in the case already referred to, and the inference which it was argued ought to be drawn from the silence of the judges on that point in *Rex* v. *Pailleur* (1909), 15 Can. Cr. Cas. 339.

The precise point involved in the second question was raised before us in *Rex* v. *Iman Din* (1910), 15 B.C. 476; 18 Can. Cr. Cas. 82, but was not decided, the Court being equally divided. My brother IRVING and I found it unnecessary to decide the point, having come to conclusions in favour of the accused on other grounds.

MACDONALD, C.J.A.

Apart from statutory law, the testimony of children of tender years, unable to understand the nature of an oath, could not be taken. Section 16 of the Canada Evidence Act and section 1003 of the Criminal Code are departures from the ordinary rules, governing the sanctions under which witnesses may testify. The danger of convicting on such unsworn evidence alone in view of the fact that children of tender years and immature minds are peculiarly susceptible to suggestions from parents or others, led to the provision of this safeguard, that "no case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence." There are two alternative interpretations of this provision; the first is that the words "such evidence" has reference to that of "a child of tender years" as an individual,

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not as a class. The second is the converse of the first. In my opinion, the latter is the true interpretation. The unsworn testimony, whether of one child or of several children, was not to be acted upon, unless fortified by other material evidence corroborating it, of a different character, *i.e.*, evidence which is legal evidence apart from this section.

IRVING, J.A.: The question we have now to determine is whether, under section 16 of the Canada Evidence Act, the unsworn evidence of a child can be corroborated by the unsworn evidence of another child. The prisoner's contention is that the 2nd subsection, which enacts that "no case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence," prevents a conviction in this case.

In *Rex* v. *Iman Din* (1910), 15 B.C. 476, counsel for prisoner raised this point; and two of the learned judges expressed an opinion to the effect that unsworn evidence could be corroborated by unsworn evidence under section 16 of the Evidence Act. The Chief Justice and I expressed no opinion on the point, because, speaking for myself, I had already determined in my mind that the so-called corroboration was not corroboration in fact. The case of *Rex* v. *Whistnant* (1912), 3 W.W.R. 486, before the Supreme Court of Alberta, on section 1003 of the Code, seems to me well decided.

IRVING, J.A.

In my opinion, the words "such evidence" in section 16 means "evidence so given," the unsworn evidence of—or unsworn evidence admitted under this section, and I would, therefore, hold that one child cannot be corroborated by the unsworn evidence of the other child. I would answer the second question in favour of the prisoner.

The learned judge left a question to us as to corroboration under section 1003 of the Code, but as he acquitted the prisoner of the charge in regard to which it was necessary to invoke section 1003, I see no reason why we should be called upon to answer it.

GALLIHER, J.A.

GALLIHER, J.A.: I agree with the *dictum* of Harvey, C.J. in *Rex* v. *Whistnant* (1912), 20 Can. Cr. Cas. 322, that, under

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section 1003 of the Criminal Code, the evidence of one child of tender years, not under oath, does not constitute the kind of corroboration required under that section of the evidence of another child of tender years. The language of that section, I think, places it beyond doubt. The language of section 16 of the Canada Evidence Act is, however, not so clear, and in the case of *Rex* v. *Iman Din* (1910), 15 B.C. 476; 18 Can. Cr. Cas. 82, my brother MARTIN, with whom I agreed, was of opinion that section 16 was wider than section 1003 of the Code, and that such evidence would be corroboration.

GALLIHER, J.A.

Since the case at bar was argued before us solely on this one point (and very ably presented by Mr. *Macintyre,* of counsel for the accused), I have consulted with my brother MARTIN, and, after the best reconsideration we can give the section (which it is still open to us to do, as no opinion was given on the point by a majority of the Court), and in the absence of direct authority (for *Rex* v. *Pailleur* (1905), 15 Can. Cr. Cas. 339, does not directly decide the point), I am of opinion, and my brother MARTIN authorizes me to state that he agrees with me, that we took too wide a view of section 16 in the *Iman Din* case—that the effect is the same under both sections, and that the words "such evidence" in section 16, subsection 2, mean "evidence so given," *i.e.,* evidence of the class receivable under the main section. It follows that the conviction must be quashed.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: I concur in the reasons given by MACDONALD, C.J.A.

Conviction quashed.

Solicitor for the accused: *A. D. Macintyre.*
Solicitor for the Crown: *F. T. Cornwall.*

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GRAHAM ISLAND COLLIERIES v. McLEOD

GRAHAM ISLAND COLLIERIES v. McLEOD.

Company law—Subscription for shares—Allotment by company—"Payment on call within 18 months after allotment"—Construction of—Forfeited shares—Companies Act, R.S.B.C. 1911, Cap. 39, Secs. 30 (2), 33, 94, 95 and 101.

Where in an action against an applicant for shares in a company, for specific performance of the contract for their purchase, it appeared that the Company had set aside certain shares for the applicant to be issued to him on payment of the balance of the purchase price, and that these shares had been previously allotted to a former applicant, which allotment was later declared forfeited by the Company, the question of whether or not the Company properly forfeited the shares has no bearing on the question before the Court. Where the balance due on shares is payable "on call within 18 months after allotment," the balance is not payable within 18 months, except upon call, but on the expiry of the 18 months it becomes due and payable without call.

Statement

APPEAL from the judgment of CLEMENT, J. in an action tried by him at Vancouver on the 2nd of June, 1913. The defendant had applied on the 8th of August, 1910, for 10 shares at the par value of $1,000 each, of the capital stock of the plaintiff Company, payable $2,500 at once, $2,500 in six months and $5,000 within 18 months, subject to call. The directors of the Company, meeting on the 12th of October, 1910, accepted the application and allotted ten shares to the defendant, who paid $2,500 in part payment on the 3rd of November, 1910, and $1,500 on the 10th of November, 1911. The stock not having been paid for in full, no certificate was issued. The president of the plaintiff Company, J. L. Kerr, had in December, 1909, applied for and was allotted 25 shares of the stock, numbered 73 to 97 in the stock-certificate book, but later, owing to his not being able to pay for the shares he had applied for, the directors, by resolution at a meeting on the 16th of January, 1911, declared twelve of the shares (Nos. 86 to 97) forfeited, and at a later meeting, on the 27th of January, ten of these shares (Nos. 88 to 97) were by resolu-

tion ordered to be allotted to the defendant. This action was for the recovery of the balance of the purchase price due on the shares. The defendant contended that the contract was only executory; that there was no allotment or issue of stock; and the contract was not enforceable, there being no independent agreement by the defendant to pay the full price of the shares irrespective of whether or not the Company carried out its obligations.

J. W. de B. Farris, and *Emerson,* for plaintiff.
MacInnes, and *Affleck,* for defendant.

6th June, 1913.

CLEMENT, J.: Notwithstanding Mr. *MacInnes's* very clear argument put before me in writing, I am still of opinion that the "allotment" from the sale of which the defendant's liability is fixed is the resolution of the 12th of October, 1910. That is the completion of the contract, the *ad idem* stage; the "complete allotment" referred to in the cases cited is the Company's performance of the contract, and their obligation in that regard has never been repudiated; so that the contract is still existing and enforceable. All other questions were disposed of at the hearing.

Upon the Company issuing and delivering to the defendant $10,000 of shares in the Company the defendant must pay the balance unpaid with interest at 5 per cent. from the due date or dates. The defendant must also pay the costs of the action and counterclaim. If any question arises as to the issue and delivery of the shares, the matter may be spoken to again, but I do not think that the defendant should be asked to accept a transfer of the Kerr shares.

The appeal was argued at Vancouver on the 18th and 19th of November, 1913, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and McPHILLIPS, JJ.A.

MacInnes, for appellant (defendant): As to the allotment of shares to McLeod on the 27th of January, these were shares that were formerly allotted to Kerr, but were cancelled on

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January the 16th at a meeting of directors. This action deprives the Company of $10,000 due from Kerr on the shares that he promised to take: see *Common* v. *McArthur* (1898), 29 S.C.R. 239. As to the effect of section 94 of the Companies Act, see *Mears* v. *Western Canada Pulp and Paper Company, Limited* (1905), 2 Ch. 353; *In re National Motor Mail-Coach Company, Limited* (1908), 2 Ch. 228. No call was ever made by the Company, and we have the right to withdraw at any time: see *Johnson* v. *Lyttle's Iron Agency* (1877), 5 Ch. D. 687.

Argument

J. W. de B. Farris, for respondent (plaintiff): An allotment was validly made to the defendant after he had applied, of which he received notice, and upon which he had made two payments. This constituted a contract upon which we could sue: see *Nelson Coke Co.* v. *Pellatt* (1901), 2 O.L.R. 390; (1902), 4 O.L.R. 481 at p. 489. The cancellation of the Kerr shares was valid, as it was done in the interest of the Company, and that is the whole question as decided in the case of *Common* v. *McArthur* (1898), 29 S.C.R. 239.

MacInnes, in reply.

Cur. adv. vult.

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MACDONALD, C.J.A.

MACDONALD, C.J.A.: Since the argument I have read the evidence through, and am confirmed in the opinion which I then held, that the appeal ought to be dismissed.

There is no merit, in my opinion, in the objections raised by the appellant to the cancellation of Kerr's subscription, and the re-issue of the shares, which were intended for him, to the defendant; but even if that objection could be supported, it is clear that defendant subscribed for shares and now declines to pay for any shares, though his subscription was accepted, and shares were allotted to him. The respondent is ready to issue other shares if he be not satisfied with those which were set aside for him, against the time the appellant shall pay the balance due on them.

The question of whether or not the Company properly forfeited Kerr's shares is not one which affects the decision of this

appeal, for if it were assumed that the forfeiture was not properly made, though I think it was, that is a matter to be attacked in another way, and not by refusal of a subscriber to accept and pay for his shares.

The defendant contends that the balance of the subscription price of the shares was not due under the terms of the allotment because of the term in it that such balance was payable "on call within 18 months after allotment," cannot, in view of the fact that the action was not commenced until the expiry of that period, be given effect to. I read that term to mean that such balance should not be payable within such period except on call, but that on the expiration of the period the balance became due and payable without call.

IRVING, J.A.: The defendant's application made on the 8th of August, 1910, was accepted, and an allotment made on the 12th of October, 1910. The defendant was duly notified, and so the contract was complete in every respect. The application not being accompanied with the cash, the allotment may have been irregular and the contract therefore voidable; but that point was not pleaded, and in any event as the writ was not issued until July, 1912, that defence would not succeed.

The evidence, to my mind, fully justifies the learned trial judge in inferring that the exhibit filed is a copy of the notice of allotment sent to the defendant, although the copy does not bear his name; yet, as he was the only person to whom shares had been allotted at the meeting of the 12th of October, 1910, there can be no doubt that the notice was sent to him.

IRVING, J.A.

After the contract between the Company and the plaintiff was complete, the directors, or some of them, began to manœuvre to protect McLeod, but this manœuvring on their part could not have the effect of rescinding the contract between the Company and the defendant. If they attempted to foist on him any "unclean" shares, or shares other than treasury shares, he had his remedy by application to the Court to rectify the register, but I do not see how he can escape his liability to take the number of shares allotted to him.

I would dismiss the appeal.

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MARTIN, J.A.: No good ground has been shewn, in my opinion, for disturbing the judgment herein. The allotment of the 12th of October, 1910, was a good one, and founded the contract between the parties, which is unaffected by the failure of the Company to comply with the provisions of sections 30, 32, 33 and 101, respecting the numbering and registration of shares and certificates therefor. Reliance has erroneously been placed upon the fact that the shares which were eventually allotted to the defendant had belonged to the president of the Company and been cancelled, but in the circumstances of this case that is quite immaterial, because there was no agreement concerning the origin or former ownership of the shares, or the allotment of any specific shares, and the defendant was not concerned with what I may call the domestic shuffles of the Company so long as it carried out its contract with him and it always had shares available to allot in answer to his application. I, therefore, express no opinion regarding the forfeiture and cancellation of said shares.

MARTIN, J.A.

It was argued that the appellant could escape the consequences of section 95, subsection (1) on the ground that subsection (3) of section 94 is exempted therefrom by subsection (6), but in my opinion, section 95 covers the whole of section 94, which is referred to as "the last preceding section," without any exception.

I have only to add that the not very clear expression "balance on call within 18 months after allotment" means at least that after said 18 months the balance is payable without call, and this action was not begun till 21 months thereafter.

It follows that the appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A. concurred in dismissing the appeal.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: This is an appeal from CLEMENT, J., the judgment being that the plaintiff Company issuing and delivering to the defendant one hundred shares of the nominal value of $100 each in the plaintiff Company, the defendant thereupon pay to the plaintiff Company the sum of $6,236.64, together with interest on the sum of $6,000 at the rate of 5 per cent. per annum from the 13th of July, 1913.

Mr. *MacInnes,* counsel for the appellant, in a most careful and able argument, put forward as the main ground of appeal that the contract at best was only executory in its nature; that there was no allotment of stock; that no liability to pay for the stock ensued; that the contract was unenforceable, there being no independent agreement by the defendant to pay the full price of the shares irrespective of whether or not the plaintiff Company carried out its obligations; and the further point not pleaded or taken at the trial that the alleged allotment of the 12th of October, 1910, was illegal and invalid by reason of non-compliance with the provisions of section 94 of the Companies Act.

With respect to the question of the alleged allotment being illegal and invalid, I would hold—if upon the facts I were of that opinion—that it was open to the appellant to advance that argument before this Court—notwithstanding that it was not pleaded or urged at the trial—and there is high authority for this course to be found in *North-Western Salt Company, Limited* v. *Electrolytic Alkali Company, Limited* (1913), 3 K.B. 422, where Farwell, L.J. at p. 424 said:

"I am not sure whether Scrutton, J. intended to hold that it was or was not unlawful. He appears to have decided against the defendants on the ground that the illegality of the contract ought to have been pleaded, and he even refused leave to amend; in my opinion he was wrong in so doing. When it is apparent on the face of the contract that it is unlawful, it is the duty of the judge himself to take the objection, and that, too, whether the parties take or waive the objection. This was so decided by Lord Mansfield in *Holman* v. *Johnson* (1775), 1 Cowp. 341, at law, and by Lord Eldon in *Evans* v. *Richardson* (1817), 3 Mer. 469, and has been consistently acted on ever since, *Scott* v. *Brown & Co., Slaughter & May* v. *Brown & Co.* (1892), 2 Q.B. 724, being one of the last cases."

I, however, cannot see that there was in this case any illegality of contract, nor do I find upon the facts that section 94 of the Companies Act was so infringed upon that the allotment made is not enforceable in the terms of the application duly accepted.

We have the learned trial judge's holding, and upon the facts I unhesitatingly agree with him, that the allotment following the defendant's application was duly made in the resolution of the 19th of October, 1910, and the legal responsibility of the defendant became absolute and complete to comply with the application made by him, and the subsequent conduct of the

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defendant by part payment precludes the defendant from setting up successfully that the executory contract is not complete; the plaintiff Company has done all that was necessary to execute the contract, and the defendant has done all that which is necessary to imply a promise to pay in the terms of his application; and the plaintiff Company is entitled to recover, not only upon the implied promise to pay, but the express promise to pay in the terms of his application.

The evidence is—and it has been accepted and believed by the learned trial judge—that the application of the defendant for the shares in question—which was sufficient in law—was duly accepted, and the notification of its acceptance duly given to the defendant, and the discovery evidence of the defendant introduced at the trial, amply proves this; and there was no withdrawal at any time before acceptance. The acceptance was by post, and any withdrawal is not effective unless it reaches the company before the notice of allotment is posted. I admit that it was contended that the notice of allotment, although posted, was never received, but the defendant's conduct by part payment, and the giving of a promissory note in further payment on account of the shares, absolutely precludes the defendant from contending that he was not aware that the acceptance of his application had taken place and due allotment made. The authorities bearing upon the point and demonstrating that upon the facts the defendant is liable to pay for the shares applied for, are the following: *Hebb's Case* (1867), L.R. 4 Eq. 9; *Dunlop* v. *Higgins* (1848), 1 H.L. Cas. 381; *Henthorn* v. *Fraser* (1892), 2 Ch. 27; *In re London and Northern Bank. Ex parte Jones* (1900), 1 Ch. 220.

MCPHILLIPS, J.A.

Everything was done in this case to constitute a valid allotment, and within the meaning of the term allotment as defined by Chitty, L.J. in *Nicol's Case* (1885), 29 Ch. D. 421 at p. 426.

The acceptance here was unconditional and was therefore complete. No new term was imported as considered in *Re Leeds Banking Company. Ex parte Barrett* (1865), 2 Dr. & Sm. 415; 62 E.R. 678; *Addinell's Case* (1865), L.R. 1 Eq. 225; *Jackson* v. *Turquand* (1869), L.R. 4 H.L. 305.

I entirely agree with the learned trial judge that the defend-

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ant is entitled to have issued to him shares in the Company different and distinct from the alleged forfeited shares of J. L. Kerr. I refrain from saying anything as to these alleged forfeited shares, or the legality of forfeiture.

It follows that, in my opinion, the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Affleck & MacInnes.*
Solicitors for respondent: *Farris & Emerson.*

IN RE OKELL AND THE CORPORATION OF THE CITY OF VICTORIA.

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IN RE OKELL AND CITY OF VICTORIA

Municipal law—Local improvements—Lowering grade of highway—Adjoining property injuriously affected—Compensation—Allowance for local improvement rate refused.

On appeal from the award of arbitrators on the assessment of compensation for damages owing to the grade of a city street in front of the claimant's property having been lowered in the course of work done by the Corporation under local improvement by-laws:—

Held, that the arbitrators properly refused to include in damages an allowance equivalent to the rates charged against the property by said by-laws.

Re Macdonald and City of Toronto (1912), 27 O.L.R. 179, followed.

APPEAL from an order made by MORRISON, J. on the 11th of June, 1913, on an application to set aside the award of arbitrators appointed under the Municipal Act on a claim for damages by the owner of certain lots facing on Dalton, Suffolk and Wilson Streets, in Victoria, owing to the alteration of the grade of the streets by the Corporation. In making improvements on the streets for putting down asphalt pavements and sidewalks with boulevards between, the grade of that portion

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abutting on the claimant's lots had been lowered from two to five feet. The arbitrators assessed the damage at $1,450, stating in the award that they did not consider that the taxes to be charged against the property for local improvements or any portion thereof should be included in the compensation, and that they had arrived at the amount of the compensation without allowing anything for the taxes to be so charged. The application to set aside the award was dismissed, and from this order the claimant appealed. The main ground of appeal was that the arbitrators, as a matter of law, should have found that the local improvement taxes, imposed by the by-law under which the damage was occasioned to the appellant's property, was part of the damage suffered by the appellant for which compensation should have been allowed.

The appeal was argued at Vancouver on the 4th of November, 1913, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

McDiarmid, for appellant: Under section 394 of the Municipal Act, the arbitrators should have taken into consideration what damage was done the property by the assessment of taxes for local improvements. The amount it would cost to put the property in the same condition as it was before the work was done is all that has been allowed. The benefit is not common to all the property owners on the street: see *In re Pryce and The City of Toronto* (1892), 20 A.R. 16; *Re Richardson and City of Toronto* (1889), 17 Ont. 491.

T. R. Robertson, for respondents, referred to the judgment of Maclaren, J.A. in *Re Macdonald and City of Toronto* (1912), 27 O.L.R. 179 at p. 185.

McDiarmid, in reply.

6th January, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This is an appeal from arbitrators. The work of grading and paving streets upon which the appellant's property abutted was being carried out by the Municipality under local improvement by-laws. The grade in front of appellant's property was lowered. For this she claimed and was allowed compensation. She also claimed by way of

damages an allowance equivalent to the rates charged against her property under the said by-laws; and it is from the refusal to allow that claim that this appeal was brought. I think the arbitrators were right. Mr. *McDiarmid,* appellant's counsel relied upon *In re Pryce and The City of Toronto* (1892), 20 A.R. 16, but that case is distinguishable from the present one in this, that there the property owner was being charged with the benefit which his property had derived from the improvements, and it was thought that in those circumstances he was entitled under the statute to have the rates set off against such benefit. There is no such question in this case, which, in my opinion, is like that of *Re Macdonald and the City of Toronto* (1912), 27 O.L.R. 179, where the distinction I have just mentioned was made.

The appeal should be dismissed.

MARTIN, J.A.: It is admitted that the special tax to be levied will be greater than any advantage to be derived from the work, or, in other words, the increase in the value of the land because of the work will be less than the amount of the tax necessary to impose on the property to do said work. How, therefore, can it be said that under section 394 there is anything "beyond" an advantage which does not exist? And if there is no "advantage" it cannot form part of the due compensation. This view is supported by the judgment of Garrow, J.A. in *Re Macdonald and City of Toronto* (1912), 27 O.L.R. 179 at p. 182, and, in my opinion, the arbitrators herein proceeded upon a sound principle.

GALLIHER, J.A.: This is an appeal from an order of MORRISON, J. dismissing an application on behalf of the appellant to have an award of certain arbitrators, which was published on the 30th of May, 1913, referred back.

In this award, as published, the arbitrators stated as follows:

"We do not consider that the taxes to be charged against the property for local improvements or any portion thereof should be included in the compensation, and in arriving at the amount of compensation awarded have followed this decision as to taxes."

Mr. *McDiarmid* urges that the arbitrators proceeded upon a

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wrong principle in not taking the taxes into account as damages. I assume that the $1,450 awarded by the arbitrators is sufficient to compensate for all damage done the property in question, but Mr. *McDiarmid* contends that inasmuch as some of the land has been taken away by subsidence and rock blasting, I think in one place two feet, and in another five feet (and which I assume has all been compensated for in the award), that the owner is entitled to have considered as a part of the damages the amount which she will still be called upon to pay by way of local improvement tax. The result of that would be that where in making local improvements the City enter upon the land of an owner and take a portion of it for the purposes of these improvements, that not only should he be compensated for the value of the land taken and the damage done to the property by lowering or raising the grade, but that he should in effect be freed from the payment of any improvement tax, and cites *In re Pryce and The City of Toronto* (1892), 20 A.R. 16; and *Re Richardson and City of Toronto* (1889), 17 Ont. 491. *Re Richardson and City of Toronto* was a case of expropriation of lands by the city for the Don improvement scheme, and it was there held that in awarding compensation to the owner under the Municipal Act for the parts of the land taken, the arbitrators should allow for benefit to other land not taken, but in estimating that benefit they were to take into account as best they could the fact that the owner was liable to be charged as for a local improvement. In *In re Pryce and The City of Toronto* the decision of the majority of the Court is to the same effect. Between these cases and the one at bar there is to be noted this marked distinction: Here there is no suggestion that the arbitrators in arriving at the amount of compensation deducted anything for enhanced value to the property by reason of the local improvements, and, shortly, when appellant receives full compensation for the injury done to the property, she is put in the same position as her neighbours affected by the local improvement, and whose lands were not injured, and, like them, is liable to the local improvement tax to be levied.

The appeal should be dismissed with costs.

McPHILLIPS, J.A.: Upon further consideration, I still remain of the same view I formed at the hearing of this appeal, and cannot agree with the argument advanced by counsel for the appellant, namely, that the award has been made upon a wrong principle, in that the arbitrators have not taken into consideration the amount of the special taxes to be charged upon the land by way of local improvement taxes.

That which is to be allowed by the arbitrators is "due compensation" as provided for in section 394 of the Municipal Act, R.S.B.C. 1911, Cap. 170. This section is, it may be said, word for word the same as section 437 of the Ontario Municipal Act, 1903, and the section in the Ontario Municipal Act came up for consideration in the Court of Appeal for Ontario in *Re Macdonald and City of Toronto* (1912), 27 O.L.R. 179, and that Court declined to entertain as an element of compensation the circumstance that the corporation was proceeding under the local improvement clauses of the Act by virtue of which the claimant would be assessed for a portion of the cost of the widening.

It was strongly relied upon by counsel for the appellant that *Re Richardson and City of Toronto* (1889), 17 Ont. 491, and *In re Pryce and The City of Toronto* (1892), 20 A.R. 16, were cases which supported the line of argument addressed to us by him. It is to be observed, though, that upon careful perusal and consideration of these cases, they cannot be so read, and in any case are not applicable. To bring this out clearly, I refer to the language of Garrow, J.A. at p. 182, in *Re Macdonald and City of Toronto, supra*:

> "It is one thing to say that if the claimant is being charged with a benefit she may offset the amount of such benefit with the amount of the assessment which she is compelled to pay, which was the case of *In re Pryce and The City of Toronto* (1902), 20 A.R. 16, to which we were referred, and a totally different thing to say that the tax thus imposed is the proper subject of all allowances as part of the 'due compensation' for which the statute provides."

There is nothing before us to shew whether the arbitrators considered the appellant derived any advantage from the work, and it may quite well be that the appellant was not charged with any benefit. Further reference is made to the *Pryce* case

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by Maclaren, J.A. in the *Macdonald* case at p. 185. He says:

"She also claims that she should have relief over against the city for what she may have to pay towards the twenty-five per cent. of the total expense of the improvements to be levied by local assessment from those specially benefited. This is rather a novel claim, and I can find no shadow of support for it in the case of *In re Pryce and The City of Toronto* (1892), 16 Ont. 726, cited in support. It is quite startling to think that a by-law passed in accordance with the Municipal Act should be got rid of in this way and practically nullified by a side-wind. In other words, that the twenty-five per cent. assessed on the properties specially benefited can be unloaded upon the city generally by a kind of jugglery. In my opinion, the arbitrator was quite right in disallowing this claim."

With this high authority upon exactly similar statute law, that of the Court of Appeal of Ontario, with which I entirely agree, it is made plain that the contention of the appellant is unsupportable.

MCPHILLIPS, J.A.

It is clearly evident, therefore, that MORRISON, J. was quite justified in refusing to remit the award for reconsideration to the arbitrators, in that the arbitrators have not awarded the compensation upon any wrong principle.

It follows that the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellant: *F. A. McDiarmid.*

Solicitor for respondent: *T. R. Robertson.*

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RICHES v. ZIMMERLI

Principal and agent—Sale of land—Misrepresentation as to ownership—Fiduciary relationship—Secret profits.

Z., a broker, purchased six acres of land in the name of W. at $500 an acre, later advising R. that he could purchase the property from W. at $750 an acre net. The two purchased the property jointly at that price, R. paying Z. $60 in addition for his services. Later they divided the property, each taking three acres, and R. then exchanged his three acres for a motor-car before it was disclosed to him that W. held the property for Z., when they made their joint purchase. On appeal from the judgment of LAMPMAN, Co. J. in an action for the recovery of secret profits made on the joint purchase:—

Held, affirming the decision of LAMPMAN, Co. J. (MCPHILLIPS, J.A. dissenting), that the relationship of principal and agent was established and that the difference in the prices paid for the land in the two sales could be recovered by R. as secret profit.

APPEAL from the judgment of LAMPMAN, Co. J. in an action tried by him at Victoria on the 28th of April and the 6th and 11th of June, 1913. The defendant Zimmerli, a broker, purchased six acres of land at $500 an acre, and had it transferred to one Wetherell, in whose name it was held for him. About two weeks later Zimmerli suggested to the plaintiff the advisability of purchasing the property, saying he could get it from Wetherell for $750 an acre net, and advising that it was a good buy, as he had inside information that a railway was to be built in the vicinity that would enhance its value. They viewed the property, and after some discussion they arranged to buy the property together (one-half each) from Wetherell, and the plaintiff paid Zimmerli a cheque for $1,075, his share of the first payment, and another cheque for $60 for Zimmerli's services. The plaintiff swore the $60 was paid as a commission, Zimmerli, on the other hand, swearing it was payment for his services in shewing the plaintiff the property and motor-car hire. The plaintiff brought action for the recovery of secret profit, being the difference between the price Zimmerli

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actually paid for the property and the price for which it was sold to the plaintiff. It was held by the trial judge that an agency had been established, and as the plaintiff had disposed of the property before the facts as to the defendant making a secret profit were disclosed to him, the damages should be asssed at the difference between the price at which Zimmerli had purchased the property and the price that the plaintiff had paid for it.

Statement

The appeal was argued at Vancouver on the 10th of November, 1913, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

McPhillips, K.C., for appellant (defendant): The evidence shews that Zimmerli held himself out as the seller's agent; that he told the plaintiff the seller wanted $750 an acre net, and that the buyer had to pay the commission also. The whole question is whether he was the plaintiff's agent or not, and even if he was, it is not the test to allow the difference between the price Zimmerli paid for the property and the price the plaintiff paid. The only remedy would be recission: see *In re Cape Breton Company* (1884), 26 Ch. D. 221; (1885), 29 Ch. D. 795 at p. 805; *In re Ambrose Lake Tin and Copper Mining Co.* (1880), 14 Ch. D. 390 and 398; *Cavendish Bentinck* v. *Fenn* (1887), 12 App. Cas. 652 at p. 658; *Burland* v. *Earle* (1902), A.C. 83 at p. 99; *Kimber* v. *Barber* (1872), 8 Chy. App. 56; Halsbury's Laws of England, Vol. 1, p. 190.

Vaughan, for respondent (plaintiff): There is evidence to establish an agency. *In re Cape Breton Company, supra*, there was no allegation of fraud or new disclosure of ownership: *In re Leeds and Hanley Theatres of Varieties, Limited* (1902), 2 Ch. 809; *In re Darby, Ex parte Brougham* (1911), 1 K.B. 95; Halsbury's Laws of England, Vol. 1, pp. 189, 190 (paragraphs 404, 405).

McPhillips, in reply.

Cur. adv. vult.

23rd February, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the relationship of principal

and agent is established. The plaintiff says that if he bought he was to pay commission; if he did not, he was to pay for the hire of the car. Defendant admits that he was to receive $60 for his time in taking the plaintiff to see the property if the plaintiff made the purchase. The defendant claimed at the trial to have been the owner of the property before he met plaintiff, though he does not deny that he represented to plaintiff at the time that it belonged to another man, Wetherell, and that the price Wetherell was asking was net $750 per acre, whereas, according to his evidence at the trial, he himself had just acquired it in Wetherell's name for $500 per acre. The documents shew that Wetherell bought from Roberts on the 24th of May; that the plaintiff and defendant bought from Wetherell on the 6th of June (defendant having offered to take a half interest, the plaintiff taking the other half) at $750 per acre, whereas the true price as between defendant and Wetherell was $500 per acre. Defendant acquired it at $500 per acre, represented that he could acquire it only at $750 per acre, and made the difference by way of secret profit. As between the documentary evidence, coupled with defendant's representations that Wetherell was the owner, and defendant's evidence at the trial, I prefer to accept the former.

I think the appeal should be dismissed.

MARTIN, J.A.: I concur with what my brother McPHILLIPS is about to say regarding the very unsatisfactory way this case comes before us, which has made it difficult to reach a conclusion. And I also agree that the plaintiff has nothing to complain of about the value of the land and that he got all in that respect that he was entitled to and acted very unwisely in sacrificing his interest as he did; and also that, if the lands were the property of the defendants, there was no fiduciary relationship between the parties as principal and agent, or otherwise.

The judgment can, I think, be supported, but supported only, on the ground that the land was in reality Wetherell's, and the determination of that question has occasioned me much difficulty, which is enhanced by the fact that Wetherell should

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have been called as a witness to explain the matter. I have to deal with the case in the light of the finding of the trial judge that he has decided to accept the testimony of the plaintiff as against that of the defendant, whom he stigmatizes as a swindler, and in such case it was open to the trial judge to determine the rights of the parties on the basis that Wetherell owned the land and to hold the defendant to his statement (which is in accord with the writings) to the plaintiff, made on the spot, that such was the case, or at least conveying that exclusive inference, which is really the same thing. Such being the circumstances, I cannot bring myself to say that the judgment below should be set aside, and so the appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: If the plaintiff could have brought his action for recission I should have experienced no difficulty in giving judgment in his favour. The defendant's acts throughout impress me very unfavourably. I have, however, to consider what is the plaintiff's position with regard to the judgment he holds on his pleadings. Mr. *Vaughan* has referred us to *In re Leeds and Hanley Theatres of Varieties, Limited* (1902), 2 Ch. 809, but it is only necessary in order to distinguish that case from the one at bar to refer to the judgment of Wright, J. at p. 813, where he says:

> "But it seems to me clear on the facts of this case that the respondents ought to be held to have bought the halls as agents or trustees for the intended company, with whose money the purchase-money was to be paid. They never intended to buy the halls for themselves, or to pay for them out of their own money. They always intended to act for the projected company";

and to the judgment of Vaughan Williams, L.J. in the Court of Appeal at p. 822:

> "The conclusion at which I arrive, taking all the facts together, is, that from first to last the Finance Company were promoters; that from first to last their intention was to buy the music-halls for the purpose of selling them to a company which they should create. They intended from the first to do that which they ultimately did."

The evidence in the case at bar is that Zimmerli purchased (as he says for himself), but at all events either for himself or Wetherell, and not for the plaintiff, as that purchase was made before he spoke to the plaintiff about the property.

The other case cited by Mr. *Vaughan, In re Darby, Ex parte Brougham* (1911), 1 K.B. 95, is also distinguishable. This case then really comes down to a consideration of whether Zimmerli or Wetherell was the owner at the time of the purchase by the plaintiff. If Wetherell was the owner, then the plaintiff's judgment can be maintained, but on a different ground; but if we must regard Zimmerli as the owner, it seems to me (recission being possible) that would be the only remedy the plaintiff would have. The evidence upon this point is to the effect (and the trial judge accepted the plaintiff's evidence) that all through the transaction Zimmerli represented Wetherell as the owner, the property was in Wetherell's name, as evidenced by the agreement from Abram Roberts to John Wetherell, dated the 26th of May, 1912, and Wetherell conveyed to Zimmerli and the plaintiff when the latter bought on the 6th of June, 1912. Zimmerli swears that he bought the property for himself in the first instance, and when called upon to explain how it came to be in Wetherell's name, does so by saying that he started out to purchase for Wetherell, that Wetherell was not very prompt in closing out the deal wanting time to consider it, and talk it over with his wife; that he then informed Wetherell he had given his (Zimmerli's) cheque for the deposit and would take it himself, but this does not explain why he had the agreement of purchase made out in Wetherell's name. We have, then, on the one side the representations that Wetherell was the owner, and the written documents which *prima facie* support that, and on the other side Zimmerli's statement that he was the owner and the fact that he paid practically all of the first deposit by his own cheques. I do not know whether Wetherell was available at the time of the trial, but it appears to me that if Zimmerli's statements are true as to the original purchase, Wetherell would have been a very important witness on his behalf, and he was not called. I do not think the evidence, such as it is, and open to the gravest doubt considering the methods of the defendant, sufficient to displace the *prima-facie* ownership disclosed by the documents, especially when coupled with the representations made to the plaintiff.

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I would dismiss the appeal and uphold the judgment below, but on a different ground—that of secret profits.

McPHILLIPS, J.A.: This appeal has relation to the purchase of certain land near Sidney, upon the Saanich Peninsula, being six acres in area, a portion of section 13, range 3, east. The action was tried by LAMPMAN, Co. J., who gave judgment in favour of the plaintiff for $750, holding that a breach of duty was established, that is, we can only assume, although it is not stated in words, that it was held that a fiduciary relationship existed, and that the appellant, Zimmerli, owed a duty to the respondent in connection with the purchase of the land.

The facts having been gone through as adduced at the trial may be summarized as follow: Riches was approached by Zimmerli about buying Saanich acreage, it is not clear that Zimmerli after this, or acting on this knowledge, brought about the purchase of the property from Roberts, who owned the land; but the fact is, on the 26th of May, 1912, the land in which Riches subsequently acquired a half interest, was purchased in the name of Wetherell for $3,000, and on the 6th of June, 1912, the same land was sold by Wetherell to Riches and Zimmerli for $7,620, agreements for sale in each case having been executed (it is to be observed, though, that the agreement of sale shews the consideration as $4,500 and the interim receipt $4,620), the interim receipt being given by Zimmerli to Riches and himself, under the name of Vancouver Island Insurance Company, a company for which Zimmerli was agent, in fact it may be said, in so far as it can be said in law, to have been Zimmerli's company.

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An interim receipt was signed, which reads as follows:

"Interim Receipt.

"June 6, 1912.

"Received from George John Riches & Ernest Zimmerli the sum of Two Hundred and no/100 dollars, being deposit on account of purchase of One Lot 6 acres, north-east corner of Et. Saanich Road and Kings Ave., N. Saanich, for the sum of $4620, on the following terms: $2270.00 cash, balance $350.00 dollars every 6 months until paid. The deferred payments to bear interest at the rate of 7 per cent. per annum until paid. Time is the essence of this agreement, and unless payments with interest are

punctually made at the time or times appointed, this sale shall be (at the option of the vendor) absolutely cancelled or rescinded, and all money paid on account hereof forfeited to the vendor as and for liquidated and ascertained damages. Cost of conveyance $5.00 to be paid by the purchaser. This receipt is given by the undersigned as agent, and subject to the owner's confirmation.

"V. I. Insurance Agency.
"Ernest Zimmerli,
"Agent for"

It would appear that Wetherell really held the property for Zimmerli, and this was unknown to Riches, Riches always believing that Wetherell was the owner, and Zimmerli always said the purchase price was to be $750 an acre net to Wetherell. The trial was held a year after the purchase had been made, and Zimmerli undertook to say that the land was at the time of the trial unsalable. It would seem that Riches sold his interest in the property by trading it for a motor car; he had apparently listed it, at one time for $850 an acre, and had even asked $1,000 an acre for it, and had expected to get that price when he purchased it. The motor car, Riches said, was worth $750. Riches went to see the land before purchasing, and no question of misrepresentation as to area or quality of the land arises. It would appear that shortly after the purchase, or when the second payment fell due, the date is not made clear, instruments of transfer between Riches and Zimmerli took place, whereby each became entitled to a certain three acres out of the six purchased. Evidence was given that at the time of the purchase the market value of property where this land was situate, near to Sidney, was from $700 to $800 per acre, and there was quite a lot of dealing in land, and it was sworn to that $750 was the market price in June, 1912. Zimmerli, in his evidence, states that in September, 1912, he sold his three acres at $1,000 an acre, the land being taken at that figure by the Wood Motor Company in the purchase of a motor car.

Upon the facts of this case I do not think that it can be successfully contended that Zimmerli was in the position of an agent employed to buy land for Riches, when the land was bought from Roberts by Wetherell. It must be admitted that the purchase by Wetherell was really a purchase by Zimmerli.

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Were this a case where the facts established the position of principal and agent, the plaintiff Riches being the principal, and the defendant Zimmerli the agent, the agent being deputed to buy the land, and within the decision of *Hutchinson* v. *Fleming* (1908), 40 S.C.R. 134 (which went from the Supreme Court of British Columbia), then unquestionably the judgment could be sustained—that is, if it was that after the establishment of the agency Zimmerli bought the land for Riches—although bought in Wetherell's name; but that was not the position of matters as I find them on the facts, and we have no finding of the learned trial judge to that effect, and if it were found it would be unsupported by evidence.

We are not assisted by any precise finding from the learned trial judge, therefore we must sift the evidence for ourselves. The highest plane that can be made out from the evidence may be said to be that Zimmerli was drawing to Riches's attention land in a certain locality in which the appellant then had land, and that land is eventually the land which was purchased without his interest being disclosed. This may even be putting the case too strongly against Zimmerli upon the evidence, as possibly the situation was nothing more than the pointing out, or the calling attention to, certain parcels of land that could be acquired, and this would not constitute the relationship of principal and agent.

MCPHILLIPS, J.A.

It must be admitted that real-estate agents and land brokers, by merely calling attention to lands which are for sale, being their lands, or the lands of others, and inducing persons to purchase the lands, do not upon these facts alone place themselves under any fiduciary relationship. Now, in this particular case, it cannot really be said that anything in the nature of a fiduciary relationship existed. It is true that Riches paid Zimmerli $60, which, it is contended, was a commission to Zimmerli, and that by reason of this the fiduciary relationship is proved. I cannot agree to this view; we must have more than this to establish the relationship as understood by the law. Further, as to this $60, it has been variously explained. Riches said he was to pay $750 net per acre to Wetherell, and if he bought the

property he was to pay a commission over and above that, and if he did not buy the property he was to pay for the hire of the motor-car to see the property, Riches taking along with him, to make a pleasure trip out of it, his wife and sister. The evidence is clear that Wetherell in buying the land was buying it for Zimmerli, but is there any evidence that in the buying of the land it was bought for Riches, and that Riches would be in any way called upon to take it? It seems to me that no such case is made out, and all the facts go to disprove it. Zimmerli could in no way shift the burden of the purchase upon Riches. Therefore, Zimmerli, in buying in Wetherell's name from Roberts, was in no way buying for Riches; it was not the case of an agent doing anything entrusted to him. In fact, to establish the case and support the judgment, Zimmerli must be estopped from saying that he bought the property on his own behalf, or otherwise than for Riches, and therefore the enhanced price was profit that belonged to Riches. It is true, if the case could be made out that there was a fiduciary relationship existing at the time between Riches and Zimmerli, and the land was bought with the intention and expectation that Riches would be induced by him, Zimmerli, to buy it, he would be considered to have bought on behalf of Riches, and be incapable of retaining any profit arising out of his effectuating the sale to Riches, but such is not the case upon the facts as disclosed to me.

Then the respondent here is in this difficulty: he carried out the purchase which could have been set aside—if for the moment this is conceded, merely to view the case as presented from the respondent's point of view—and retained and afterwards sold the property, and what is his remedy? In considering this point, the case of *In re Cape Breton Company* (1885), 54 L.J., Ch. 822, is instructive. Cotton, L.J. at p. 826 said:

"As far as I can see, there is no decision which favours the case of the appellant—a case, that is, of persons who have adopted a purchase which they could set aside, and have retained, and have afterwards sold, property of this kind, being allowed to hold their vendors responsible for the difference between what they gave for the property and what the vendors had given. In my opinion there is no authority for the contention, and, therefore, this appeal fails."

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The *Cape Breton Company* case was referred to by Lord Davey in *Burland* v. *Earle* (1901), 71 L.J., P.C. 1 at p. 8:

"Reference may also be made to the judgments of Mr. Justice Pearson and Lord Justice Cotton and Lord Justice Fry in *Cape Breton Co., In re* (1884), 54 L.J., Ch. 217; 26 Ch. D. 221; (1885), 54 L.J., Ch. 822; 29 Ch. D. 795. To rescind the sale is one thing, but to force on the vendor a contract to sell at another price is a totally different thing."

Now, if this were a case where a fiduciary relationship existed at the time of the purchase of the land, and Zimmerli covertly bought property which was his own and Riches's, in ignorance of this, sold the three acres he was entitled to, whereby he cannot reconvey, the question would be, how could the loss which Riches sustained be arrived at? It has been held that in such a case, if the property were not fairly worth the price paid for it, there might be recovered the difference between the real value and the price.

Now, proceeding upon the above hypothesis, with which, of course, I do not agree, in the case before us, what evidence is there of the difference between the real value and the price? The evidence that is before us seems to me to establish the market value as being as great, if not greater than the price paid, and certainly the evidence of Riches upon the point is that he held the land at $850 to $1,000 an acre after his purchase. The evidence given by Riches as to the value of the land is so absurd that in my opinion no reliance can be placed upon it, as against the other and positive evidence that was adduced at the trial, in view of the common and general knowledge of the values of all Saanich-peninsula property, which may be said to be of public notoriety, owing to the acquirement of right of way through the peninsula by the British Columbia Electric Railway Company and the Canadian Northern Railway Company; and the fact that the land in question is close to Sidney, and particularly well situated, to shew the unreliability of this evidence it is only necessary to quote some of it:

MCPHILLIPS, J.A.

"Have you an automobile? Yes, I have.

"How long have you had it? I think I bought it last September.

"And you have used it and driven around the country? Oh, yes; in my business as a broker I have been interested in different properties in the vicinity of Victoria, and different properties on the Island.

"Are you well acquainted with the property now at Sidney? Yes, very well acquainted.

"Have you any property for sale there? Listed with me?

"Yes. Yes, I have some water frontage there; a very nice place, indeed.

"Now, as a broker, what do you know about values of property now? What do you say the property is worth now, this particular property per acre? Well, you couldn't sell it.

"You couldn't sell it? You could not sell it; you could put it almost any price, you couldn't sell it now.

"Now, what would you say supposing there was a demand for property at Sidney, this particular property, what would you say would be the market price of it? The price would depend a lot, of course, on the demand.

"Of course, you say there is no demand at present, you could not sell the property at all? At Sidney, under any circumstances, unless you almost gave it away.

"Has there been any demand since you purchased it? No, it has got worse.

"Have you disposed of this particular interest you had in it? Well, I got rid of it in a way.

"How did you get rid of it? I traded it for a motor-car. I couldn't sell it at all, and I took any amount of people to look at it, and could not possibly sell it at all.

"What did they say? I stated my price, they just laughed at me. I offered it to one man for $600 an acre.

"The Court: When was that? It would be somewhere about three months ago, your Honour. I did ask as high as a thousand dollars an acre for it until I knew better."

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In my opinion, even were this a case where the difference in price could be considered, I unhesitatingly say that my view of the evidence is that at the time of the purchase and for a long time thereafter, the market price was as great as that for which it was purchased, namely, $750, and even higher, and there is no satisfactory evidence at all before us to establish any difference in price, and the *onus probandi* as to this was on the plaintiff in the action.

This is a most unsatisfactory case in every way; the evidence is given in the most casual manner, dates are not fixed, transactions took place and you cannot tell when they took place, and documents apparently were executed whereby the parties each transferred to the other a certain three acres out of the six jointly purchasd. These documents were not brought before the Court, nor was the date fixed when they were entered into; no evidence is given as to the time when Riches became aware of the fact that Zimmerli had any interest in the land, or that

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it was really his, although in Wetherell's name. Riches disposes of his three acres without complaining to Zimmerli of depreciation in value, or advising him of his intention to do so; then we have the sales made of the land by both parties for motor-cars without really fixing the date of those sales; a disordered jumble of evidence, and we are expected to pass upon a question of very great importance, that is, whether upon the facts a fiduciary relationship existed? In my opinion, the evidence falls very far short of establishing this.

In view of the unsatisfactory condition in which the case comes before us, I think the language of Kennedy, L.J. in *Kinahan & Co.* v. *Parry* (1910), 80 L.J., K.B. 276, a principal and agent case, is much in point. At p. 277 he said:

> "I agree with Lord Justice Vaughan Williams in thinking that this is an unsatisfactory case. I am not satisfied that all the facts have been so fully disclosed as they might have been. For some reason or other the parties would seem to have left largely to inference what might have been proved by direct evidence."

I am by no means satisfied with the evidence of Riches, that he sold his three acres or his interest therein for a motor worth only, or taken as being worth only, $750; it is inconceivable that he would do so, and if he did, it was a reckless sacrifice of valuable property. The plaintiff had to make out his case, and when the case is one of fraud, it must be made out without any reasonable doubt, and in my opinion it has not been made out, in fact falls far short of it, and whilst it is necessary that there should be fair dealing in all business transactions, still the proper extent of the agency must be established before a fiduciary relationship can be said to exist.

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In Halsbury's Laws of England, Vol. 1, at p. 182, we find this language:

> "The relation is of a fiduciary nature whenever the principal reposes trust and confidence in the person whom he selects as his agent. This is so in all cases of general agency, but where the agency is not a general one, its fiduciary nature depends upon the circumstances of the particular case."

The authorities cited for the above-quoted proposition are *Makepeace* v. *Rogers* (1865), 4 De G. J. & S. 649; *Foley* v. *Hill* (1848), 2 H.L. Cas. 28; *Fluker* v. *Taylor* (1855), 3 Drew. 183; *Mackenzie* v. *Johnston* (1819), 4 Madd. 373.

The circumstances of the case before us do not warrant it being found that a fiduciary relationship existed. Further, the conduct of Riches throughout was not that of one who believed or felt that he was over-reached, and having sold the land there can be no setting aside of the sale now, and his inaction and the surrounding circumstances are plainly against the contention set up.

In my opinion, the language of Fry, L.J. at p. 829, of the *Cape Breton Company* case, *supra,* aptly fits this case.

It therefore follows that, in my opinion, the appeal should be allowed, and the action dismissed with costs, here and below, to the appellant.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Robertson & Heisterman.*
Solicitor for respondent: *W. R. Vaughan.*

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Trespass—Allowing decayed tree to stand within falling distance of neighbour's house—Fall of tree in storm—Injury to house.

S. owned unimproved land adjoining R.'s house and lot, on which were a number of cedar trees in a state of semi-decay. R. warned S. of the dangerous condition of one of the trees, that was within falling distance of his house, S. replying that R. was at liberty to cut the tree down if he wished to do so. The tree fell on R.'s house during a high wind and damaged it.

Held (reversing the judgment of McINNES, Co. J.), that there was no cause of action.

Giles v. *Walker* (1890), 24 Q.B.D. 656, followed.

APPEAL from the judgment of McINNES, Co. J. in an action tried by him at Vancouver, on the 27th of May, 1913. The facts were that the plaintiff was the owner of a lot in East

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Hastings, on which was erected a house. Defendant owned the adjoining land, on which was a number of partially decayed cedar trees. In October, 1912, the plaintiff notified the defendant that the trees were in a dangerous condition and requested him to cut them down, to which the defendant replied: "If they are dangerous, cut them down yourself. I will make no objection." The trees were not cut down, and in December, 1912, one of them blew down and damaged the plaintiff's house. In an action for damages, the trial judge awarded the plaintiff $179.

The defendant appealed, and the appeal was argued at Vancouver on the 10th of November, 1913, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Steers, for appellant: The defendant did not grow the trees; he did not rot them; and he did not blow them down. This all happened in the course of nature, and there is no liability. Plaintiff built his house where he did, knowing of the existence of the trees. He refused to cut them down, although he was aware of the danger of what afterwards happened: he accepted the risk.

If adjoining proprietors of lands on a mountain, the tenement of one being higher than the other, and on the higher tenement there is a boulder existing at the time the owner of the lower tenement builds a house on his property, surely the owner of the higher tenement is not at his peril to keep the boulder in place, and, if from natural causes, such as the action of snow or ice, it becomes dislodged and, obeying the natural law, rolls down the hill, injuring the house on the lower tenement, there is no legal liability. The rule laid down in *Ryland* v. *Fletcher* (1868), L.R. 3 H.L. 330, is discussed and the extent to which it goes defined in *Nichols* v. *Marsland* (1875), L.R. 10 Ex. 255; affirmed in (1876), 2 Ex. D. 1. See also *Giles* v. *Walker* (1890), 24 Q.B.D. 656.

Mellish, for respondent: The lots in question were within the City of Vancouver. He referred to *Smith* v. *Giddy* (1904), 2 K.B. 448; *Lemmon* v. *Webb* (1894), 3 Ch. 1; *Crowhurst* v. *Amersham Burial Board* (1878), 4 Ex. D. 5; Halsbury's

Laws of England, Vol. 21, p. 507; *Vaughan* v. *Menlove* (1837), 3 Bing. N.C. 468.

Steers, in reply: The distinction is clear from the case of a tree overhanging another's property.

Cur. adv. vult.

6th January, 1914.

MACDONALD, C.J.A.: The allegation of the plaintiff is that the defendant was, on the 31st of December, 1912, the owner of and in possession of lots contiguous to the house and premises of the plaintiff, and had been in possession of said lots and owned the same for a long time previous to said date; that he had on his land a number of standing trees, including decayed trees which were dangerous to the house and property of the plaintiff, and that the plaintiff in the previous October notified the defendant of the dangerous condition of the trees, but that the defendant negligently allowed the trees to remain in their dangerous state, and that, on the said 31st of December, some of the trees were blown down, including a dead and decayed cedar tree, which fell on plaintiff's house and damaged it, whereby the plaintiff suffered loss. These allegations are not disputed.

The defence relied upon was, first, the act of God, or *viz major,* founded upon the allegation that the storm which blew down the trees was an unusual one; and, secondly, that the defendant owed no duty to the plaintiff to cut down the decayed trees, and thus protect him from injury, or to make compensation in case they should fall upon plaintiff's premises.

Rylands v. *Fletcher* (1868), L.R. 3 H.L. 330, was relied on. That case lays it down that the owner of land who brings or collects on it something of a dangerous character which, if allowed to escape, is likely to do damage to another, must keep it at his peril. Here the tree which did the injury grew on defendant's land in a state of nature. It was blown down upon the plaintiff's property by the elements. The defendant did nothing either to cause it to fall or to prevent it from falling, and the question is, under such circumstances, is he liable?

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We have been referred to no case, and I am unable to find one quite like this. In *Smith* v. *Giddy* (1904), 2 K.B. 448, the plaintiff was awarded damages for injury caused by the branches of defendant's trees overhanging the plaintiff's land, thereby causing injury to his crops. On the other hand, it was decided in *Giles* v. *Walker* (1890), 24 Q.B.D. 656, a case to which I have been referred by my brother McPHILLIPS, that when an occupier of land allows it to become overgrown with thistles, and the seed is carried by the wind into his neighbour's fields to his great injury, no action will lie, because, as Lord Coleridge, C.J. and Lord Esher, M.R. said, the thistles were the natural growth of the soil.

Now, it does not appear to have been regarded as wrongful to allow branches to overhang another's land, when no injury was occasioned thereby. It would seem that there must be something more than that. Kelly, C.B. in *Crowhurst* v. *Amersham Burial Board* (1878), 4 Ex. D. 5 at pp. 9-10, said:

> "On the part of the defendants it may be said that the planting of a yew tree in or near to a fence, and permitting it to grow in its natural course, is so usual and ordinary that a court of law ought not to decide that it can be made the subject-matter of an action, especially when an adjoining landowner over whose property it grew could, according to the authorities, have the remedy in his own hands by clipping."

And Kennedy, J. in *Smith* v. *Giddy, supra,* at p. 451, said:

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> "If trees, although projecting over the boundary, are not in fact doing any damage, it may be that the plaintiff's only right is to cut back the overhanging portions; but where they are actually doing damage, I think, there must be a right of action. In such a case I do not think that the owner of the offending trees can compel the plaintiff to seek his remedy in cutting them. He has no right to put the plaintiff to the trouble and expense which that remedy might involve."

This is not a case of nuisance. If the defendant is liable at all it is for trespass, and if any act of his had brought about the falling of the tree on the plaintiff's house, there would be no difficulty in the case.

The doctrine of *Rylands* v. *Fletcher, supra,* is not one which must govern the decision of this case. There the defendant was liable because of his own acts irrespective of negligence. Here clearly he cannot be liable unless he has been guilty of negligence. My difficulty is to say, under the peculiar circumstances now arising for the first time, so far as any direct authority

goes, that there was any duty on the defendant either to cut down the menacing tree or to make good the damage should it fall without any act of his. If the law does not reach such a case, then it stands thus: the owner of a lot in a city may maintain on that lot a primeval forest tree in such a condition of decay that it is a menace to a neighbour, and should it fall upon his neighbour without any inducing act of the owner of the tree, the neighbour must bear the loss. If it were the case of an ancient building falling into decay, although not erected by the then owner of the lot, but by a remote predecessor in title, the owner would undoubtedly be liable, but there there would be privity of estate between the person who erected the artificial structure and his successor who negligently maintained it. I think there is no warrant for saying that at common law that one who allows his land to remain in its natural state, neither he nor a predecessor in title having changed that state, is under any obligation to his neighbour in respect to what is standing or growing thereon. The neighbour must protect himself, if he can, or suffer the consequences. No precedent for such an action as this can be found in the books here or in England, or in the United States. This would not be fatal to the plaintiff's claim, if some legal principle could be assigned in support of it. It is not enough to say that a man is bound to use his own land so as not to negligently injure another; but is a man who becomes the owner of wild land on which there is a steep bank of clay which is being gradually undermined by a natural stream of water, and which may, and in all likelihood will, in heavy rain, slide upon the adjoining lands of another, and do him injury, bound to do something to protect his neighbour in such circumstances? I think not. That example is not different in principle to the case at bar.

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I think, therefore, the judgment below should be reversed, and the action dismissed.

MARTIN, J.A.: It is admitted that the tall, rotten cedar, about 75 feet high, which was blown down by a bad storm (as the plaintiff described it) and did the damage complained of, was in an undisturbed state of nature, standing on the

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defendant's lot, which is not occupied, and has been left in said state of nature. In such circumstances, it is clear that there is no duty owing by the defendant to the plaintiff, and the case cannot be distinguished in principle from *Giles* v. *Walker* (1890), 24 Q.B.D. 656, cited by the appellant, wherein damage done by thistles was sought to be recovered by an adjoining owner, but the action was dismissed because the thistles were "the natural growth of the soil," as are trees in this Province. Indeed, counsel for the plaintiff in that case admitted that if the land had been left in its natural state he could not recover, but sought to do so because the thistles had been caused to grow by cultivation, thereby "disturbing the natural condition of things." In the case at bar, the defendant is in an even stronger position, because he has done nothing in the premises, and it is according to the ordinary course of nature that trees should grow and decay, and, it may be, do more damage than thistles as a result of that decay.

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GALLIHER, J.A.: The learned trial judge has found as a fact that the tree which did the damage was a rotten, high stump with no hold on the ground, and that the defendant knew of the danger. The plaintiff and defendant are owners of adjoining lots in a townsite subdivision, the plaintiff's house being damaged by the stump falling on it from the defendant's land. The defendant pleads *viz major,* and that the tree in question was in a state of nature. The immediate cause of the tree falling was a very high wind. One of the plaintiff's witnesses, Abbot, says: "Every year there is a bad wind storm such as this one," and Tellinck, a witness for the defence, says: "Worst storm I had seen here in fourteen years." The real question is: Was there any duty incumbent on the defendant to remove the tree when he was aware of its dangerous condition? In the case of *Giles* v. *Walker* (1890), 24 Q.B.D. 656, Lord Coleridge, C.J. and Lord Esher, M.R., both held that there was no duty as between adjoining occupiers to cut thistles which are the natural growth of the soil. There would seem to be just as much carelessness in permitting thistles to ripen so that the wind would blow the seed over into a neighbour's land, doing

damage thereto, as in allowing this tree to stand so that even an ordinary wind would blow it over, though the effect in one case might, of course, be more serious than in the other. But whether it be carelessness in the one instance, or the other, the question is: Was there any duty devolving on the defendant? Had the tree been a live, growing one, the natural growth of the soil, would there have been any duty cast upon the defendant to remove it because the plaintiff built a house on the adjoining property so close that it was in danger if the tree fell? I think not. Then, can it be said that, because in the course of nature, or by reason of some act over which the defendant had no control, the tree decayed and became less firm in its original bed and liable to do damage, that the defendant was charged with the duty of removing it? To do so might in some cases prove very onerous. The point is a nice one, and I can find no case which exactly meets it, but on the best consideration I can give to it, I am of opinion that the defendant is not liable.

I would therefore allow the appeal.

McPHILLIPS, J.A.: This action was one brought to recover damages for an actionable nuisance, or the negligence of the defendant in the management of his land, the learned trial judge finding that "the cedar tree was a rotten, high stump, with no hold on the ground, and that the defendant knew it was a danger to the plaintiff." The land was in a state of nature, and the tree was a natural product of the land—the land being within the corporate limits of the City of Vancouver. The tree fell during a wind storm, and fell upon the house of the plaintiff and did damage thereto, and judgment was entered for the plaintiff for $179, being the damages found by the learned trial judge.

It would appear that the plaintiff advised the defendant of the insecure condition of the tree, and the defendant gave leave to the plaintiff to cut the tree down, which the plaintiff did not do. This is not the case of an overhanging tree, and, in my opinion, the action brought is one unknown to the law.

It was held by Lord Coleridge, C.J. and Lord Esher, M.R., sitting as a Divisional Court, in *Giles* v. *Walker* (1890), 59

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L.J., Q.B. 416, that where an occupier of land allows thistles which he has not brought on the land, to seed, so that the seed is carried on to adjoining land, which is thereby injured, no action will lie for the recovery of damages for the injury so caused.

In considering this case, we are really asked to establish, in my opinion, a new cause of action; this is really beyond the province of a Court of law; at times it may appear to have been done, but, if carefully examined, it would be seen that in all cases it is at most the application of the law to the different existing conditions not evolving new causes of action. It is interesting upon this point to refer to the case of *Smith* v. *Giddy* (1904), 2 K.B. 448; 73 L.J., K.B. 894, a decision of a Divisional Court, consisting of Wills and Kennedy, JJ. That was an action brought for an injunction, and it was held to lie against a person who allows the branches of his trees to overhang his neighbour's land, whereby his neighbour's trees are damaged. Wills, J. in the Law Journal report at p. 895, said:

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"I have come somewhat reluctantly to this conclusion, because I have a very strong feeling against the desirability of establishing new causes of action. There are plenty of persons in the world who are glad enough to torment their neighbours with all forms of action which have been established for centuries, and I always approach the notion of a new ground of action with much caution."

We find, though, in the jugdment of Kennedy, J. at p. 896, a discussion of the law which clearly demonstrates, if authority were needed, that no right of action exists in the case before us:

"It seems to me that in principle the action ought to lie, and I cannot myself differentiate this case in principle from the decision in *Crowhurst* v. *Amersham Burial Board* (1878), 48 L.J., Ex. 109; 4 Ex. D. 5. It is the law, I think, that, as long as the yew tree is proved not so to overhang, and the yew tree leaves have not been so cut by the owner as to fall on the neighbour's land, there is no right of action, although the neighbour's cattle may be hurt by eating leaves from the yew tree. I suppose that no action would, under such circumstances, lie because in a high gale (to take the simplest case) yew leaves are blown on to the adjoining land and cause injury to animals which eat them. No action, I take it, would lie for that."

Appeal allowed.

Solicitors for appellant: *McCrossan & Harper.*
Solicitor for respondent: *A. J. B. Mellish.*

IN RE JACKSON AND THE CORPORATION OF NORTH VANCOUVER.

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Municipal law—Arbitration—Compensation for injury by municipal improvements—Failure of Municipality to appoint arbitrator—Application of Arbitration Act—Unregistered title when damage occurred—Right to compensation—Municipal Act, R.S.B.C. 1911, Cap. 170, Sec. 394—Arbitration Act, R.S.B.C. 1911, Cap. 11, Sec. 8—Land Registry Act, R.S.B.C. 1911, Cap. 127, Sec. 104.

Where, in an arbitration to assess damages under section 394 of the Municipal Act, a municipality fails to appoint an arbitrator, the provisions of the Arbitration Act in respect thereto apply, IRVING and MARTIN, JJ.A. dissenting.

Where a purchaser merely holds property under an agreement for sale when damaged through the lowering of the grade of the street on which it fronts, but completes his title by a registered conveyance before commencing arbitration proceedings under the Municipal Act to recover compensation for the damage so caused, he is not thereby debarred by section 104 of the Land Registry Act.

APPEAL from an order of MURPHY, J. made in Vancouver, on the 27th of June, 1913. The owner of two lots on Third street, North Vancouver, after claiming damages owing to excavations made by the Corporation on said street adjoining his lots, appointed an arbitrator on his own behalf to assess the damages under section 394 of the Municipal Act. After notifying the Corporation to appoint an arbitrator on their behalf, which they refused to do, he applied, under section 8 of the Arbitration Act, for an order appointing an arbitrator to act with the arbitrator he had appointed. The order was made and the Corporation appealed on the grounds that section 8 of the Arbitration Act cannot be invoked for the appointment of an arbitrator in an arbitration under section 394 of the Municipal Act, that the claimant was not the registered owner of the lots in question when the alleged injury was done, and on other grounds.

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MURPHY, J.: In my opinion, I ought to appoint an arbitrator herein, and counsel may speak further to the matter and suggest names. This is an attempt on the part of the Corporation to defeat a just claim by invoking the provisions of section 104 of the Land Registry Act. The contention that they may be subjected to a claim by the registered owner is idle, for any such claim would be immediately met by the reply that, prior to any damage done, he had sold the land and has received his price in full. The case is not one between two parties setting up conflicting claims to lands or to appurtenances to lands, such as was *Goddard* v. *Slingerland* (1911), 16 B.C. 329; 18 W.L.R. 324. The Corporation has admittedly no claim to this land, and admittedly is under a statutory compulsion to pay, unless it can defeat same by said section.

It appears to me that the Legislature in passing the section in question meant its provisions to apply only to such disputes; in other words, that it is a registration section and not as it must be, if the Corporation's contention herein is to be sustained, a confiscatory section. I think this view is in a measure supported by the case of *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51; 9 W.L.R. 17, 317. There, as stated by the Chief Justice, the solution depends upon a section of the Judgments Act, although a similar contention to the one here raised was set up. Here it depends on section 394 of the Municipal Act. That section does not speak of registered owners or occupiers or persons interested in real property any more than did the section of the Judgments Act considered in the case cited.

MURPHY, J.

It seems to me the clear intention of the Legislature was that compensation should be made irrespective of registration. Further, to quote the language of the Chief Justice *mutatis mutandis,* "as soon as the Municipality became apprised of the true state of facts it became against equity and good conscience for them to insist on damaging Mr. Jackson's property without making compensation as compelled by law."

They were fully aware of his interest in this property before they started to work, for they not only assessed it in his name and collected taxes from him, but inserted his name in the list of interested persons to whom they were bound by law to give

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notice of this very work. On this feature the recent case of *Loke Yew* v. *Port Swettenham Rubber Company, Limited* (1913), A.C. 491; 82 L.J., P.C. 89; 108 L.T.N.S. 467, may be usefully considered.

The appeal was argued at Vancouver, on the 5th of December, 1913, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Ritchie, K.C., for appellant: There is no jurisdiction to appoint an arbitrator; the Municipal Act ousts the jurisdiction under the Arbitration Act. The point was not taken in the Court below, but a question of jurisdiction can be taken at any time: see *Norwich Corporation* v. *Norwich Electric Tramways Company, Limited* (1906), 2 K.B. 119.

Under section 251, subsection (1) of the Municipal Clauses Act, B.C. Stats. 1906, Cap. 32, in case one party neglects or refuses to appoint their arbitrator, a judge appoints the three arbitrators: see *The King* v. *The Nottingham Old Water Works Company* (1837), 6 A. & E. 355; *West* v. *Parkdale* (1885), 12 S.C.R. 250; *In re Walker and South Vancouver* (1913), 18 B.C. 480; 5 W.W.R. 389: the Arbitration Act has no application here. It is not shewn that plans were filed and preliminary notice given to give rise to an arbitration under the Municipal Act: see *Saunby* v. *London (Ont.) Water Commissioners* (1905), A.C. 110; *The Corporation of the City of New Westminster* v. *Brighouse* (1891), 20 S.C.R. 520. At the time the operations complained of took place the complainant was not the registered owner of the property; he was a purchaser under an agreement for sale. Under the statute he has no interest in real property until his title is registered: see *Goddard* v. *Slingerland* (1911), 16 B.C. 329.

Argument

Griffin, for respondent: The Arbitration Act and the Municipal Act are consistent, and section 25 of the Arbitration Act provides that the Act shall apply, except in so far as they are inconsistent. The Municipal Act provides for a case where the individual does not appoint an arbitrator, but not where the municipality neglects to appoint, in which case the Arbitration Act is resorted to: Redman on Arbitrations and Awards, 4th

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Ed., pp. 40-41; *Tabernacle Permanent Building Society* v. *Knight* (1892), A.C. 298; 62 L.J., Q.B. 50. At the time the damage was done the claimant was not the registered owner of the land, but he was when the arbitration proceedings commenced: see *Loke Yew* v. *Swettenham Rubber Company, Limited* (1913), A.C. 491; 82 L.J., P.C. 89; *Ex parte Winder* (1877), 6 Ch. D. 696; *Haney* v. *Winnipeg & Northern Ry.* (1912), 1 W.W.R. 1046. As to persons interested, see *Sanders* v. *Edmonton, &c., Ry. Co.* (1913), 5 W.W.R. 172.

Ritchie, in reply.

23rd February, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A. The order appealed from is one appointing an arbitrator pursuant to R.S.B.C. 1911, Cap. 11, Sec. 8, in default of appointment by the appellant Corporation of the City of North Vancouver.

The injury to the property for which the respondent claims compensation under R.S.B.C. 1911, Cap. 170, Sec. 394, was caused by lowering the street grade in front of said lots.

The appellants attacked the order on several grounds, only two of which I think it necessary to discuss: (1) that said section 8 cannot be invoked for the appointment of an arbitrator in an arbitration under said section 394, because of inconsistency; and (2) that the respondent's interest in the lots at the time the injury was done was that of a purchaser under an unregistered agreement, he could, because of the operation of section 104 of the Land Registry Act, R.S.B.C. 1911, Cap. 127, which declares that certain instruments, of which the said agreement is one, shall not be deemed to pass any estate or interest at law or in equity in the land being dealt with until registration of the instrument have no complaint; in other words, that the said agreement had no effect in passing any estate to the respondent.

This Court has already considered the rights of the parties as between themselves under instruments of that class: *Goddard* v. *Slingerland* (1911), 16 B.C. 329; *Chapman* v. *Edwards, Clark and Benson, ib.* 334; but not under circumstances such as here, where the owner's right to compensation under a statute for injuries arising out of the exercise of statutory

powers is in question. Before these proceedings to obtain compensation were commenced, the respondent had procured and registered a conveyance of said lots, thus perfecting his title before action. The appellants were aware from the beginning that the respondent was the real owner. They assessed him as owner for the year 1911, in the summer of which year the work complained of was done, and also in the year 1912, so that if appellants' contention is to prevail, it is not because they were misled into paying compensation to the registered owner, or were otherwise prejudiced, but because of a section of a statute dealing with land titles and the protection of purchasers and creditors of vendors. I do not suggest that the protection of the Land Registry Act does not extend to persons and corporations in the position of the appellants who have to pay compensation for land injuriously affected by their works. It may be that the respondent could not take the proceedings he is now prosecuting until he had become the registered owner. I do not stop to consider that question here. The question I have to determine is, can the respondent, who was, as between himself and the vendor, the equitable owner of the land when the damage was done, and who, as between himself and his said vendor, is the party injured, and who, before taking proceedings, perfected his title by getting in the legal estate and complying with said section 104, on the facts above recited, carry on this litigation? I am of opinion that he can. He is the only person injured. It is quite clear that the vendor has suffered no injury, having sold the property to the respondent before the grade was lowered. The respondent's right to commence proceedings might have been suspended until he registered his conveyance, but I have no doubt that, once that was done, he was in a position to recover compensation in the manner which he is seeking to do here.

MACDONALD, C.J.A.

The other question turns on whether or not there is any inconsistency between section 8 of the Arbitration Act and section 394 of the Municipal Act as applied to the facts of this case. We have been referred to some of the English authorities, but it is to be borne in mind that the English Arbitration Act, which was passed in 1889, was not then as wide in

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its scope as is our Act as we now find it. The English Act did not authorize the appointment of an arbitrator by the Court where the submission was to three arbitrators, one to be appointed by each of the parties and the third to be selected by the two arbitrators, as is the case here. Hence it was held in *In re Smith & Service and Nelson & Sons* (1890), 25 Q.B.D. 545, that the Court had no jurisdiction in a case of this kind to appoint an arbitrator where one of the parties had made default in appointment. Section 8 of our Act, however, covers the very case. It was contended that said section 394 is a complete code in itself, providing how arbitrators shall be appointed to fix compensation under it, and that it excludes by implication the provisions of the Arbitration Act. It was argued that when the Corporation failed to appoint an arbitrator, the proper course was to apply to the Court for a *mandamus*. By section 25 of the Arbitration Act

> "This Act shall apply to any arbitration under any Act passed before or after the commencement of this Act, as if the arbitration were pursuant to a submission, except in so far as the Act is inconsistent with the Act regulating the arbitration, or with any rules or procedure authorized or recognized by that Act."

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The object was to supply deficiencies in submissions to arbitration. It is suggested that, because the common law provided a means of compelling the appointment of an arbitrator, that that means should be held to fall within the exception in section 25, particularly the words "any rules or procedure authorized or recognized by that Act," in this case the Municipal Act. With deference, I do not think that that construction can be given to those words. Such procedure is neither directly nor indirectly recognized by the Municipal Act. It is a procedure quite independent of the Act. The most that can be said is that it provides for the appointment of an arbitrator for the Corporation when such might be accomplished in another way by an order of *mandamus*. Even if I were in doubt, I should resolve that doubt in favour of the simpler and less expensive procedure.

I would dismiss the appeal.

IRVING, J.A.

IRVING, J.A.: The main question involved in this appeal is

as to the application of section 8 (*c*) of the Arbitration Act, R.S.B.C. 1911, Cap. 11, to the 251st section of the Municipal Clauses Act of 1906 (now section 394 R.S.B.C. 1911, Cap. 170).

The learned judge appealed from, came to the conclusion that the Arbitration Act did apply, by virtue of the provisions of the 25th section of the Arbitration Act. It is unnecessary to set it out again.

Much weight was placed by counsel for the respondent on the words "except in so far as the same is inconsistent," and it was argued that as there is no provision in the Municipal Act for the appointment of an arbitrator to represent the Corporation in the event of that body making default, the Arbitration Act could be invoked and the difficulty cured in that way. But I think we must take a broader view of the case than that. The sections of the Municipal Act under consideration contemplate a peculiarly appointed board. Under certain circumstances the Court can set aside or ignore the appointment made by the Corporation and appoint all three arbitrators. This peculiar arrangement strikes me as being inconsistent with the circumstances contemplated by the Arbitration Act, and lend much force to Mr. *Ritchie's* argument, that these sections in the Municipal Act constitute a code in themselves for the settlement of these difficulties. The sections in question can be traced back to the Municipal Clauses Act, 1892 (Sec. 269 *et seq.*), and were, therefore, in force when the Arbitration Act was passed (12th April, 1893). It is a well-established principle that they who come and obtain Acts of Parliament, such as railway Acts, do in effect submit to do whatever the Legislature empowers and commands them to do, that they will do nothing else; and that they will do and forbear all they are thereby required to do and forbear, as well with reference to the interests of the public as to the interests of individuals. In my opinion, similar principles must be taken to govern bodies incorporated under the Municipal Act, and, relying on that principle, the Legislature thought it unnecessary to make provision for a case of default on the part of the municipal body—the remedy in the event of refusal by the Corporation to appoint an arbitrator would be by *mandamus*. In Tapping on Mandamus

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(1848), p. 85, a long list of reported cases is given in support of the statement that the writ lies to command a railway or other company incorporated by Act of Parliament, to issue a warrant or other statutory process, and summon a jury for the purpose of assessing compensation or damages incurred in pursuance of its Act. It would seem from this that, at the time the Arbitration Act was passed, there was a procedure for dealing with the Corporation in the event of its neglecting or refusing to do its duty, and, having regard to the established practice and principles that I have endeavoured to indicate in what I have just said, I should say it was a procedure "recognized" by the Municipal Act. The "recognition" may be by reasonable implication, or by express authorization. On these grounds I would hold the 8th section of the Arbitration Act does not apply to the sections of the Municipal Act in question.

IRVING, J.A.

The case of *The Queen* v. *Corporation of Mission* (1900), 7 B.C. 513, although it does not decide the point now under consideration, shews that *mandamus* was regarded by some of the profession as the proper remedy, and as McColl, C.J., who had a very great deal of experience in municipal matters, did not demur to the procedure by way of *mandamus,* I think we may take it that he recognized it as the correct practice.

It is unnecessary for me to deal with the other points.

MARTIN, J.A.

Martin, J.A.: In my opinion, section 8 of the Arbitration Act is, in the language of section 25, "inconsistent with" the established and well-recognized procedure under section 394 (*a*) of the Municipal Act, and the two cannot be conveniently or properly worked together; therefore, the appeal should be allowed.

GALLIHER, J.A.

Galliher, J.A. concurred with Macdonald, C.J.A.

MCPHILLIPS, J.A.

McPhillips, J.A.: This appeal really involves questions similar, to a great extent, to those considered by me in *In re North Vancouver and Loutet* [(1914), 19 B.C. 157] (having reference to lot 23, block 137, district lot 27, group 1, Vancouver District).

In view of that fact, it is quite unnecessary to repeat my reasons, there expressed, for coming to the opinion that the Arbitration Act applies in respect to the appointment of an arbitrator—in a case such as this—where the Municipality has failed to appoint an arbitrator.

With reference to the case of *Norwich Corporation* v. *Norwich Electric Tramways Co.* (1906), 75 L.J., K.B. 636, which was an additional authority to those to which we were referred in *In re North Vancouver and Loutet, supra,* Mr. *Ritchie* laid great stress upon the point that it was there held that a provision in a general Act was not held to apply, Vaughan Williams, L.J. at p. 639, saying:

"In my judgment, section 33 of the Act of 1870 [Tramways Act], by appointing a special tribunal which is to deal with disputes of this kind, has to that extent ousted the jurisdiction of the Court. The decision of the House of Lords in *Joseph Crosfield & Sons, Limited* v. *Manchester Ship Canal Company* (1905), A.C. 421; 74 L.J., Ch. 637, is really conclusive that this is a case in which the jurisdiction of the Court is ousted."

It is, however, a matter of remark that the case before us is not one calling in question the jurisdiction of the Court, but it is the consideration of the question whether the Legislature has left the statute law in such a state that it is unworkable, that is, the Municipality failing to appoint an arbitrator, the tribunal contemplated to decide the compensation through the default of the Municipality, cannot be brought into being.

The present appeal brings to the attention of the Court that which would be a blot upon the statute law if there was no means available to constitute the tribunal which is to decide the compensation. This is all the more pointedly indicated where we have the Legislature enacting that the claim for compensation, unless accepted by the council, shall be forthwith determined by arbitration: B.C. Stats. 1906, Cap. 32, Sec. 251, Subsec. (6); R.S.B.C. 1911, Cap. 170, Sec. 403.

It is the province as well as the duty of the Court to so construe the statute law as to carry out the object intended to be attained, when the intention is discernible, and when we have the Arbitration Act made applicable generally to every arbitration under any Act, it does seem to be right and proper

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to hold, and agreeable to convenience, reason and justice, that, where there is default upon the part of either party in the appointment of an arbitrator, that there is machinery available, and power in the Court, to carry out that which is plainly intended. It is true that the Court has limitations upon its authority, as stated by Halsbury, L.C. in *Cooke* v. *Charles A. Vogeler Co.* (1901), 70 L.J., K.B. 181 at p. 184, where he said:

"And if, on the other hand, it is manifest that the language of the statute does not reach the case supposed, no Court has jurisdiction to enlarge the ambit of English legislation beyond what the Legislature has permitted."

Is this not only the case of the Legislature permitting the Arbitration Act to apply, but directing that it shall apply to every arbitration under any act except when inconsistent? There is no inconsistency—in fact, to apply the Arbitration Act to the Municipal Act to work out the appointment of the arbitrators, and to constitute the tribunal contemplated by the Legislature, accomplishes a consistent whole.

MCPHILLIPS, J.A.

With respect to the many exceptions taken to the right of the claimant to compensation upon the various grounds advanced, and most carefully and forcibly argued, I do not consider that these are matters that we are called upon to go into—they can all be urged, and may be taken up by way of stated case for the opinion of a judge of the Supreme Court during the course of the reference.

It, therefore, follows that, in my opinion, the appeal should be dismissed, and the order of MURPHY, J. appointing an arbitrator on behalf of the City of North Vancouver be confirmed.

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

Solicitors for appellant: *Bowser, Reid & Wallbridge.*
Solicitor for respondent: *W. M. Griffin.*

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Municipal law—Arbitration—Municipal corporation—Street improvements—Damages from—Compensation—Default of municipality in appointing arbitrator—Appointment by Court—R.S.B.C. 1911, Cap. 170, Sec. 394; Cap. 11, Sec. 8.

Where, upon a Corporation failing to appoint an arbitrator to ascertain the compensation payable for damages arising from municipal improvements, under section 394 of the Municipal Act, an order is made by a judge, under section 8 of the Arbitration Act, upon the application of a party suffering damage, in terms ordering the Corporation to appoint an arbitrator:—

Held, on appeal, that the order was made without jurisdiction, and should be set aside.

APPEAL from an order made by CLEMENT, J. at chambers in Vancouver on the 4th of September, 1913, whereby the Corporation of North Vancouver was ordered to appoint an arbitrator to act on its behalf for the purpose of determining the compensation that should be paid by the appellants to the respondents for damages resulting from the doing of certain street excavation work fronting on their lots. The property owners had appointed their arbitrator under section 394 of the Municipal Act, but the Corporation, after due notice thereof, neglected to appoint theirs, and this application was made for the appointment of an arbitrator to act for the Corporation pursuant to section 8 of the Arbitration Act, R.S.B.C. 1911, Cap. 11.

Statement

The appeal was argued at Vancouver on the 11th of November, 1913, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

At the close of the argument, judgment was delivered allowing the appeal. On the following day respondent's counsel applied to re-open the case on the ground that he had overlooked in his argument subsection (*f*) of section 8 of the Arbitration Act, pointing out at the same time that should he fail to sustain

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the order below, there was great danger of the respondent being absolutely barred from relief owing to the Statute of Limitations. The application was granted (MARTIN and MCPHILLIPS, JJ.A. dissenting), subject to counsel's argument being confined to said subsection. MARTIN, J.A. did not take part after the appeal was re-opened.

Ritchie, K.C., for appellant Corporation: There is no authority in a judge to appoint an arbitrator under section 8 of the Arbitration Act. The Municipal Act provides for arbitration proceedings, and it is only in the case of the two arbitrators not agreeing on a third that the judge can appoint: see *The Queen* v. *Corporation of Mission* (1900), 7 B.C. 513; *Norton* v. *Counties Conservative Permanent Benefit Building Society* (1895), 1 Q.B. 246; Yearly Supreme Court Practice (1913), Vol. 2, p. 1433. The Municipal Act limits the judge to the third arbitrator, whereas the Arbitration Act does not; the gap is filled by means of *mandamus* proceedings: see *Tabernacle Permanent Building Society* v. *Knight* (1892), A.C. 298 at p. 306. An Act which provides for the appointment of arbitrators and that a judge can appoint a third is inconsistent with the Arbitration Act under which they can all be appointed by a judge.

Argument

Hogg, for respondent, contended that the Court of Appeal has jurisdiction to appoint an arbitrator. The proper course is to dismiss the appeal and amend the order of the Court below to comply with the statute. As to the appointment of a first and second arbitrator, there is no provision in the Municipal Act, so there can be no inconsistency with the Arbitration Act: *Cameron* v. *Cuddy* (1914), A.C. 651; 83 L.J., P.C. 70; 5 W.W.R. 56. A prerogative writ of *mandamus* cannot be issued where there is another remedy, and there is another remedy in the Arbitration Act. They should also be precluded from objecting to this procedure on the ground of estoppel, as they led us to believe that they would make their appointment up to within a short time before the expiration of the period within which we were compelled to act: *Fotherby* v.

Metropolitan Railway Co. (1866), L.R. 2 C.P. 188; Halsbury's Laws of England, Vol. 1, p. 6. On the limitation of an arbitration, see *Delany* v. *Metropolitan Board of Works* (1867), L.R. 2 C.P. 532.

Ritchie, in reply: The proceedings were not taken pursuant to the statute, and they therefore could fall back on their common law rights: see *Cook* v. *North Vancouver* (1911), 16 B.C. 129; *Saunby* v. *London (Ont.) Water Commissioners* (1906), A.C. 110; *Hammersmith, &c., Railway Co.* v. *Brand* (1869), L.R. 4 H.L. 171 at p. 197.

Cur. adv. vult.

23rd February, 1914.

MACDONALD, C.J.A.: This is an appeal from an order of CLEMENT, J. whereby it was ordered that the Corporation of the City of North Vancouver should within the time therein limited appoint an arbitrator for the purpose of determining the compensation (if any) that should be paid by the appellant to the respondent for damages resulting from the doing of certain street work by the Corporation, and which is said to have injuriously affected the said lot.

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The respondent appointed its arbitrator pursuant to section 394 of the Municipal Act, R.S.B.C. 1911, Cap. 170, and served the prescribed notice on the Corporation, requiring it to appoint its arbitrator. This the Corporation neglected to do, and application was made to the said judge to appoint an arbitrator pursuant to section 8 of the Arbitration Act, R.S.B.C. 1911, Cap. 11. It was contended by counsel for the Corporation that section 8 was not applicable to arbitration under said section 394. I have dealt with that point in my reasons for judgment in *In re Jackson and North Vancouver* [(1914), 19 B.C. 147], just handed down. The difficulty in this case is that the order of CLEMENT, J. is not the order authorized by said section 8. It does not appoint an arbitrator, but orders the Corporation to do so. It was, therefore, in my opinion, made without jurisdiction, and must be set aside.

This was the view held by me, and by the majority of the Court, at the close of the argument, and the appeal was then

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allowed and the order set aside. On the following morning respondent's counsel applied to us to re-open the case on the plea that he had inadvertently overlooked in his argument subsection (*f*) of section 8 of the Arbitration Act. It was also represented that there was great danger of the respondent being barred from recovery by reason of the Statute of Limitations should he fail to sustain the order below. Lest a miscarriage of justice should result from a slip of counsel, we acceded to his request.

MACDONALD, C.J.A.

In my opinion the said subsection does not assist the respondent, but merely authorizes the judge to accept the nominee of the party in default. The learned judge might have done that, and instead of himself selecting the arbitrator, might have named in his order the arbitrator desired by the party in default. That, however, was not the course taken. The order appealed from is in form an order of *mandamus* directing the Corporation to appoint some person not named. It is clearly unauthorized by the Act, and therefore cannot be supported. If hardship results, it will be because the plain provisions of the Act were disregarded.

IRVING, J.A.

IRVING, J.A.: I would allow the appeal, and set aside the order made herein.

Whether the Arbitration Act can or cannot be read into the Municipal Act, so as to provide for the appointment of an arbitrator upon the Council making default, need not be determined in this case. In any event, I do not think the learned judge could make the order appealed from under any section in the Arbitration Act.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal is to be disposed of by the consideration of the Municipal Act and the Arbitration Act. The question before us is this: has the Arbitration Act application when the appointment of arbitrators is the matter being dealt with? It would appear that the Corporation of

the City of North Vancouver in the grading of Second street, acting under a by-law, as the respondents contend, passed under the local improvement provisions of the Municipal Act, injuriously affected lot 23, block 137, group 1, Vancouver District, the property of the respondents, in that in the grading, the level of the street in front of the lot was lowered, and that access to the dwelling-house situated on the lot, and in occupation by a tenant, is wholly cut off, and to lower the lot to the street level will involve the removal of a thousand yards of earth.

It would appear that on the 1st of November, 1911, a claim was made by the respondents in pursuance of section 251 of the Municipal Clauses Act (B.C. Stats., 1906, Cap. 32), and by letter of date of the 16th of January, 1912, request was made of the Council of the City of North Vancouver to appoint its arbitrator. It would not appear that the Corporation took any steps to appoint an arbitrator. On the 2nd of June, 1913, the respondents claim to have appointed GRANT, Co. J. their arbitrator, and that a written notice was given to the Corporation of this appointment on or about the 9th of June, 1913. On the 3rd of July, 1913, the respondents took out a summons at chambers, in the Supreme Court, asking for an order appointing an arbitrator to act as the nominee of the Corporation in determining the compensation to which the respondents were entitled resulting from the exercise of the powers of the Corporation in grading Second street, and reducing the level of the street in front of lot 23. The application came on for hearing before CLEMENT, J., and it was ordered by the learned judge that the Corporation do within seven days appoint an arbitrator to act on its behalf.

It was admitted upon the argument that, quite outside of the question of whether the Arbitration Act applied or not, the order as framed was not supportable, as, if the Act did apply, the proper order would be one appointing an arbitrator for and on behalf of the Corporation—the Corporation having failed to do so; and it was pressed upon us that if this Court were of the opinion that the Arbitration Act did apply, the Court of Appeal might appoint the arbitrator.

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The Municipal Act, R.S.B.C. 1911, Cap. 170, Sec. 394, Subsec. (*a*), provides the procedure for the appointment of arbitrators to ascertain the compensation payable where a municipality is required to make due compensation for any damages suffered beyond any advantage derived from the work. The subsection reads as follows:

"The municipality shall appoint one, the owner or tenant or other person making the claim, or his agent, shall appoint another, and such two arbitrators shall appoint a third arbitrator within ten days after their appointment; but in the event of such two arbitrators not appointing a third arbitrator within the time aforesaid, one of the judges of the Supreme Court shall, on application of either party by summons in Chambers, of which due notice shall be given to the other party, appoint such third arbitrator."

It is apparent that the Legislature intends that the Municipality shall appoint its arbitrator, and no provision is made for any procedure in default of this being done. The Municipality failing to do what the statute requires, the question arises—what procedure is there available to enforce the appointment or to proceed in default of appointment? It was forcefully argued before us that the Arbitration Act applies, and that an arbitrator may be appointed by a judge of the Supreme Court.

As to the application of the Arbitration Act to other Acts with provisions for arbitration, we have a judgment of the Privy Council as to the effect of the provision in *Zelma Gold-Mining Co.* v. *Hoskins* (1894), 64 L.J., P.C. 45, where at p. 48 Herschell, L.C., said:

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"Stress was laid by the learned judges below upon the provisions of the 24th section of the Arbitration Act, which enacts that the Arbitration Act shall apply to every arbitration under any Act passed before or after the commencement of that Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration, or with any rules or procedure authorized or recognized by that Act. But the only effect of that section is to apply the arbitration provisions to arbitrations under any other Act, as, for example, arbitrations under the Companies Act, except so far as the arbitrations under those Acts are conducted pursuant to statutory provisions inconsistent with the provisions of the Arbitration Act. Its effect is in no way to introduce into arbitrations under the Arbitration Act any of the provisions for arbitration contained in any of the other Acts, such as the Companies Act."

It is to be observed that Lord Herschell in *Tabernacle Permanent Building Society* v. *Knight* (1892), A.C. 298, at

p. 306, dealing with the question whether the Arbitration Act applied to an arbitration under the Building Societies Act, said:

"The Arbitration Act which confers upon the Court the power to order a case to be stated, if it applies, adds, no doubt, to the provisions which are to govern an arbitration under the Building Societies Act; but it is clear that the fact that the provision is an additional one does not of itself shew that there is any inconsistency in the two Acts, for, if so, the 24th section [similar to 25th section in our Act] would never have any operation. I think the test is, whether you can read the provisions of the later Act into the earlier without any conflict between the two. This you can clearly do as regards the enactment under consideration. For these reasons I concur in the judgment of the Court below."

It is seen that Lord Herschell places the matter for consideration in this terse way: Is there conflict between the two Acts? That is, between the Municipal Act and the Arbitration Act, relative to the appointment of arbitrators.

Little or no assistance can be obtained upon the point of whether the present case is one for the appointment of an arbitrator from the cases in England or Ontario, the Arbitration Acts there in force differing from the Act in force in this Province in that with us the Arbitration Act covers references to three arbitrators, and the Municipal Act provides that the compensation shall be decided by three arbitrators.

Whilst upon the argument I took a different view and was, as then advised, disposed to hold that the Municipal Act was a code by itself, I have, after careful consideration and examination of the authorities, satisfied myself that there is no conflict between the Arbitration Act as we have it and the Municipal Act, and that the situation of affairs existent is one that is amply capable of being met by the application of the Arbitration Act. Under the provisions of the Municipal Act an award may be made by any two of the arbitrators, and under the Arbitration Act the award may be made by a majority of the arbitrators which is in effect the same. That the arbitrator appointed by the Court or a judge will have the same authority as if appointed by the municipality is clear when subsection (*e*) of section 8 of the Arbitration Act is read.

It was contended that in some way the application was out of time. As to this there is no such definite evidence before us that this can be satisfactorily passed upon. However, it is

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to be remarked that the claim was made, and apparently in time, and the statute is precise that the claim being filed, unless accepted by the council, shall forthwith be determined by arbitration: Municipal Clauses Act, B.C. Stats. 1906, Cap. 32, Sec. 251, Subsec. (6); and Municipal Act, R.S.B.C. 1911, Cap. 170, Sec. 403. It would, therefore, seem to me to be impossible for the Municipality to successfully set up any bar —in that the council did not proceed *forthwith,* and my view of the statute is that it is mandatory upon the council to proceed to arbitration. There is full opportunity when the arbitration proceedings are pending, and during the hearing, to have a special case stated for the opinion of the Court upon any questions of law arising—for instance, as to whether the proceedings are out of time, or whether the claim is one for compensation to be determined by arbitration, or whether the proceedings must be by way of action.

In the result, therefore, my opinion is that the order appealed from cannot be supported, as it is not in form such as is authorized by the Arbitration Act. The learned judge should have appointed the arbitrator, the Municipality having failed to appoint, and being unwilling at the time of the application to appoint, with his leave, an arbitrator.

MCPHILLIPS, J.A.

This brings one to the consideration of what a Court of Appeal should do under the circumstances. My opinion is that this Court might proceed to appoint the arbitrator, but that would be somewhat inconvenient, and I do not see that the ends of justice necessarily require it. If they did, I would unhesitatingly so decide, but it seems to me that this can still be done by a judge of the Supreme Court, and, if necessary, this appeal, if allowed, should be without prejudice to any further application to a judge of the Supreme Court to appoint an arbitrator. In my view, the judge of the Supreme Court is not a *persona designata* under the Arbitration Act, and his order was a judicial order from which an appeal lies. The case of *Excelsior Life* v. *Employers' Liability Corporation* (1903), 5 O.L.R. 609, in the Court of Appeal of Ontario, supports that view. Further, I am of opinion that under Order LVIII., rule 4 (marginal rule 868), the Court of Appeal has power to

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make the order which ought to have been made, but, as I have already intimated, it would not seem to be necessary to do so. I would, therefore, allow the appeal, but without prejudice, should that be necessary, to the respondents to make a further application to a judge of the Supreme Court for the appointment of an arbitrator should the Municipality continue in its failure to make such appointment.

Appeal allowed.

Solicitors for appellants: *Bowser, Reid & Wallbridge.*
Solicitors for respondents: *Scrimgeour & Hogg.*

IN RE RYAN AND THE DISTRICT REGISTRAR OF TITLES.

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IN RE RYAN

Land Registry Act—Subdivision of parcel of land—Refusal of municipal council to approve of plan—Agreement for sale of lot within parcel—Plan of lot attached—Application to register as charge—Duty of registrar—R.S.B.C. 1911, Cap. 127, Secs. 29, 90, 92, 100; B.C. Stats. 1912, Cap. 15, Secs. 7, 19, 21 and 26.

The owner of a parcel of land subdivided into lots and applied for the approval of the plan of the subdivision by the municipal council of the municipality in which it lay, pursuant to section 92 of the Land Registry Act. The council refused to approve of the subdivision, as sufficient allowance had not been made for streets, and the registrar of titles then refused to accept the plan. Subsequently the petitioners, who purchased lots within the subdivision, applied to register as charges their agreements of sale, in which each lot was described by metes and bounds, and attached thereto was a plan of the lot. The lots were identical with certain lots shewn on the plan of the subdivision that had been rejected, but no reference was made to the rejected plan in the description of the lots. The registrar refused to register the agreements as charges affecting the original parcel.

Held, on appeal (GALLIHER and MCPHILLIPS, JJ.A. dissenting), that the applications for registration were wrongfully rejected.

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Per MACDONALD, C.J.A.: The sole duty of the registrar is to satisfy himself, after examination of the title deeds or other evidence produced, that a *prima-facie* title has been made out, and then register the charges. The registrar is given no mandate to inquire beyond the question of the sufficiency of the title.

Per GALLIHER and MCPHILLIPS, JJ.A.: It is the duty of the Court to read the statutes as a whole and together. It is plain what the intention of the Legislature is, and what is attempted here is a clear evasion of the statute law.

Judgment of MORRISON, J. reversed.

Statement

APPEAL from an order made by MORRISON, J. at chambers, in Vancouver, on the 18th of September, 1913, dismissing the petitions of John A. Olsen and others praying that the registrar of titles at Vancouver be ordered to register certain agreements for sale and assignment thereof, pursuant to applications duly made to said registrar. The facts in the Olsen application were that by articles of agreement, dated the 1st of February, 1913, Jemima Russell agreed to sell to John A. Olsen certain land in South Vancouver, described as a portion of block 11, in blocks numbered 7, 9 and 11, in subdivision of district lot 352, group one, New Westminster District, according to a registered plan numbered 1457. The tract sold was described by metes and bounds, as shewn coloured red on the plan attached to the agreement. On the 26th of March, 1913, Olsen applied to register the agreement in the land registry office in Vancouver, and on August 5th received notice of refusal to register the same from the registrar, on the ground that a subdivision plan was required of block 11. Prior to lodging the application, Jemima Russell the registered owner of block 11, had had the block surveyed and divided into lots by a Provincial land surveyor, a plan of which was submitted to the council of the municipality of South Vancouver for approval, but the council refused to approve of it, as proper street allowances were not provided for. The land covered by the applications of the petitioners was identical with certain lots shewn upon the plan prepared by the Provincial land surveyor referred to, and the sketches attached to the applications were tracings from said plan, the numbers of the lots only being omitted.

The appeal was argued at Vancouver, on the 11th and 12th of November, 1913, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Bray, for appellant (petitioner): We purchased one lot 33 feet by 141 feet, which is described in the agreement for sale by metes and bounds. Property is allowed to be conveyed in this manner, and it is desired to register the agreement for sale with plan attached. The registrar says there is no subdivision plan registered and this is required. It is true that the plan desired to be registered does not comply with section 19 of the Act of 1912, but we contend that we are entitled to registration under section 26.

The District Registrar (respondent), in person: Sections 92 and 100, if construed as the appellants desire, are repugnant to each other. The result, therefore, is that either one has to give way to the other, or a construction has to be adopted to give effect to both. For these sections in their original form see R.S.B.C. 1897, Cap. 111, Secs. 65, 66 and 67. Since then provision has been made, and from time to time extended, allowing municipalities to exercise an important control: see B.C. Stats. 1907, Cap. 24, Sec. 3; 1908, Cap. 25, Sec. 5; 1909, Cap. 30, Sec. 2; 1910, Cap. 27, Secs. 3 and 4; 1912, Cap. 15, Secs. 19 and 21; 1913, Cap. 36, Sec. 34.

Argument

If a registrar acts under section 100, municipal control would be eliminated. "If the co-existence of two sets of provisions would be destructive of the object for which the later was passed, the earlier would be repealed by the later": see Maxwell's Interpretation of Statutes, 5th Ed., p. 265; *Romang* v. *Tamburri* (1912), 17 B.C. 166. Section 100 should, therefore, be deemed to be repealed so far as it conflicts with municipal control, or, what is the same thing, should be held to apply only where there is no occasion for the municipality to exercise its functions. The plan shews that the effect of appellants' contention will be to have 66-foot roads approaching these parcels, but surrounding them only 33-foot roads dedicated by adjoining owners. If a line is not drawn at the present subdivision, it is impossible to draw a line anywhere, as the same reasons would

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apply to a parcel of ten acres or of a hundred. Appellants submitted the plan to the municipal council for approval, and as an appeal is allowed to the Lieutenant-Governor in Council, not having availed themselves of this, they are estopped.

Bray, in reply: There is nothing in the Land Registry Act taking away from us the right to deal with the property as we see fit. Although we do not comply with sections 90 to 98 of the Act, and the amendments in B.C. Stats. 1912, Cap. 15, the registrar should register our agreements under section 108.

Cur. adv. vult.

30th January, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The facts of this case are that one Jemima Russell, being owner of a parcel of land, and desiring to subdivide it into a number of small lots, apparently for building purposes, made a plan of the subdivision, which she sought to have approved by the municipal council of South Vancouver, the municipality in which the land lay, pursuant to section 92 of the Land Registry Act, R.S.B.C. 1911, Cap. 127. The council refused its approval because proper street allowances were not provided for, and hence the plan was not accepted by the registrar, and was apparently abandoned by Jemima Russell. The petitioners are each the purchaser from her of a lot, being part of said parcel. Each lot is described by metes and bounds, and attached to the agreement is a sketch of the lot. No reference is made in the description of the lots to the rejected plan, though it is alleged by respondents in the case that "a portion of the land covered by the application of the petitioners is identical with certain lots shewn upon the plan" (the rejected plan) and that "the sketches attached to the said applications are merely tracings from the said plan, omitting the numbers of the lots." While not very clear, I think this means that the subdivisions described in the agreements sought to be registered are each identical with a lot shewn on the rejected plan.

The district registrar of titles at Vancouver declined to register the said agreements as charges affecting the said

original parcel, and from that refusal the petitioners appealed to a judge of the Supreme Court, who dismissed their appeal. From that order this appeal is taken.

It is not easy to define with precision the rights of parties to registration under the Land Registry Act when subdivided lands are in question. Section 90 of the Act appears to have been intended to apply more especially to the subdividing of lands in the popular sense and meaning of the word "subdivision," namely, an addition to a townsite or a division of land into a number of village, town or city lots, including streets, lanes and other public places. When an owner has made such a subdivision of his land, he is required, under a penalty, to deposit a plan of the same with the registrar. Should such plan not be deposited, the registrar, in my opinion, is not obliged to register any instrument which contains a description of land by reference to such undeposited plan.

Section 100 of said Act makes it appear with reasonable clearness that all subdivisions were not necessarily to be governed by said section 90. I use the word "subdivision" in this connection in its true sense—a dividing of something into parts, even if it be divided into two parts only. Subsection (3) of that section was relied upon by the appellants in support of their contention that the registrar was bound to accept their applications and register their instruments. That subsection deals with applications to register "a portion of an entire lot or section." In such case the applicant may attach to the instrument a sketch of that portion, or, if the applicant has not attached such a sketch, the registrar may require him to do so, and by subsection (4) if he decline, then the registrar need not proceed with the registration.

The language of subsection (3) is somewhat indefinite. What is meant by entire lot or section? Is it the original lot or section as granted by the Crown? Whatever is meant, the intention of the subsection is to provide a means of relieving persons subdividing their lands from the operation of said section 90. Where lots are designated by reference to an undeposited plan, the matter is simple enough, the record itself is defective, and the registrar cannot proceed; but where they

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are sufficiently described by reference to a recorded plan, or a registered parcel, I am unable to find anything in the Act which authorizes the registrar to go behind the record and hold an investigation into the propriety of the subdivision.

The applications in question here are to register charges, and are governed by section 29 of said Act as re-enacted by section 7 of the Act of 1912. That section provides that when the fee simple has been registered, any person claiming any less estate (*i.e.*, a charge) may apply to the registrar for registration thereof,

"and the registrar shall, upon being satisfied after examination of the title deeds or other evidence (if any) produced that a *prima-facie* title has been established by the applicant, register the title of such applicant in a book to be called the 'register of charges.'"

MACDONALD, C.J.A.

In this case it is not disputed that Jemima Russell had a good registered title to the original parcel, nor that the petitioners had not made out a *prima-facie* title to their charges upon it. The duty, and the only duty, of the registrar, as declared by the section, was to satisfy himself that such title had been made out and then to register the charges. The language is entirely free from ambiguity and is imperative. The registrar is given no mandate to inquire beyond the question of the sufficiency of the title. In this case, in so far as the title is concerned, there was nothing on record to justify the rejection of the applications, nor is there anything in the rest of the Act to authorize the course which was pursued by the registrar in rejecting the applications.

I must, therefore, give effect to the clear language of the section and declare the petitioners' applications to register their charges were wrongly rejected.

The appeal should be allowed.

IRVING, J.A.

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

MARTIN, J.A.

MARTIN, J.A.: It is a serious matter to curtail the right of any owner of land to convey any portion of it in such manner as he may see fit, and before I could feel justified in so doing,

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I should require to have the matter placed beyond peradventure by the legislation which has been invoked by the district registrar in support of his refusal to register the petitioners' application. The case should, in my opinion, be considered on the application of the present petitioners, as it now stands, entirely apart from the action taken by Jemima Russell, the then registered owner, to have a plan approved by the municipality of South Vancouver. The question of what is a "subdivision" is not an easy one to answer, but on the facts of the present case I have reached the conclusion that the term does not apply to this agreement for sale, which is, I think, governed by subsection (3) of section 26 of the Act of 1912, covering the case of "a portion of an entire lot or section"; whatever construction or limit may be placed upon that language, it at least reasonably as well as actually covers the land in question, and, therefore, I think the appeal should be allowed.

GALLIHER, J.A.

GALLIHER, J.A.: The owners of above property subdivided it into town lots, and caused a map or plan of same to be made out. The municipal council refused to assent to this plan owing to the streets not being of the proper width. The owners then proceeded to sell the property in lots described by metes and bounds, corresponding exactly with the boundaries of said lots as shewn on the plan, and the purchasers of these lots applied to register same. Registration was refused, and the matter came up before MORRISON, J., who dismissed the petitions. From this order the appeal is taken.

The appellants admit that they have not complied with section 19 of the Act of 1912, but claim that they have complied with subsection (3) of section 26 of said Act, and are entitled to registration. This subsection is as follows:

"Notwithstanding anything hereinbefore contained, whenever any person applies for registration of a portion of an entire lot or section, or for the issuance of a certificate of indefeasible title to the same, he may and shall, if so required by the registrar, append to or procure to be endorsed on the instrument conveying the said land, or deliver to the registrar, a map or sketch thereof, certified by a duly qualified land surveyor and signed by the grantor or other conveying party, or by the applicant, shewing the dimensions of the land, and giving such information as will easily identify the same, and a duplicate of such plan shall also be delivered to the registrar."

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When the parties proceed under section 19, the assent of the municipal council is necessary: see section 21. It is quite apparent that what is attempted here is a clear evasion of the Land Registry Act, and unless it comes within subsection (3) of section 26, the appellants must fail.

If I own an acre of ground and seek to sell a certain number of feet off it to my neighbour, it may very well be I can do so, describing it by metes and bounds, and otherwise identifying it under section 26, but it seems to me quite a different matter when, as here, the whole scheme for disposition of the holdings is in effect one of subdivision, and the reason is so apparent why it is attempted in this way.

GALLIHER, J.A.

I do not think subsection (3) of section 26 was ever intended to cover such a case.

The appeal should be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal is one from an order made by MORRISON, J. dismissing the petition of the appellants, praying for an order that the registrar be directed to register certain agreements of sale, and assignment of agreement for sale, pursuant to the applications made, the registrar having refused to do so upon the ground that the land covered by the agreements of sale constitute a subdivision, and the consent of the Municipality of South Vancouver had not been obtained to the plan, and the subdivision was not one, reading the Municipal Act and the Land Registry Act together, that entitled registration being made by way of charge or otherwise.

The Land Registry Act and the Municipal Act need careful attention, and the history of the various Acts and amending Acts, and in particular the Land Registry Act Amendment Act, 1912.

The land in question is within a municipality, namely, the land can rightly be termed a "subdivision." Being a subdivision, it comes within section 92 of the Land Registry Act, R.S.B.C. 1911, Cap. 127, as amended by section 21 of chapter 15 of the Act of 1912. That being so, it must, in my opinion, be approved by the municipal council, or by some person authorized by the municipal council to approve the same, which is not the

case. The admitted facts that seem to me to be material are admissions Nos. 4 and 5, which read as follows:

"4. Prior to the lodging of the applications of the petitioners, Jemima Russell, the then registered owner of the property in question herein, and the vendor thereof to the petitioners, had block 11 surveyed and a plan of the same shewing the same divided into lots, prepared by a Provincial land surveyor, and submitted the said plans to the council of the municipality of South Vancouver for approval. The said council refused to approve of the same.

"5. A portion of the land covered by the applications of the petitioners herein is identical with certain lots shewn upon the plan prepared by a Provincial land surveyor, and referred to in the last-preceding paragraph hereof, and the sketches attached to the said applications are merely tracings from the said plan prepared by the said surveyor, omitting the numbers of the said lots."

It is contended by counsel for the appellants that there need not be compliance with section 92 of the Land Registry Act, but that there is right to registration under section 100 of that Act, as amended by section 26 of chapter 15 of the Act of 1912, submitting that the word "notwithstanding" in subsection (3) to said section 100 as amended, indicates that the requirement of said section 92 is not a condition precedent to registration. In my opinion, this contention is untenable, and as it is the province and the duty of the Court to read the statutes as a whole and together, it is plain what the intention of the Legislature is, and it is a plain attempt to evade the statute law, and is such an evasion as cannot be countenanced by the Court.

The registrar, in a careful argument, in my opinion, well demonstrated that the enactments are capable of standing together, and it is apparent that to allow what is contended for here would be the destruction of a policy well spread upon the statute book, and one which is eminently in the public interest.

It is apparent that the plan as presented to the municipal council, not being approved, it is now attempted to specifically describe the parcels by metes and bounds, and accomplish registration in this way. If there is any good ground why the plan should be approved, notwithstanding the decision of the municipal council, it is well known that an appeal lies to the Lieutenant-Governor in Council, and that course, it would seem, was not adopted, the only conclusion that can be come to is that the appellants were of the opinion that any such appeal would

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not be successful, and this method is a method which, in my opinion, this Court cannot accede to; further, it is beyond the jurisdiction of the Court.

It is contended, and I think rightly, in this case that the course adopted is an attempted evasion of the statute law. We have, it is true, the language of Lord Cranworth, L.C., in *Edwards* v. *Hall* (1855), 25 L.J., Ch. 82 at p. 84:

"I never understood what is meant by an 'evasion' of an Act of Parliament; either you are within the Act of Parliament or not. If you are not within it, you have a right to avoid it, to keep out of the prohibition; if you are within it, say so, and then the course is clear."

However, in legal terminology, it is quite common usage and custom to speak of the evasion of a statute. Maxwell, on the Interpretation of Statutes, 5th Ed., p. 184, has this to say with regard to Lord Cranworth's proposition:

"When not so exact as he we, in law Courts and in statutes, as well as in ordinary life, use the phrase 'evasion' of a statute as really connoting an attempt to evade it."

Without unduly elaborating the matter, it may be said that what is prohibited is that which the Legislature has guarded against, and what may be done is that which is beyond the enacting part; and it may possibly be that the statute falls short in some cases of accomplishing what was the real policy; and if in this case it was the latter, that is to say, that the policy, whilst apparent, the enactment fails to prevent, then there would be the right to registration. In other words, there is no prohibition for doing that, or being entitled to relief from the Court in the doing of that against which there is no inhibition. Lord Hobhouse in *Simms* v. *Registrar of Probates* (1900), 69 L.J., P.C. 51, a succession duty case, said at p. 56:

MCPHILLIPS, J.A

"It does not appear to their Lordships that an examination of the decisions in which the word 'evade' had been the subject of comment leads to any tangible result."

It is true we have not here any words of the statute in express terms legislating against any evasion, but a statutory procedure is enacted in obtaining registration, and what right is there in the appellants to override this? If it could be said that the appellants are outside of the statute law, and that the registrar is exacting something not called for, then admittedly the Court could direct registration; but only upon it being clear beyond

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all reasonable peradventure that the registrar was in error. To arrive at this conclusion is, in my opinion, the setting aside and the ignoring of provisions of the statute law that seem to me to stand out, and prevent any such conclusion being arrived at.

Then it is said what is asked is only the registration of a charge. What a delusion it would be to make registration as a charge not capable of being perfected later! It seems to me that subdivisions must be made and approved in the manner called for by the statute, and, in my opinion, the appellants are attempting an evasion of that which is a condition precedent to registration.

It follows, therefore, in my opinion, that the appeal should be dismissed, and the order of MORRISON, J. affirmed.

Appeal allowed,
Galliher and McPhillips, JJ.A. dissenting.

Solicitors for appellants: *Henderson, Tulk & Bray.*

Solicitor for respondent (Municipality of South Vancouver): *H. C. Clarke.*

REX v. McNAMARA. (NO. 1).

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REX v. McNAMARA

Practice—Stated case—Court of Appeal—Motion to amend—Disposition of—To be heard before stated case—Charge upon which prisoner was extradited—Evidence of.

A motion to the Court of Appeal to amend a stated case must be disposed of before the hearing of the stated case.

An objection to a conviction on a charge other than that upon which a prisoner is extradited cannot be entertained without evidence of what the charge was upon which the extradition was effected.

Statement

MOTION to the Court of Appeal on behalf of the prisoner to amend the stated case by substituting a new question in lieu of

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one of the questions submitted by the Court below, heard by MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A. on the 3rd of February, 1914.

Argument

A. H. MacNeill, K.C., for the Crown, stated that he had been served with notices of motion that the Court should state a new question, in lieu of the second question in the stated case, and asked that the motion be disposed of before going on with the stated case.

A. S. Johnston, for the prisoner, asked that the stated case be proceeded with, and if he was not successful on the presentation of question two, he would then bring on the motion for amendment.

Judgment

Per curiam (IRVING, J.A. dissenting): The motion should be disposed of first before taking the case, and must either be gone on with or abandoned. It is not desirable to break into the argument of the case, but to dispose of the matter at one time.

On the motion,

Argument

Johnston, moved that the following question be submitted in lieu of question two in the stated case, namely:

"The prisoner was extradited from the State of New York, one of the United States of America, on the charge set out in the indictment, and inasmuch as I was of opinion that the building of Thomas John Trapp, from which the automobile was alleged to have been stolen, mentioned in the indictment, was not within the curtilage of the dwelling-house of the said Thomas John Trapp, was I right in instructing the jury that the accused would be convicted of any offence included in the charge mentioned in the indictment?"

No evidence of the prisoner having been extradited, or of the charge upon which he was extradited, was put in at the trial.

Judgment

Per curiam: There is nothing on the record to shew that the prisoner was not convicted on the same charge as that upon which he was extradited.

The Court is unanimously against you on the motion. The motion is dismissed.

Motion dismissed.

LOACH v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

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LOACH v. B. C. ELECTRIC RY. CO.

Negligence—Contributory negligence—Ultimate negligence—Street railway—Defective brakes—Responsibility of passenger for negligence of driver of waggon.

Where, in an action under Lord Campbell's Act, a jury finds that the defendant was guilty of negligence and the deceased guilty of contributory negligence, but also finds that the defendant's motorman could have avoided the accident, notwithstanding the deceased's negligence, if the brake on the car had been in an effective condition, failure to provide a proper brake is "ultimate negligence" as distinguished from "original negligence," and the plaintiff was entitled to recover. (MACDONALD, C.J.A., and MCPHILLIPS, J.A. dissenting).

Per MACDONALD, C.J.A., and MCPHILLIPS, J.A.: The term "ultimate negligence" is inapt unless it is confined to an act or omission subsequent in point of time to the negligence of the other party, and cannot cover the negligent omission of a railway company to supply proper brake equipment, anterior though continued right up to the time of collision.

A person receiving a lift from a driver on a vehicle and sitting beside him is not so identified with the driver as to make the driver's negligence his negligence.

Per IRVING, J.A.: If a jury finds a plaintiff guilty of negligence which contributed to the accident owing to his not taking extraordinary precautions, and later in their findings they distinguish between ordinary and extraordinary negligence, the finding is not one of contributory negligence.

Judgment of MURPHY, J. reversed.

APPEAL from the judgment of MURPHY, J. in an action tried at Vancouver on the 2nd, 3rd and 4th of September, 1913, dismissing the plaintiff's action after the jury had given a verdict in the plaintiff's favour.

Statement

This action was brought by the administrator of Benjamin Sands, deceased, for the benefit of his widow and children under the Families Compensation Act. The deceased and one Milton Hall were employees of the Bitulithic Paving Company, deceased as a timekeeper and Hall as a teamster. On the evening in question, Hall was driving his team with a load of

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paving material. Deceased asked for, and was given by Hall, a ride on the waggon, and sat by the driver. They proceeded eastward from the employer's office, which was west of the defendant's railway three-quarters of a mile. Approaching the railway the view was partially obstructed by an orchard; Townsend road, on which they were driving, approached the rail level on an up-grade. There was a space between the orchard and the railway, the width of which is not very definitely fixed. The plaintiff and Hall approached the railway engrossed in conversation, and took no precautions at all to ascertain whether or not a car was approaching the crossing. The evidence is clear and uncontradicted on this point. The two men were totally oblivious of their surroundings. There is evidence that, had they looked, they could have seen the approaching car; but if there be any doubt upon this point, there is no question that had they listened they could have heard the approaching car, which was coming down grade to the crossing at a speed of 35 miles an hour, and making a noise which could be heard at a great distance. The driver and the deceased neither stopped, nor looked, nor listened, nor gave any attention at all to the presence there of the railway track. When the horses had got partially across the track, and the front wheels of the waggon had reached the rail, they were struck by defendant's tramcar coming from the north, and Sands was killed.

Statement

The following were the questions put to the jury and the answers given:

"1. Was the defendant Company guilty of negligence which was the proximate cause of the accident? Yes.

"2. If so, in what did such negligence consist? (1) Excessive speed under the circumstances, *viz.*: a single track was in use for both way passengers, and it was proved passengers were waiting whose destination was unknown to motorman or conductor—therefore, the speed should have been slackened and car brought under complete control approaching station; (2) insufficient space between orchard and station for observing approach of cars from the north.

"3. Was the deceased, as distinguished from the driver of the rig, guilty of negligence which contributed to the accident? Yes.

"4. If so, in what did such negligence consist? By not taking extraordinary precautions to see road was clear.

"5. If both the Company and the deceased were guilty of negligence,

could the Company then have done anything which would have prevented the accident? Yes.

"6. If so, what? The motorman could have stopped the car if the brake had been in effective condition.

"7. Was the driver, as distinguished from deceased, guilty of negligence that contributed to the accident? Yes.

"8. If so, in what did such negligence consist? By not taking ordinary precautions to see road was clear.

"9. If both the driver, as distinguished from deceased, and the Company were guilty of negligence, could the Company then have done anything which would have prevented the accident? Yes.

"10. If so, what? The motorman could have stopped the car if the brake had been in effective condition.

"11. (a) Damages for widow? $5,000; (b) Damages for each child? $2,500."

Macdonell, and *Killam,* for plaintiff.

L. G. McPhillips, K.C., and *G. B. Duncan,* for defendant.

5th September, 1913.

MURPHY, J.: In this action the jury have found the Company guilty of negligence, and have also found the deceased guilty. It is true that the answer fixing the liability upon the deceased is somewhat peculiarly worded, but I think it must be taken in connection with the evidence and the charge, and I think there was evidence that would justify them in saying that he was guilty of negligence, and I take it that that answer means that he did not act as a reasonable man under the circumstances should have acted. That being so, his representatives cannot recover, unless it be shewn that, despite his negligence, the Company could have avoided the accident. In answer to questions 5 and 6, the jury replied that the Company could have avoided the accident, because the motorman could have stopped the car if the brake had been in effective condition. In my opinion, under the judgment of MACDONALD, C.J.A. in *Rayfield* v. *B. C. Electric Ry. Co.* (1910), 15 B.C. 361, that answer does not fix liability on the Company. If I understand that judgment aright, I think it lays down the principle that on the question of ultimate negligence, that negligence must arise on the conditions as existing at the time of the accident. It would, of course, be absurd to say the Company has any opportunity between the time that this rig

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appeared upon the track and the collision to remedy any defect in the brake. If there was such a defect, I think it was original negligence and not what may possibly be termed "ultimate negligence." That being my view of the law, I grant the motion of the defendant and enter judgment for them on the questions. Although I have no power to remedy the matter, I think it is my duty to say that on the evidence, in my opinion, the amount of the verdict is in excess of what should reasonably have been given under the provisions of the Families Compensation Act.

Judgment for the defendant, and costs.

The appeal was argued at Vancouver on the 14th and 17th of November, 1913, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Macdonell (*Killam,* with him), for appellant: The jury answered questions, and on the answers the learned trial judge dismissed the action, following *Rayfield* v. *B. C. Electric Ry. Co.* (1910), 15 B.C. 361. The evidence shews there was excessive speed, which was the original negligence: see *Brenner* v. *Toronto R. W. Co.* (1907), 13 O.L.R. 423; *Hinsley* v. *London Street R. W. Co.* (1907), 16 O.L.R. 350; *The Halifax Electric Tramway Company* v. *Inglis* (1900), 30 S.C.R. 256. The motorman could have stopped the car if the brake had been in proper order, and this was the ultimate negligence that makes the defendant liable.

Argument

McPhillips, K.C. (*G. B. Duncan,* with him), for respondent: Any act of negligence that the jury have found against us was prior to the plaintiff's contributory negligence: see *Brenner* v. *Toronto R. W. Co.* (1907), 15 O.L.R. 195; 40 S.C.R. 540. The plaintiff was responsible for anything that the driver of the waggon did: see *The "Bernina"* (1888), 13 App. Cas. 1. The deceased and the driver were in the employ of the same company, and were in the course of their employment: *Flood* v. *Village of London West* (1896), 23 A.R. 530; Underhill on Torts, 8th Ed., 397; Pollock on Torts, 9th Ed., 481; *Brickell* v. *New York Central & H. R. R. Co.* (1890), 24 N.E. 449.

Macdonell, in reply: Hall's negligence is not imputable to the deceased; he had full control of the horses. The whole question is that of ultimate negligence, which was found against the defendant.

Cur. adv. vult.

6th January, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A., after stating the facts already set out, continued: The jury found the defendant was negligent in running the car at an excessive rate of speed, and in not slackening this speed and bringing the car under complete control approaching the crossing, and in having insufficient space for observation of approaching cars between the orchard and the station, which was a small shelter erected within a few feet of the rails just north of the crossing. They found that the driver, Hall, was guilty of negligence in not taking ordinary precautions to see that the road was clear; that the deceased was guilty of negligence which contributed to the accident, and which consisted in not taking extraordinary precautions to see that the road was clear, and that the defendant's motorman could have stopped the car and have avoided the accident if the brake had been in effective condition.

Upon these findings the learned judge entered judgment for the defendant and dismissed the action. From that judgment this appeal is taken.

The finding of contributory negligence is peculiarly worded, but, having regard to the evidence, which is conclusive and uncontradicted, upon the point, it can mean nothing less than that the deceased did not take ordinary or reasonable care. If there were any doubt about this, if the evidence were at all equivocal, if it were uncertain what the deceased's negligence consisted of, I should not hold the answer a sufficient finding of contributory negligence; but the jury could not, I think, have done otherwise than find the deceased guilty of want of reasonable care; his negligence was identical with that of the driver, who was found guilty of want of ordinary care by the answer to another question.

It was suggested in argument that, because the deceased was not the driver, he was under no obligation to take care, but

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this is quite a different case from the class of cases considered in *The "Bernina"* (1888), 13 App. Cas. 1, where the rights and duties of passengers in and drivers of public conveyances are discussed.

It was also suggested that it was not shewn in evidence that the deceased knew the railway was there, and hence was not guilty of any want of precaution in not looking to see if a car were approaching. That question seems to have been raised before us for the first time. The reason, I think, that no evidence was offered of the deceased's knowledge that the railway was there is, that all parties took such knowledge for granted, it being apparent that he must have known, his employers' office being three-quarters of a mile to the west of the railway track, the men whose time he was keeping being at work east of the railway track, and the deceased having been in that employment for a month before the accident.

This brings me to the question of law so strongly pressed upon us by the appellant's counsel, based upon the answer of the jury, or what I must take that answer in effect to be, that the occurrence could have been prevented had the car been equipped with an efficient brake. He relied very strongly upon *Brenner* v. *Toronto R. W. Co.* (1907), 13 O.L.R. 423. I confess I was much impressed by the reasons for judgment in that case. On an appeal to the Court of Appeal for Ontario, the judgment was reversed on other grounds, and no reference at all was made to the point so fully discussed by Mr. Justice Anglin. The judgment of the Court of Appeal was sustained by the Supreme Court of Canada on the same grounds; so that I have not the advantage of the opinions of the learned judges in either of these Courts, except casual notice of the point in the judgments of Mr. Justice Idington and Mr. Justice Duff.

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It seems to me that the term "ultimate negligence" is inapt and confusing unless it be confined, in the application of it, to an act or omission subsequent in point of time to the negligence of the other party. It pre-supposes anterior negligence on the part of, at least, the party complaining. It can only be properly used, I think, with deference, to designate an act or omission but

for which the consequences of his own negligence would have been avoided; something which ought to have been done or omitted when the particular danger was imminent. It has been found a convenient phrase when analyzing and distinguishing the several acts of negligence where several appear to exist, and fixing upon the proximate or efficient cause, eliminating the others. Hence, where one party negligently approaches a point of danger, and the other party with like obligation to take care negligently approaches the same point of danger, if there arises a situation which could be saved by one and not by the other, and the former then negligently fails to use the means in his power to save it, and injury is caused to the other, that failure is designated ultimate negligence in the sense of being the proximate cause of the injury. In this case, it is sought to carry forward, as it were, an anterior negligent omission of the defendant, though continuing, it is true, up to the time of the occurrence and to assign to it the whole blame for the occurrence, although by no effort of the defendant or his servants could the situation, at that stage, have been saved.

It is said that but for the act of negligence in not repairing the brake, the occurrence could have been avoided, but it is equally true that but for the acts of negligence of the deceased and the driver, it could have been avoided. It is equally true to say, where the only negligence is excessive speed, that but for that it could have been avoided, or, in case of failure of a car or engine driver to sound a warning when approaching a crossing, that but for that negligence it could have been avoided.

Both parties were actors in the occurrence, that is to say, each was present and capable of acting when the danger was imminent, or when it ought to have been apparent to them that a particular danger of that sort might be imminent. In this respect it is unlike *Davies* v. *Mann* (1842), 10 M. & W. 546; and *Radley* v. *London and North Western Railway Co.* (1876), 1 App. Cas. 754; where neither plaintiff could at the time do anything to avert the injury, but each defendant could.

The judgment of Walton, J. in *Reynolds* v. *Thomas Tilling, Limited* (1903), 19 T.L.R. 539; affirmed in the Court of

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Appeal, 20 T.L.R. 57, seems to me to point irresistibly to the conclusion at which I have arrived. I can see no distinction in principle between this case and that. There the plaintiff pushed his truck in front of the hind wheel of an omnibus. He did not do it intentionally, but negligently. The driver of the omnibus could, so it was found, by the exercise of care, have avoided it. It was held that plaintiff could not recover, because of his own negligent act in pushing his truck in front of the wheel. Here, in the same negligent manner, the deceased, without paying any heed to an apparent danger, allowed himself to be driven in front of an approaching car.

I think, therefore, the appeal should be dismissed.

IRVING, J.A.: The defendant's cross-appeal I would dismiss. In my opinion, the evidence will support the jury's findings.

We must, therefore, deal with the plaintiff's appeal on the findings of the jury, and on the facts not disputed or admitted. The defendant cannot rely on facts which were disputed in evidence, and which were not found by the jury. On the findings I would allow this appeal and enter judgment for the plaintiff.

IRVING, J.A.

I cannot agree that the verdict of the jury amounts to a finding that the plaintiff was guilty of contributory negligence. Taken alone, the answer to question 3 might bear that construction. The use of the word "extraordinary" in the 3rd answer, contrasted with "ordinary" in the 8th, shews that the jury used the word "negligence" in a different sense.

Nor was the plaintiff so identified with the driver as to make the driver's negligence his negligence. In *Pike* v. *London General Omnibus Co.* (1891), 8 T.L.R. 164, before Lord Coleridge, L.C.J. and Mr. Justice A. L. Smith, the plaintiff was being driven by Kettle, as a friend, not as a servant of Kettle's master. He took no part in the driving. An omnibus ran against the vehicle, and the plaintiff was hurt. It was argued that a person sitting by the driver was responsible for his careless driving, so as to preclude him from recovering damages. The jury found that the company was guilty of negligence, and that Kettle was guilty of negligence in driving

too rapidly, but that there was no negligence on the part of the plaintiff. The Court overruled this contention.

See also *The "Bernina"* (1888), 13 App. Cas. 1, overruling *Thorogood* v. *Bryan* (1849), 8 C.B. 115; 18 L.J., C.P. 336.

In the case before us the jury have not found that the plaintiff was talking to the driver, or doing anything to distract his attention. In fact, they have acquitted him of any negligence, except that of not taking "extraordinary" precautions to see the road was clear.

The jury found that the negligence which was the proximate cause of the accident, was the excessive speed of the car as a consequence of its defective brakes; that had there been proper brakes on the car, the motorman would have been able to stop the car after he saw the position of the deceased on the track, and before he was struck. Now, although the emergency calling for the use of the brakes did not arise until the deceased was on the track, the failure to furnish a car equipped so as to stop when approaching a crossing, although such an omission on the part of the Company occurred prior in point of time to the deceased's alleged negligence, was the negligence which caused the accident, the proximate cause of the accident. I think that is the effect of the 1st, 5th, 6th, 9th and 10th findings of the jury. What is the proximate cause, is a question of fact for the jury.

IRVING, J.A.

In cases where it is suggested both parties are guilty of neglect of duty, and that if either had exercised reasonable care and skill, the collision would have been avoided, if the negligent acts ascribed to the deceased and defendant, respectively, are practically simultaneous, the received and usual direction to the jury is to say that if the plaintiff could, by the exercise of such care and skill as he was bound to exercise, have avoided the consequence of the defendant's negligence, he cannot recover: *per* Lord Blackburn in *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1155 at p. 1207. But assuming that the jury meant to find the deceased guilty of negligence in its legal sense, then, although the deceased's conduct—even negligent conduct—may have formed a material part of the cause of the accident, he can nevertheless recover,

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if it be shewn that the defendant's servants could by the exercise of ordinary care and caution on their part, have avoided the consequence of the deceased's negligent conduct. This is the doctrine of *Davies* v. *Mann* (1842), 10 M. & W. 546; re-stated in *Grand Trunk Railway* v. *McAlpine* (1913), A.C. 838.

The answer of the jury to the 4th question shews in effect that the deceased could only have avoided the defendant's negligence in not providing a properly equipped car, by resorting to extraordinary precautions—possibly they had in mind the difficulty that arose from the Company's station shutting out a view of the track, or possibly they may have thought that the deceased, not being in charge of the horses, was not required to look out for trains. So, in whatever way we construe the 3rd answer, the 10th finding, to which some effect must be given, would disentitle the defendant to hold the judgment in its favour.

IRVING, J.A.

I would allow the appeal.

MARTIN, J.A.: After reading all the evidence, in addition to what we were referred to, I am of the opinion that the jury meant what they said in drawing the distinction between the "ordinary precautions" omitted to be taken by the driver of the waggon and the "extraordinary precautions" omitted by the deceased, in each case "to see [the] road was clear."

There is abundant evidence to shew that the space between the station (shelter) and the orchard was, as the jury found, insufficient to properly observe the approach of the car, and the presence of this building doubtless also tended to prevent the sound of the car, or its whistle, being heard, as did also the trees of the orchard. Taking, as must be done, the answers to questions 3 and 4 together, they absolve the deceased from contributory negligence. He can only be regarded as a passenger, being given a ride on the waggon as a matter of kindness, because the driver, Hall, had sole control over it, with which the deceased very properly made no attempt to interfere. Hall had been working on the job for about a month, and knew the road and the railway track, having been across it six or seven times, but there is no evidence that the deceased had ever

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driven over it, and it is only a matter of inference, though a probable one, that he had been across the track, which is three-quarters of a mile from his office; and he is said by one witness, Hayes, to have been working there only four or five days, though a longer period of two weeks is mentioned, but the point is not cleared up.

With respect to the duty of a passenger, the case of *Brickell* v. *New York Central & H. R. R. Co.* (1890), 24 N.E. 449, was relied upon, but, in the first place, the facts are not the same, as the deceased here undoubtedly had not the same knowledge of the road and environment as the driver, and the point of view of a driver and a pedestrian often is essentially different; and, in the next place, the rule is extended beyond that which is recognized by our Courts in the cases cited and accurately stated in Halsbury's Laws of England, Vol. 21, p. 415, thus:

> "If the vehicle is a hired vehicle, the person to whom it is hired is only liable for the negligence of the driver in so far as he is in a position to control the actions of the driver. A mere passenger, even though sitting by the side of the driver, and, therefore, physically in a position to control his actions, is not liable for the driver's negligence."

The cases cited are *M'Laughlin* v. *Pryor* (1842), 4 Man. & G. 48; *Wheatley* v. *Patrick* (1837), 2. M. & W. 650; and *Pike* v. *London General Omnibus Company* (1891), 8 T.L.R. 164. It follows, therefore, that as negligence has been found the appeal should be allowed on this ground alone, so I express no opinion on the other questions raised; that one relating to the dismissal of an action without a verdict where contributory negligence is pleaded really disappeared during the argument when the respondent's counsel applied for and obtained an amendment to cross-appeal, which appeal should also be dismissed.

GALLIHER, J.A.: The circumstances of this case did not relieve the deceased from taking ordinary precautions in approaching the crossing. The jury have found the defendant Company guilty of negligence, in that it was running at an excessive rate of speed, and have also found the deceased guilty of contributory negligence. It is not quite clear why the jury in finding contributory negligence should have stated that the

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deceased should have used "extraordinary care." Such was not necessary, but I think it cannot be disputed that the deceased used no care whatever in approaching the crossing; but, owing to the view I take on another ground, it becomes unnecessary to decide what, if any, effect their finding in this form should have on the judgment.

The point most strenuously argued before us by Mr. *Macdonell,* counsel for the plaintiff, was that admitting negligence, and contributory negligence, the fact that the brake equipment of the car was defective, as found by the jury, was ultimate negligence on the part of the Company, which entitled the plaintiff in law to recover. We were referred to *Brenner* v. *Toronto Street R. W. Co.* (1907), 13 O.L.R. 423, where Anglin, J. dealt very exhaustively with the question of ultimate negligence, and in whose judgment Mulock, C.J. and Clute, J. concurred. That case went to the Court of Appeal for Ontario, 15 O.L.R. 195, and to the Supreme Court of Canada (1908), 40 S.C.R. 540, on the ground of misdirection, but in neither of these Courts was the question of ultimate negligence dealt with, and, as I read the case in those Courts, the question is open to us here.

In the present case, what is claimed to be ultimate negligence was the defective brake equipment. If the view expressed by the Divisional Court in the *Brenner* case is good law, then this case comes within it.

GALLIHER, J.A.

The cases of *Radley* v. *London and North Western Railway Co.* (1876), 1 App. Cas. 754; *Davies* v. *Mann* (1842), 10 M. & W. 546; and *Tuff* v. *Warman* (1858), 5 C.B.N.S. 573, while they are all in accord with the principle that a plaintiff, though negligent, where he can shew that the ultimate negligence of the defendant was the proximate cause of the accident, is entitled to recover, do not assist us very much in determining in this case whether the defective brakes bring it within the class of ultimate and not original negligence. The negligence, in so far as the existence of the defective brakes is concerned, was anterior to and continued right up to the time of collision. The motorman did all he could as soon as he discovered the danger to avoid the accident, but (owing, as the jury have

found, to the defective condition of the brakes) without avail.

Does what is in the first instance original negligence become ultimate negligence which can be said to be the proximate cause of the accident when the Company has, by that very negligence, tied the hands of its employees, so to speak, and rendered useless any physical act on their part, performed subsequent to the act of negligence of the plaintiff which otherwise might have avoided the accident?

The case of *Scott* v. *Dublin and Wicklow Railway Co.* (1861), 11 Ir. C. L. R. 377, referred to by Anglin, J. in *Brenner* v. *Toronto R. W. Co., supra,* would seem to bear out that view. The matter was so thoroughly reasoned out in the Divisional Court in the *Brenner* case (supported by *Scott* v. *Dublin and Wicklow Railway Co.*) that I need not do more than refer to those cases.

There is an additional feature, however, which suggests itself to my mind in the case before us which is not present in the *Brenner* case, and which makes this case stronger, *viz.*: that the negligence in having defective brakes became effective at the crucial moment, and at a time subsequent to the deceased's negligence, so as to be really the proximate cause of the accident.

I would allow the appeal.

GALLIHER, J.A.

McPHILLIPS, J.A.: In this case, upon the answers of the jury to questions submitted to them, and upon a motion reserved to the defendant to move for judgment at the close of the plaintiff's case, MURPHY, J. directed judgment to be entered for the defendant, dismissing the action with costs; and from that judgment the plaintiff now appeals to this Court.

The questions as submitted to the jury, and the answers thereto, are as follows: [Already set out.]

MCPHILLIPS, J.A.

I may say that I have had the advantage of reading the judgment just delivered by my brother the Chief Justice, and I may say that I entirely agree with it, adding some further reasons which, in my opinion, are salient reasons upon which to support the judgment of the learned trial judge.

In my opinion, both upon the answers of the jury, and upon

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the whole evidence, judgment has been rightly entered for the defendant.

It has been contended that where a question of contributory negligence arises there never can be a nonsuit or dismissal of the action without a verdict. This contention had consideration by the Appellate Division of the Ontario Supreme Court in *Cooper* v. *London Street R. Co.* (1913), 9 D.L.R. 368: see the judgment of Meredith, J.A. at p. 369.

It is contended by counsel for the appellant that the answers of the jury to questions 3 and 4 do not, taken together, amount to a finding of contributory negligence, that is, that 4 is explanatory of 3, and that the resultant effect is—no finding of contributory negligence. In my opinion, such is not the effect, and the evidence would not support this, and we may look at the evidence. The jury plainly intended to indicate that a person about to pass over the railway track under the circumstances which the deceased did, did not take the precautions which one is called upon to take. What should these precautions have been? In the case last cited, Meredith, J. dealt with a somewhat analogous situation, although it is true that was a case of a double track, and the passenger went around the rear of the car from which she had just alighted. At p. 371 he said:

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"Accidents such as this are likely to happen unless, perhaps, considerably more care than the ordinary person takes is taken. Not only should the passenger be more than ordinarily careful in crossing the other track after alighting from a car and passing close behind it; but also conductors as well as motormen should be more than usually alert to prevent accidents so happening."

Can it not be well said that the jury, when they used the words "by not taking extraordinary precautions to see the road was clear," meant to accentuate their view that upon all the facts of the case, and the surrounding circumstances, the deceased did not do that which he ought to have done, and if he had done that which he ought to have done, the accident would not have occurred? It would seem to me that, if it is necessary to give consideration to the answers of the jury at all, that this is the only conclusion to which one can come. If the jury did not mean this, and did not in effect find contributory

negligence, my opinion is that there is no reasonable evidence upon the whole case upon which the jury could find in the plaintiff's favour. Therefore, it follows in my opinion that the action has been rightly dismissed upon the whole case.

A most interesting case in the light of the facts of this case is *Long* v. *Toronto R. Co.* (1913), 10 D.L.R. 300, which is also a case in the Appellate Division of the Ontario Supreme Court. It is interesting to read at p. 301, the questions and answers that were under consideration there, and notwithstanding which, judgment went for the railway company; and see the judgment of the Court at p. 302. It will be observed that Mulock, C.J. in dealing with the answers to questions 3 and 4, said:

"Their evident meaning is, that the deceased failed to exercise reasonable care by not looking for an approaching car, and by negligently stepping upon the track and endeavouring to cross in front of it, thereby causing, or contributing to, the accident."

In the case before us the jury, in answering questions 3 and 4 as we have them, unquestionably meant that there was an absence of reasonable care, and that the deceased was guilty of contributory negligence in not looking for an approaching car, as the admitted facts are that the deceased did not, nor did the driver of the vehicle, look for an approaching car, but were talking to each other, looking down at the heels of the horses—looking right at the horses.

There is the further and still more recent Ontario case of *Herron* v. *Toronto R. Co.* (1913), 11 D.L.R. 697. The determination of the Court upon the facts of the case, which was one for damages for personal injuries sustained in a collision between one of the defendants' electric street cars and a vehicle in which the plaintiff was driving, was, as set forth at p. 697, that—

"1. In a personal injury action arising from a street car colliding with a rig where the findings of the jury were in effect that the negligence of the defendants' motorman and that of the plaintiff were concurrent and simultaneous negligence of similar character by both parties and that there was not any new negligent act by the defendant in addition to its first act of negligence, verdict was properly for the defendant and will not in that respect be disturbed. 2. In an action of negligence, a plaintiff, whose want of care was a direct and effective contributory cause of the injury com-

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plained of, cannot recover, however clearly it may be established that, but for the defendants' earlier or concurrent negligence, the mishap, in which the injury was received, would not have occurred. 3. In a personal injury action arising from a street car colliding with a rig, where both the plaintiff and the defendants' motorman were guilty of negligence, each in not seeing the danger and avoiding the injury of a collision, if it appears that when the motorman first saw the impending danger it was too late to prevent the injury, the plaintiff's action fails."

In the present case the jury find as against the defendant excessive speed, insufficient space between the orchard and the station, and that the motorman could have stopped the car if the brake had been in an effective condition, all existent before the deceased recklessly places himself in the way of the car. There was not here what might be said to be any new negligence; it was all existent before the deceased placed himself in front of the car. Taking these findings of the jury, they become resolved finally to this: the deceased recklessly placed himself without looking in front of a rapidly approaching car, and was killed, it having been impossible through defective brakes, the jury say, for the car to be then stopped in time to have prevented the accident. In by opinion, upon the evidence, whether it was because of defective brakes or any of the acts of negligence found against the defendant, none of them were acts of negligence arising after the act of contributory negligence of the deceased, and cannot be held to be acts of negligence which, notwithstanding the later negligence of the deceased, warrant judgment going for the plaintiff: see the remarks of Hodgins, J.A. in *Herron* v. *Toronto R. Co., supra,* at pp. 707-08.

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The jury have negatived any new negligence act of the defendant—as in the *Herron* case. It is plain that the motorman, after he saw the vehicle, could not have stopped the car—if it was the ineffective brake which prevented him (although upon the whole evidence my own view is it was then an impossibility under any known mechanism); therefore, as nothing could be then done by the motorman to remedy the ineffective brake, the want of care of the deceased was the direct and effective contributory cause of the accident resulting in his death, and the plaintiff, the administrator of the estate

of the deceased, cannot recover—adopting the language of Mr. Justice Duff:

"however clearly it may be established that but for the defendants' earlier or concurrent negligence, this mishap, in which the injury was received, would not have occurred."

It follows, in my opinion, that the judgment of the learned trial judge must be affirmed, and the appeal dismissed.

Appeal allowed,
Macdonald, C.J.A., and McPhillips, J.A. dissenting.

Solicitors for appellant: *Killam & Beck.*
Solicitors for respondent: *McPhillips & Wood.*

REX v. McNAMARA. (NO. 2).

Criminal law—Procedure—Change in statute governing selection of jury—Jury summoned before change—Trial after—Extradition—Trial on different charge—Want of evidence of extradition—Stated case—R.S.B.C. 1911, Cap. 121—B.C. Stats. 1913, Cap. 34, Sec. 70.

The jury for an Assize was selected and summoned in the month of June, 1913; this trial commenced on the 14th of July following. The statute law governing the selection and summoning of jurymen was amended by a statute which came into force on the 1st of July of the same year.

Held (GALLIHER, J.A. *dubitante*), upon a case stated, that the objection to the jury panel was properly overruled by the trial judge.

Four questions were grounded upon the suggestion that the prisoner was indicted and tried on a charge other than the charge or charges on which he was said to have been extradited:—

Held, that as there was no evidence, except vague allusions, to shew that

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the prisoner was brought to trial after extradition from a foreign country, no warrant having been put in evidence, and even assuming him to have been extradited, as there was no evidence that he was tried on a charge other than that upon which he was extradited, there is nothing on the material submitted to shew that a mistake in law was made in the Court below.

APPEAL by way of case stated from the judgment of MORRISON, J. and the verdict of a jury on a trial heard at the spring Assizes at New Westminster, on the 14th of July, 1913, and following days, concluding on July the 24th. The accused was indicted for breaking into a building of one T. J. Trapp in New Westminster, being within the curtilage of the dwelling-house of the said T. J. Trapp and by him occupied, there being no communication between the building and the dwelling-house, and stealing from said building an automobile. The accused was convicted and the questions reserved by the trial judge were as follows:

"1. Was I right in overruling the objection taken by counsel for the accused, that John McNamara could not be tried on the indictment by the petit jury summoned for the New Westminster Spring Assizes, 1913, for the 16th of June, 1913?

"The evidence of the sheriff shewed that the jury were, prior to July 1st, 1913, summoned under Cap. 121, R.S.B.C. 1911, and no steps were taken under the new Act, which came into force on the 1st of July, 1913, this case having been called on July 14th, 1913.

"2. Inasmuch as I was of opinion that the building of Thomas John Trapp, from which the automobile was alleged to have been stolen, mentioned in the indictment, was not within the curtilage of the dwelling-house of the said Thomas John Trapp, was I right in instructing the jury that the accused could be convicted of any offence included in the charge mentioned in the indictment?

Statement

"3. Was it open to the jury to bring in a verdict of theft of the automobile mentioned in the indictment under the circumstances disclosed in the proceedings?

"4. Did I exercise my discretion properly, or did I mislead the jury when I instructed them or gave them the impression in my instructions that the automobile referred to by Henry J. Keen, one of the witnesses for the defence, might have been the automobile alleged to have been used by the prisoner.

"5. Did I exercise my discretion properly when I decided that the case herein should go to the jury?

"6. Was I right in deciding that the garage of Thomas John Trapp was not within the curtilage of the dwelling-house of the said Thomas John Trapp mentioned in the indictment?

"7. Upon the above grounds, or any of them, should the prisoner be discharged, or, in the alternative, upon the above grounds, or any of them, should there be a new trial, or should the sentence be reduced?"

The appeal was argued at Victoria, on the 3rd of February, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and McPHILLIPS, JJ.A.

Argument

A. S. Johnston, for appellant: On question one, the jury could not act when the new Act was in force, they having been summoned under the old Act (R.S.B.C. 1911, Cap. 121), which was in force until the 1st of July, 1913, when chapter 34 of the Statutes of 1913, governing the summoning of juries, came into force. The case was not called until the 14th of July: see *Morgan* v. *Thorn* (1840), 10 L.J., Ex. 125.

On question four there is a misstatement of the facts by the judge: see *Rex* v. *Thomas Mason* (1911), 28 T.L.R. 120.

A. H. MacNeill, K.C. (whose argument was confined by the Court to the first question), for the Crown: The question is not open after the verdict has been given: see sections 1010 and 1011 of the Criminal Code. As to section 70 of Cap. 34, B.C. Stats. 1913, it was to cover a case of this nature that the further provision was added at the end of the section.

Johnston, in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: Seven questions were submitted, for the opinion of this Court, by MORRISON, J., before whom, sitting with a jury, the prisoner was convicted and sentenced.

The first question reserved was in relation to the jury. The statute law governing the selection and summoning of jurymen had been amended by a statute which came into force on the 1st of July, 1913, after the opening day of the Assizes, at which the prisoner was tried, but before his trial commenced. I concur in the conclusion arrived at by the other members of the Court, that the objection to the jury panel was properly overruled by the learned trial judge. I express no opinion, as it is unnecessary for me to do so, as to whether or not objection was taken in the proper way.

Questions 2, 3, 5 and 6 are all grounded upon the suggestion of his counsel that the prisoner was indicted and

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tried on a charge other than the charge or charges on which he was said to have been extradited. The difficulty with which he is faced is that there is nothing in the case except vague allusions to shew that the prisoner was brought to trial after extradition from a foreign country. The warrant was not put in evidence by the defence as it should have been if it were intended to rely upon a variation between it and the indictment. Therefore, even if, as was urged by his counsel, Mr. *Johnston,* it were well understood at the trial that the prisoner had been so extradited, assuming that that would help him here, there is not the slightest evidence that the Court was in any way made cognizant of a variation of that kind, nor does it appear in the case before us that the prisoner, assuming him to have been so extradited, was tried on a charge other than that upon which he was extradited. This Court as a Court of Criminal Appeal is limited in its jurisdiction to a review of questions of law. We cannot quash a conviction, or order a new trial, unless it appear on the material submitted that a mistake in law was made in the Court below. In the absence of evidence such as I have just adverted to, these questions are meaningless.

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The fourth question relates to alleged misdirection by the learned judge in his charge to the jury. I am unable to find misdirection. That part of the charge complained of was not, in my opinion, calculated to mislead the jury. The learned judge reviewed the evidence in question and commented upon it, but took care to leave the finding of the facts involved to the jury, whose province it is to find the facts. It was his right, indeed his duty, to review the evidence and to indicate, if he saw fit, the impressions he derived therefrom. This he did clearly and without, in my opinion, saying anything which tended to lead the jury into error either in law or fact.

The seventh question is without point, and should not have been submitted to us. It raises no question of law, as admittedly the sentence was within the statute. We have no power to interfere with discretion in such matters.

The result is that all the questions are answered in favour of the Crown and against the prisoner.

IRVING and MARTIN, JJ.A. concurred with MACDONALD, C.J.A.

GALLIHER, J.A.: I entirely agree with my learned brothers on all the questions, excepting possibly the first. I have some doubt on that, but, as I understand all the other members of the Court are clear on it, I will content myself by saying that, while I have some doubt, it is not sufficient to cause me to dissent from the other members of the Court.

McPHILLIPS, J.A.: In my opinion, the accused was tried by a Court properly constituted, and I do not find any error upon the part of the trial judge, and the questions submitted to this Court are, in my opinion, correctly answered in favour of the Crown and against the accused. No error or miscarriage of justice took place.

Conviction affirmed.

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Criminal law—Murder—Stated case—Postponement of trial—Application for—Absence of witnesses—Question of law—Cross-examination of prisoner—Questions as to former offences—Admissibility of prisoner's evidence at inquest—Cross-examination on, in absence of depositions—Criminal Code, Sec. 1014.

The exercise of judicial discretion by a judge in granting or refusing the postponement of a trial is not a "question of law" upon which a case may be reserved under section 1014 of the Criminal Code (MARTIN and McPHILLIPS, JJ.A. dissenting).

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On an application to grant a postponement of a trial on the ground of absence of witnesses, the Court must be satisfied by affidavit, firstly, that the persons are material witnesses, which must be sworn to positively and not merely on belief; secondly, that there has been no neglect in omitting to apply to them and endeavouring to procure their attendance; and, thirdly, that there is reasonable expectation of counsel being able to procure their attendance at the future date, if granted.

Rex v. *D'Eon* (1764), 1 W. Bl. 510; 3 Burr. 1513, applied.

Counsel for the Crown may ask the prisoner who testifies on his own behalf if he had been charged with or committed certain offences in the past, but unless there is evidence to warrant the imputation being made, counsel should not make it by question.

A prisoner charged with murder, who testifies on his own behalf may be cross-examined on his alleged testimony at the inquest in the absence of the original depositions.

CRIMINAL APPEAL by way of case stated by MURPHY, J. in an indictment for murder tried by him at the Clinton fall (1913) Assizes. In the case stated for the opinion of the Court, the learned judge said:

"The accused was charged with the murder of one Edward Kelly, on or about the 29th of July, 1913, and committed for trial on the 5th of August, 1913. At the fall Assizes at Clinton on the 13th of October, 1913, the grand jury returned a true bill, and the accused was placed upon his trial before me.

"Being undefended and without means, I requested Mr. *A. D. Macintyre,* who was then present, to act as counsel for the accused, which he accordingly did.

Statement

"Counsel for the Crown thereupon informed Mr. *Macintyre* that he proposed giving in evidence, on behalf of the Crown, the testimony of Ray Olson and Joseph Sarvent, who had not been examined at the preliminary hearing, and whose evidence the Provincial constable alleged had been subsequently obtained, and handed to Mr. *Macintyre* a copy of a letter from Constable MacInnes containing a resume of the evidence which would probably be given by these witnesses.

"Mr. *Macintyre* thereupon asked for a traverse until the following Assizes upon the grounds that the memorandum was evidence directly against the accused and much stronger than any given at the preliminary hearing; that these men were in the neighbourhood at the time the alleged offence was com-

mitted; that there was no reason why their evidence might not have been given at the preliminary hearing, and, being offered now, it was impossible for the accused to prepare to meet their testimony by inquiring into their antecedents and the reason their evidence had not been given at the preliminary hearing and was now being given; that the accused has no means and was unable in any case to have prepared his defence; that he was a stranger in the Province and had been incarcerated in New Westminster since the preliminary hearing; that while in New Westminster he had sent word to Vancouver to obtain the services of a lawyer, but apparently the message had miscarried, and that from the very nature of the evidence proposed to be given, it was clear that he ought to have time to prepare to meet it.

"I refused the traverse until the spring Assizes on account of the Crown witnesses being there, the expense involved, and the representation of Crown counsel that it was impossible to ensure the attendance of the Crown witnesses if they once dispersed, but intimated to counsel for the defence that the case might go on to the Vernon Assizes, which would be held in about two weeks.

"Counsel for the defence, after considering the matter, pointed out that the Kamloops and Vernon Assizes would follow the Cariboo Assizes, and that it would be impossible for him as counsel to give any attention to the preparation of the defence of the accused, and intimated that unless the adjournment were granted until the spring Assizes, the trial might as well go on, and the trial accordingly proceeded.

Statement

"During the course of the trial, Mr. *Macintyre* claimed that the memorandum given to him of the evidence to be given by Ray Olson and Joseph Sarvent did not at all disclose the evidence as actually given by them, and intimated that he would ask for a reserved case on the ground that without the evidence of these two witnesses it would be impossible to convict the accused, and that, in fact, the case against the accused depended upon their evidence.

"The jury, after being absent for upwards of three hours, returned a verdict of guilty, and I accordingly sentenced the accused to be hanged.

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"On the 23rd of December, 1913, Mr. *Macintyre,* for the accused, applied to me for a reserved case and also for a reprieve of the accused for one month. I accordingly granted a reprieve of the case until the 30th of January, 1914.

"In his cross-examination, counsel for the Crown asked the accused, who took the stand on his own behalf, the following questions:

"'Do you know a bartender named Harry James? Yes, sir.

"'Do you remember trying to hold a saloon up where he was at in Seattle, a saloon belonging to Jamison & McFarland? No, sir.

"'He laid you out with a bottle? No, sir.

"'Don't you remember that? No, sir; that was not me, there ain't a man in the world can say so.

"'Do you remember being in Taft? I never was in Taft in my life.

"'Now be careful. Just think a moment. No, sir, never.

"'I cannot from memory—I forget the exact year, but this will recall it to mind: One spring in Taft, a few years ago, when the railroad construction was in full bloom, and the snow went off in the spring, fourteen or fifteen corpses were uncovered, men that had been killed in the winter, and no one knew about it. Now, weren't you one of the men that were indicted for killing those men? No, sir.

"'Weren't you indicted and tried and acquitted? No, sir; there is no man can say so.

"'*MacIntyre*: In the case of a prisoner, the moment he goes into the box, it is well known he puts himself at the mercy of the Crown; certainly the Crown counsel ought to have some instructions; that man has simply swore he was never indicted.

"'The Court: I don't think I can stop it.

"'Now, do you remember giving evidence at the inquest? Yes, sir.

Statement

"'Of Kelly? Yes, sir.

"'*MacIntyre*: Any depositions here?

"'*Moore*: I haven't seen them.

"'*MacIntyre*: My learned friend cannot go into it now.

"'The Court: He can cross-examine on it, I don't know about legal rebuttal evidence, but he can cross-examine on it.

"'You recall giving evidence at the inquest of Kelly's body at Freeport? What did you say?

"'You remember giving evidence at the inquest of Kelly? I gave some.

"'The Court: Were you under arrest at the time? Yes, sir.

"'*Moore*: Arrested on suspicion at that time. And the coroner told you, being under arrest, he stated you were not obliged to testify, if you did not want to? No, sir.

"'You swear to that? They asked me there if I was going to say anything—asked me about the card game, that was all.

"'You say that the coroner did not give you that warning, you need not say anything unless you felt like it? He might have; I don't know.

"'You wouldn't swear he didn't? No.

"'And then you went on to say that you went to bed at ten or eleven o'clock—between ten and eleven o'clock on the night of the shooting, and did not wake up until next morning; isn't that a fact? No, sir.

"'Isn't that a fact? I told them—they asked me if I could guess the time that me and Kelly had the trouble; I told them I thought it was between ten and eleven o'clock.

"'And you went to bed right after that, and did not have a drink all that night, didn't you say that? and did not have a drink all that night, didn't you say that? No, sir; I went outside—

"'You have told us, now; I am asking you as to your evidence then. Didn't you also tell the same story to the constable when he came there —in other words, when he first came to Freeport? I told him that?'

"The questions reserved for the opinion of the Court are:

"1. Was the accused entitled to a traverse of the trial to the spring Assizes, his counsel claiming to have been taken by surprise by the introduction of the evidence of Olson and Sarvent, so that he might have a better opportunity to obtain evidence in answer to that evidence?

Statement

"2. Was I right in permitting the counsel for the Crown to ask the accused if he had been charged with or committed the offences referred to in the above questions?

"3. Was I right in permitting the accused to be cross-examined on his alleged testimony at the inquest in the absence of the original depositions?"

The appeal was argued at Victoria on the 22nd of January, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

A. D. Macintyre, for appellant: It is submitted that the facts shew the whole surroundings of the case justified the judge in traversing the case until the next Assize. The question is: Was there a substantial wrong or injustice by bringing in entirely new evidence that was not given at the preliminary hearing? It is partly a question of law and fact as to whether the prisoner, from the nature of the evidence, should have time to prepare to meet it: see *Reg.* v. *Flannagan and Higgins* (1884), 15 Cox, C.C. 403; Roscoe's Criminal Evidence, 13th Ed., p. 61.

Argument

H. W. R. Moore, for the Crown, referred to *Rex* v. *D'Aoust* (1902), 5 Can. Cr. Cas. 407; Halsbury's Laws of England, Vol. 9, p. 358, par. 694; *Reg.* v. *Johnson* (1847), 2 Car. & K. 354; *Reg.* v. *William Slavin* (1866), 17 U.C.C.P. 205 at p. 211;

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Reg. v. *Bertrand* (1867), 10 Cox, C.C. 618; *Allen* v. *Rex* (1911), 44 S.C.R. 331.

Macintyre, in reply.

Cur. adv. vult.

27th January, 1914.

MACDONALD, C.J.A. concurred in the reasons for judgment of IRVING, J.A.

IRVING, J.A.: The questions involved come before us on a case stated by MURPHY, J., before whom, sitting at Clinton, the accused was brought for trial on the 16th of October, 1913, upon a charge of murder alleged to have been committed at Burns Lake, on the Grand Trunk Pacific Railway line of construction, on the 29th of July, 1913. An inquest was held upon the body of the deceased, at which the accused attended and gave evidence. Afterwards he was brought before a magistrate and committed for trial. He, in the meantime, was in custody in the Provincial gaol at New Westminster.

At Clinton, on the opening of the Assizes, Mr. *Macintyre,* at the request of the learned judge, undertook to act as prisoner's counsel. He was then informed by counsel for the Crown of two things: 1st, that the depositions taken at the inquest had not been received from the coroner; and, 2nd, that the Crown intended to give in evidence the testimony of the two men Ray Olson and Joseph Sarvent, who had not been examined at the preliminary hearing before the magistrate. At the same time a copy of a letter written by constable MacInnes—the constable stationed in the vicinity of Burns Lake—containing a resume of the evidence which would probably be given by the two men, was handed to Mr. *Macintyre.*

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Mr. *Macintyre* thereupon applied to the judge for a postponement of the trial, and the first question submitted to us is, was the accused entitled to a traverse of the trial to the spring (*i.e.,* the next) Assizes, which would mean a postponement for some six or seven months? His counsel claimed that he was taken by surprise by the introduction of this new evidence, and he asked that he might be given a better opportunity of obtaining evidence in answer to that which would be given by these two men. The postponement of the trial of a criminal charge

is always a matter of anxiety to a judge—so much can be said in almost every case for and against the motion, whether the application is by the Crown or by the prisoner.

The principles upon which a Court proceeds in putting off a trial were very fully considered in the case of *Rex* v. *D'Eon* (1764), 1 W. Bl. 510; 3 Burr. 151, where an information was filed, *ex officio,* against the defendant for a libel on the French ambassador. In that case it was laid down by Lord Mansfield that no crime is so great, and no proceedings so instantaneous, but that, upon sufficient grounds, the trial may be put off; but to grant a postponement of a trial on the ground of absence of witnesses three conditions are necessary: 1st, the Court must be satisfied that the absent witnesses are material witnesses in the case; 2nd, it must be shewn that the party applying has been guilty of no laches or neglect in omitting to endeavour to procure the attendance of these witnesses; and, 3rd, the Court must be satisfied that there is a reasonable expectation that the witnesses can be procured at the future time to which it is prayed to put off the trial. The application should be made after plea pleaded, and although in an ordinary case an affidavit in common form is sufficient, yet where from the nature of the case, or from the affidavit on the opposite side, the Court has reason to suspect that the application is not made *bona fide,* for the purpose of obtaining material evidence, but merely for delay, the Court will examine particularly into the grounds for the application; and it will require to be satisfied, specially, by affidavit, firstly, that the persons are material witnesses, which must be sworn to positively, and not merely on belief; secondly, that there has been no neglect in omitting to apply to them, and endeavouring to procure their attendance; and, thirdly, that there is a reasonable expectation of counsel being able to procure their attendance at the future date, if granted: 3 Burr. 1514-5. But notwithstanding these requirements,

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"it is the constant practice at the Old Bailey not to put off trials for the absence of witnesses to character only, on account of the facility of making such applications in delay of justice":

Per Lawrence, J. in *Rex* v. *Jones* (1806), 8 East 31 at pp. 34-35.

No affidavit was filed, or sworn in the case now before us.

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We are told that the learned judge dispensed with the making of an affidavit, and agreed to accept the representation of prisoner's counsel. It is to be regretted that there should be any departure from the established practice—established in 1764 (if not before) and continued until this day—on so delicate and important a matter as the postponing of a criminal trial on so grave a charge. We have, however, the representations of the prisoner's counsel set out in the stated case. They are contained in the following extract: [Already set out in statement.]

These representations and statements, if they were embodied in an affidavit, would fall far short of the special affidavit required by the established practice. In particular there is no assertion that the evidence which he hoped to obtain would be available in May, 1914. Again, the foundation of his application is not that he now knows of certain material witnesses, but that he wishes to inquire into the antecedents of Olson and Sarvent.

In the case of *Reg.* v. *Johnson* (1847), 2 Car. & K. 354, this same ground was put forward. There the witnesses who had not been examined at the preliminary examination were to be called in order to shew previous attempts on the part of the accused, who was charged with poisoning, of a kind similar to that charged in the indictment. Alderson, B. said:

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"This appears to me to be an entirely new application. Suppose that the trial was to be postponed, and that the prosecutors were to discover fresh evidence before the next assizes, is it to be again postponed? I cannot think this is a sufficient ground for postponing the trial."

His lordship, nevertheless, consulted with Rolfe, B. (afterwards Lord Cranworth) and ultimately refused the application. This seems to me very weighty authority as to the insufficiency of the grounds put forward by the prisoner's counsel for postponing the trial at all. But although MURPHY, J. was unwilling to postpone the trial till the spring, he intimated that he was willing to allow the case to stand over for about two weeks, that is, until the Vernon Assizes, but this the prisoner's counsel declined, as, owing to his other engagements, "it would be impossible for him to give," in the proposed interval, "any attention to the preparation of the defence."

The case continues: "And he intimated that unless the adjournment were granted until the spring Assizes, the trial might as well go on, and the trial accordingly proceeded."

In these circumstances, I am of opinion that, assuming this is a question of law within the meaning of section 1014 of the Code, it must be answered in the affirmative and against the prisoner.

Before parting with the matter dealt with in the first question, I would like to say that, in my opinion, the question is not one that can or should be reserved under section 1014. Riddell, J. expressed the same view in *Rex* v. *Blythe* (1909), 19 O.L.R. 386 at p. 389, and although an appeal was taken from his decision, this point was not questioned by the prisoner's counsel.

In *Rex* v. *Lewis* (1909), 78 L.J., K.B. 722, it was held that the discretion of a judge in discharging a jury was not a question of law for the Court of Appeal to deal with.

In *Rex* v. *Hughes* (1910), 22 O.L.R. 344; 17 Can. Cr. Cas. 450, the indictment contained two counts. According to the report of the proceedings at the trial, no request was made for separate trials, but it was stated in argument that such a request had been made. Maclaren, J.A. at p. 347, said:

"Assuming that the request was made, it was, under section 857, a matter for the discretion of the trial judge. We have no right to review that discretion, or to substitute our own for it. Appeals to this Court are limited to questions of law."

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Meredith, J.A. at pp. 348-9, said:

"[It is] a question of procedure rather than of law."

He then in the result adds:

"If the question . . . is not one of law, there was no power to reserve it."

The other three judges concurred.

It is a matter of procedure, and rests largely in the discretion of the trial judge. It was not matter (under the old practice) that would appear on the return to a writ of error, nor would it have been dealt with by the Court of Crown Cases Reserved, which Court had power under 11 & 12 Vict., Cap. 78, to consider "any question of law." Sir James Fitzjames Stephen, in his Digest of the Law of Criminal Procedure, (1883), says at p. 199:

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"Such questions may not relate to irregularities of practice which may constitute a mistrial."

There is high authority (Abbott, C.J. in delivering the opinion of the judges in *The Queen's Case* (1820), 2. Br. & B. 284 at p. 315) for saying that

"Nice and subtle distinctions are avoided in our Courts as much as possible, especially in matters of practice, on account of the delay, confusion, and uncertainty, to which such distinctions naturally lead."

In disposing of matters arising at a trial a very great deal is, of necessity, committed to the discretion of the trial judge, and Courts of Appeal are very loath to interfere with the exercise of such discretion. In *Rex* v. *Crippen* (1911), 1 K.B. 149 at p. 157; 5 Cr. App. R. 255 at p. 266, there is a reference to the Court of Appeal interfering with the discretion of the trial judge which supports the above statement. It is to be noted that under section 890 (*c*) the statute has made a determination of the judge as to allowing an amendment a question of law which may be reviewed.

In connection with the statement of the learned trial judge that it was in the course of the trial that the prisoner's counsel intimated that he would ask for a reserved case, it is to be observed that the application and refusal for a postponement of the trial must be determined (if at all) upon the material presented to the Court at the time of the application, and not by what subsequently appears in the course of the trial. I have, therefore, avoided dealing with much which was pressed upon us during the argument.

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The other two questions can be dealt with more shortly. The second question is:

"Was I right in permitting the counsel for the Crown to ask the accused if he had been charged with or committed the offences referred to in the above questions."

In cross-examination (Phipson, 3rd Ed., 451),

"the witness may be asked not only as to facts in issue, or directly relevant thereto, but all questions tending (1) to test his means of knowledge, opportunities of observation, reasons for recollection and belief, and powers of memory, perception and judgment, or (2) to expose the errors, omissions, contradictions and improbabilities in his testimony; or (3) to impeach his credit by attacking his character, antecedents, associations, and mode of life; and in particular by eliciting (*a*) that he has made previous statements inconsistent with his present testimony; or (*b*) that he

is biased or partial in relation to the parties to the cause; or (*c*) that he has been convicted of any criminal offence."

In *Rex* v. *D'Aoust* (1902), 3 O.L.R. 653; 5 Can. Cr. Cas. 407, on a case reserved, where the prisoner, accused of robbery, had been cross-examined as to a number of previous convictions, Armour, C.J.O. pointed out the difference between our Act and the English Act, and at p. 655 said:

"Nor is there any provision limiting in any way the cross-examination of a person charged with an offence who becomes a witness on his own behalf."

Osler, J.A. at pp. 656-7 said:

"When he [the prisoner] does so, he puts himself forward as a credible person, and except in so far as he may be shielded by some statutory protection, he is in the same situation as any other witness, as regards liability to and extent of cross-examination."

The other three judges, Maclennan, Moss and Garrow, JJ.A. concurred.

Section 12 permits a witness to be questioned as to whether he has been convicted of any felony; and to prove it, if denied, even though the conviction is altogether irrelevant to the matter in issue: *Ward* v. *Sinfield* (1880), 49 L.J., C.P. 696 at p. 697.

The second question should, in my opinion, be answered in the affirmative. I express no opinion as to the propriety of those questions, but I take advantage of the occasion to quote what was said by Lord Mersey in the Titanic investigation:

"According to the practice of the English bar, unless there is evidence to warrant a gross imputation being made, counsel should not make it by question."

It was pressed upon us that this cross-examination prejudiced the prisoner in the eyes of the jury. It may be well to point out that we have to deal with questions of law, and the question of "substantial wrong" does not arise unless and until it is shewn that there was some error in law.

The third question, which is:

"Was I right in permitting the accused to be cross-examined on his alleged testimony at the inquest in the absence of the original depositions?"

must also be answered in the affimative: see section 10 of the Evidence Act. This is a reproduction of 28 & 29 Vict. (Imp.), c. 18, s. 5. Under this section a witness may be asked whether he has said a certain thing or not at the inquest. He has no right to say before answering that he wants to see or

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hear what has been taken down in the depositions. If, however, the matter is carried further, and the document is to be used for the purpose of contradicting him, then it must be produced.

MARTIN, J.A.: Three questions are stated for our consideration, and I answer them thus:

Question 1. In the negative, and to determine it I must first pass upon the contention of the Crown, that it is not open to this Court to review the discretion of the learned trial judge, which is submitted to be absolute, and it is further suggested that his decision in the exercise of his discretion on the facts before him is one of fact, and not one of law, and, therefore, cannot be reserved under section 1014. To clear the ground, I deal with this latter point first, and after mature reflection have reached the conclusion that it cannot be sustained. It is the duty of the trial judge to first find the facts upon which his discretion may be grounded, or, as the Court of King's Bench (appeal side) puts it, unanimously, in *Rex* v. *Fortier* (1903), 7 Can. Cr. Cas. 417 at p. 420:

> "The facts of the case are found by the petit jury (or the judge when he is constituted the trier of the facts), and the questions of law are decided in all cases by the judge."

Having then found the facts, as to which he is on an application of this kind the sole "constituted trier," he proceeds to give a decision thereon, in other words, he exercises his discretion. There is, in my opinion, no distinction in principle between this discretion and any other ruling that a judge has to give upon facts found by himself or by a jury; the application of the judge's mind to facts as found in order to give a ruling thereon, is just as much a question of law, or at least legal practice founded upon facts, in the one case as in the other, because, as Halsbury, L.C. said in *Sharp* v. *Wakefield* (1891), A.C. 173 at p. 179, a

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> "'discretion' means, when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular."

There are undoubtedly cases in which the discretion has been held to be absolute, either upon a statute or *ex necessitate rei*,

but even in those cases the Court appealed to must look to see that there are facts which supply a foundation for the exercise of the discretion, because if such facts do not exist, neither does the right to exercise the discretion, because that right could only be invoked by the occurrence of the facts. This, for example, is recognized in magistrates' cases, in one of which, *Reg.* v. *Wellings* (1878), 47 L.J., M.C. 100; and (8), I should "It is true that there is a rule of this Court that the discretion of magistrates is not to be interfered with, so long as that discretion is based on fitting materials," and applying that expression to the facts, the Court held that "We think he [magistrate] has exercised this power of adjournment unreasonably, and that he ought now at once to proceed with the hearing."

Some examples of absolute discretion are (1) the right of a judge to relax the general rule of evidence, and allow the Crown to give further evidence after the close of the prisoner's case: *Rex* v. *Wong On and Wong Gow* (1904), 10 B.C. 555, also to allow leading questions—*Lauder* v. *Lauder* (1855), 5 Ir. C.L.R. 29 at p. 38, an unanimous decision of the Irish Common Pleas *in banc,* and approved in *Ex parte Bottomley* (1909), 2 K.B. 14 at p. 21, and see also *Ohlsen* v. *Terrero* (1874), 10 Chy. App. 127; and *cf. Rex* v. *Crippen* (1911), 1 K.B. 149, on another point of evidence; (2) the determination of the hostility of a witness, *i.e.,* "in case the witness shall, in the opinion of the judge, prove adverse," because the judge's discretion must be principally, if not wholly, guided by the witness's behaviour and language in the witness box"—*Rice* v. *Howard* (1886), 16 Q.B.D. 681; (3) the granting of a view under section 958 of the Criminal Code; (4) the discharging of the jury after disagreement and postponing the trial "on such terms as justice may require" under section 960 of the Criminal Code, which discretion by subsection (2) it is declared that "it shall not be lawful for any Court to review," differing in this respect from the right to discharge for disobedience and postpone under the preceding section 959, subsection (3); (5) the discharging of the jury without giving a verdict because of the illness or drunkenness of one of them, or otherwise: *Reg.* v. *Charlesworth* (1861), 31 L.J., M.C. 25, citing the highly com-

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mended judgment of Crampton, J. of the Irish Court of Queen's Bench in *Conway and Lynch* v. *Reg.* (1845), 7 Ir. L.R. 149; and *Rex* v. *Lewis* (1909), 78 L.J., K.B. 722; (6) the keeping of the jury together under section 945, subsection (3); (7) the determination of the illness of a witness so as to render him unable to travel: *Reg.* v. *Stephenson* (1862), 31 L.J., M.C. 147; *Reg.* v. *Wellings* (1878), 47 L.J., M.C. 100; and (8), I should think, the admission of the unsworn evidence of children under section 1003 of the Criminal Code and section 16 of the Canada Evidence Act, whereby the matter rests "in the opinion of the Court" or justices, etc., which is the same expression as was held to confer an absolute discretion in my second illustration. I observe that the Court of Appeal in Ontario in *Rex* v. *Armstrong* (1907), 15 O.L.R. 47, did, in fact, review this discretion, exercised by a magistrate, doubtless because no objection was taken, and the decision in *Rice* v. *Howard, supra,* which is particularly applicable to the behaviour of children, was not brought to the attention of the Court.

But in the case at bar, it is a rule of law or at least a matter of judicial practice that we have under consideration, according to *Charlesworth's* case, *supra,* at p. 40, and also in *Lewis's* case, *supra,* it is said, inferentially, at least, by the Court of Criminal Appeal, to be one of law, though the Court could not review the discretion there exercised, as it had been held to be an absolute one depending upon necessity, and, therefore, no legal objection could be taken to it.

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I have given some examples of discretions that will not be reviewed, but it is not difficult to instance some everyday ones which will be, *viz.*: (1) the admission of dying declarations; (2) of confessions; (3) of statements made by females in rape and kindred offences; and (4) amendments, as provided by section 890, subsection (3) of the Criminal Code, expressly giving an appeal. The first three of these have been reviewed frequently by this Court, as a matter of course, though in each of them the trial judge has first had to find the facts and then exercise his discretion in the form of a decision to admit or reject the evidence before it could go to the jury, or be con-

sidered by himself in discharging equivalent functions; and it is obvious that if the matter were determined finally by the way in which he found the facts, then there was nothing more in it than a pure question of fact which this Court admittedly could not have reviewed. *Reg.* v. *Woods* (1897), 5 B.C. 585; and *Rex* v. *Louie* (1903), 10 B.C. 1 (and *cf. Rex* v. *Jimmy Spuzzum* (1906), 12 B.C. 291) are illustrations of the first; *Rex* v. *Lai Ping* (1904), 11 B.C. 102; and *Rex* v. *Bruce* (1907), 13 B.C. 1 (and *cf. Reg.* v. *Viau* (1898), 7 Que. Q.B. 362; 2 Can. Cr. Cas. 540) of the second; and *Rex* v. *McGivney* [(1914), 19 B.C. 22] in which we gave judgment on the first day of this term, of the third.

In *Rex* v. *Davis* [(1914), 19 B.C. 50] which we also decided this term, it was not suggested by either counsel that we could not review the discretion exercised by a trial judge in refusing to order a separate trial under section 857.

In the light of the foregoing I find myself wholly unable to reach the conclusion that we must refuse to entertain the present application to review what was done on the motion to postpone the trial. If I could bring myself to take the view that it was a question of fact and not of law, I should have to refuse, but on the authorities it is clearly not a question of fact, and to say that it has been held to be a question of legal practice (apart from the holding I have cited that it is one of law) is only another way of saying it is in one sense one of law, because, though there is a technical distinction between rules of practice and of law, *e.g.,* as in that rule of practice requiring a jury to be instructed not to convict on the unconfirmed testimony of an accomplice, which has become such a part of the established procedure in criminal trials that a judge "is blameable if he departs from" it (to use Mr. Justice Blackburn's words in *Charlesworth's* case, *supra,* at p. 42), yet there is no essential distinction. And I am fortified in this view by *Wade's case* (1825), 1 M.C.C. 86, wherein the judges of England sitting to hear a Crown case reserved by Bayley, J., reviewed the discretion he had exercised in discharging a jury, thereby, in effect, postponing the trial, so that a witness might receive instruction upon the nature of an oath, before the next

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Assizes, and declared the trial judge's action "improper," which could only have been done if the matter were one of law, because no questions of fact were reserved for or entertained by that Court. And in the *Conway and Lynch* case, *supra,* it was expressly decided by Pennefather, C.J. and Burton and Perrin, JJ. that the discretion was reviewable: see pp. 165, 187, 190-1, 193; and while both these decisions may in some respects more or less conflict with later ones, yet they establish what was never questioned, *viz.*: that the review was essentially a question of law. And finally I cite our own decision in *Rex* v. *Lai Ping, supra,* at p. 106, upon objection taken by the Crown, wherein the Court (consisting of four judges) held that

"the question as to whether the trial judge was right in coming to the conclusion that the confession was voluntary, is a question of law and can be reserved as such."

The headnote of the case is incorrect, the ruling being given in the form of a query, whereas only one of the four judges expressed doubt upon the subject. I shall, therefore, with all deference to other opinions, venture to continue to hold the opinion that within the true meaning of section 1014, it at least partakes of and contains the elements of a "question of law" until I am corrected by a higher tribunal.

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I conceive our duty to be (a) in cases which are not reviewable to see if there is a foundation for the exercise of the right as already explained; and (b) in cases which are, to consider the matter on the facts as found and certified to us by the trial judge—we have no jurisdiction to find the facts ourselves, as that would be to usurp his function and to give an appeal on fact, which is prohibited, except in certain specified cases, *e.g.,* sections 1012 and 1021.

As pointed out in *Rex* v. *Spintlum,* which we decided last term (1913), 18 B.C. 606, a discretion of this kind must only be "reviewed with great care." We were referred to the Quebec case of *McCraw* v. *Rex* (1907), 13 Can. Cr. Cas. 337, but it is of no assistance, as the point was not reserved or raised, and it is stated at p. 340, that the judge acted by consent and specially fixed the hearing in the same way. But fortunately I have found a decision of the Court of Appeal in *Sackville West* v. *Attorney-General* (1910), 128 L.T.Jo. 265, which settles

the matter, and shews what our duty is in an application to postpone a trial under the English, and our Rule 458, as follows:

"The judge may, if he think it expedient for the interests of justice, postpone a trial for such time, and to such place, and upon such terms (if any) as he shall think fit."

I pause here to say that these essential expressions on discretion are very similar to those in section 884 of the Criminal Code relating to change of venue, which were considered in the *Spintlum* case, and are apparently unfettered powers, yet in the *Sackville West* case, *supra,* it was held that the Court of Appeal had the power to interfere with the discretion, but—

"it would only be in the most extraordinary circumstances that an application to review the decision of the learned judge as to the conduct of the business of his own Court could succeed; that the only case in which the Court of Appeal would so interfere would be if satisfied that the decision was such that, notwithstanding any exercise by the learned judge of the power of control which he would have over the action when it came on for trial, justice did not result and he had failed to see that such would be the effect of his decision."

Taking, as I must, this declaration of the law as my guide, I now consider the learned judge's action. The facts in brief are that after the grand jury had brought in a true bill on Monday, the 13th of October (which, by an admitted clerical error, is given in the case as the 15th), the present appellant's counsel, Mr. *Macintyre,* at the request of the Court on that day was good enough to undertake the defence of the accused. He then was told that two of the Crown's witnesses, Sarvent and Olson, whose names were, it is admitted, on the back of the indictment, had not been called at the preliminary inquiry, as their evidence had not then been obtained by the Crown, and realizing, from the minute of their proposed evidence that was given him by the Crown counsel, that said evidence would tell strongly against his client, he applied for a postponement of the trial till the next Assizes (in the spring), on three grounds, (1) that the accused, who had been in custody at the coast from the time he was committed for trial, was taken by surprise; and (2) that he wished to examine into the antecedents of the new witnesses, and reasons for their not giving evidence at the inquiry, and (3) that the accused was without means and

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unable to prepare his defence. This application was objected to by the Crown on the ground of expense (which, of course, is no ground at all), and that it would be impossible to ensure the attendance of the Crown witnesses if they once dispersed. No affidavits were filed on either side, but statements of fact were made without objection by counsel, so we are again compelled to do what we had to do in the *Spintlum* case, *supra,* and take these statements as equivalent to facts, and the judge so acted on them, but I repeat what we said in that case about the great desirability of these applications being founded on proper materials to meet the special circumstances according to the established practice for a great many years, which it is unsafe for Crown or subject to depart from, and causes great difficulty and embarrassment in this Court in attempting to review the matter. The learned judge refused to grant a postponement till spring, but offered one till the Vernon Assizes, in about two weeks, which was refused, because counsel had engagements which would prevent him from "giving any attention to the preparation of the defence" herein, and so the motion was refused and the trial proceeded.

We have no information on the record respecting the locality in which the antecedents of the two witnesses were to be investigated, or the means of communication by telegraph or otherwise —in short, the matter is left, on behalf of the accused, in a most unsatisfactory state. It has been expressly decided that a postponement will not be granted for the purpose of making inquiries respecting fresh witnesses not called before the committing justices: *Reg. v. Johnson* (1847), 2 Car. & K. 354; nor because the accused had no knowledge of the evidence to be produced against him: *Reg.* v. *William Slavin* (1866), 17 U.C.C.P. 205. I have not overlooked the expressions of Mr. Justice Brett in *Reg.* v. *Flannagan and Higgins* (1884), 15 Cox, C.C. 403 at p. 407, as to the course he might feel justified in adopting in the circumstances of that case, and at the stage of the trial (the proposed evidence not having been obtained till that morning) in regard to new witnesses not on the back of that indictment (though undue stress should not be laid upon this last fact in the case at bar), and, if I am

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called upon to say so, I consider them appropriate to the case he had in hand, but they furnish no ground for overturning the discretion herein exercised. It may be said that the learned judge herein has himself shewn that he doubted the exercise of his discretion by reserving a case on the point, which he ought not to have done had he been free from doubt, but on mature reflection I think that he may well be deemed to have taken the course he did, not from any doubt of the propriety of his own act, but because he did not in a capital case wish to deprive the condemned man of the benefit of having the matter reviewed by a higher tribunal, which would have a much better opportunity of arriving at a proper conclusion upon further argument and consultation of authorities not available on circuit in Cariboo, and, in my opinion, if it is proper for me to say so, he did wisely, as this subject of the review of judicial discretion in criminal cases is a difficult one, which has occasioned me much labour and research, and I have gone into it at this length because of the importance of it and the strange lack of much direct authority thereupon. We have no decision of this Court which assists us, the two reported cases, *Reg.* v. *Morgan* (1893), 2 B.C. 329; and *Reg.* v. *Gordon* (1898), 6 B.C. 160, being quite dissimilar. I can only say that the result of my repeated consideration of the facts before the learned judge is that I find myself quite unable to say that there are here those extraordinary circumstances as required by the Court of Appeal in England, *supra,* which would justify our interference with the discretion in question, even after making due allowance for the fact that in a capital case I should personally be inclined to construe the rule as much as possible in favour of the accused. By the statute the learned judge was vested with a large discretion, entailing a like responsibility upon his shoulders, and I shall conclude with the words of Cockburn, L.C.J. in *Reg.* v. *Charlesworth, supra,* "far be it from me to say that he acted wrongly."

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Questions 2 and 3 I answer in the affirmative, but though I have no doubt about the strict legal right of the Crown counsel to ask the questions complained of, yet I feel bound to say

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that, as a matter of forensic propriety, the question put to the accused concerning his complicity in the murder of fifteen men, whose corpses were found in the spring after the snow disappeared, seems difficult to justify whatever the instructions to counsel may have been, seeing that it was admitted by said counsel that if the accused had been indicted for that offence, he had nevertheless been acquitted. The necessity for asking such a question in such, in my long experience, unprecedented circumstances is not apparent from the record, and it is difficult to imagine how the necessity could have arisen for asking it from a man who was admittedly innocent of the damaging imputation carried by it. While we have to accept the statement of counsel as to what is necessary in the conduct of his case, yet the responsibility of asking such a question as this is so heavy that he should be prepared with a satisfactory explanation in case his action is challenged.

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The result is that, in my opinion, all the questions should be answered in favour of the Crown, and the conviction sustained.

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GALLIHER, J.A.: I concur in the judgment of my learned brother IRVING, and I merely wish to mention one case in view of some authorities that were handed in to us yesterday by Mr. *Macintyre* on the second question, and also a point in the same connection that was raised in the hearing before us: *Rex* v. *Muma* (1910), 22 O.L.R. 225; 17 Can. Cr. Cas. 285, the unanimous judgment of the Court of Appeal of Ontario, and was on the point that where the witness as here (the accused) is asked in cross-examination about some irrelevant fact that is not directly connected with the issue as to his having committed some previous offence, the Crown is bound by his answer and cannot produce witnesses to contradict him. As to the right to ask such a question, there is a difference between the English law and the law in that respect as it is in Canada.

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MCPHILLIPS, J.A.: In proceeding to consider the case reserved for consideration, I propose to deal with questions 2 and 3 before taking up the consideration of question 1.

As to question 2: The law of England differs from the law of Canada in this respect, that in England the accused, if he gives evidence, cannot be asked any question tending to shew that he has committed or been convicted of, or been charged with, any offence other than that he is then charged with, or is of bad character, unless it is admissible evidence to shew that he is guilty of the offence then charged, or he has personally, or by his advocate, asked questions of the witnesses for the prosecution to establish his own character, or given evidence of his good character, or the defence is such as to involve imputations on the character of the witnesses for the prosecution (Criminal Evidence Act, 1898, 61 & 62 Vict., c. 36).

The Canada Evidence Act, R.S.C. 1906, Cap. 145, Sec. 12, reads as follows:

"12. A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction.

"2. The conviction may be proved by producing,—(*a*) a certificate containing the substance and effect only, omitting the formal part, of the indictment and conviction, if it is for an indictable offence, or a copy of the summary conviction if for an offence punishable upon summary conviction purporting to be signed by the clerk of the Court or other officer having the custody of the records of the Court in which the conviction, if upon indictment, was had, or to which the conviction, if summary, was returned; and (*b*) proof of identity."

It was held in *Rex* v. *D'Aoust* (1902), 3 O.L.R. 653; 5 Can. Cr. Cas. 407, that an accused person examined as a witness on his own behalf may be cross-examined as to whether he has been previously convicted of an indictable offence, whether or not the charge upon which he is being tried sets out the fact of a previous conviction, and although no evidence of good character had been adduced for the defence—it being held that the question is relevant to the issue as affecting the credibility of the accused as a witness.

Osler, J.A. in the *D'Aoust* case, *supra,* draws attention to the difference between the Imperial Criminal Evidence Act, 1898, and the Canada Evidence Act, 1893, and its amendments, 61 Vict. Cap. 53, and 1 Edw. VII., Cap. 36, and at pp. 656-7, said:

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"The right and, if such it can be called, the privilege, of the accused now is to tender himself as a witness. When he does so he puts himself forward as a credible person, and except in so far as he may be shielded by some statutory protection, he is in the same situation as any other witness, as regards liability to and extent of cross-examination."

It will, however, be observed that the questions put by the Crown counsel were not questions directed to any previous convictions, but to, in the one case, the alleged attempt to rob in a saloon, and, in the other, his acquittal, not conviction, upon an indictment for murder. Were it not for the very high authority of the Court of Appeal for Ontario, and in view of the proper ethical rules that should govern counsel, and also considering the very loose way the questions were put by Crown counsel, indicating, especially in the reference to the murder charge, the absence of any precise or definite instructions, or any well-founded knowledge of the occurrences, my opinion would be that the questions were improper and should not have been asked—they certainly had the tendency of prejudicing the accused. The question having relation to the murder charge was revolting in its nature, and carries condemnation on its face, as in the form in which it is put is not that he was convicted, but indicted, tried and acquitted; therefore, the accused was innocent, and the effect could only be to prejudice the accused in the minds of the jury, that although acquitted, he may have been nevertheless guilty of a crime which cries to heaven, and the accused went "upwhipp'd of justice."

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In the case of *Rex* v. *Pollard* (1909), 15 Can. Cr. Cas. 74, it was held that a single prior act of the like criminal nature as the subject of the charge, but not connected therewith, is not evidence proving the criminal intent of the act charged; in that case the Crown introduced evidence in reply to the denial of the accused of a prior offence, and a new trial was ordered—here, of course, no error of that nature took place. Osler, J.A. at pp. 81-82, said:

"I entirely agree with the observation of Kennedy, J. in the passage where he says [*Rex* v. *Bond* (1906), 2 K.B. 389] at p. 398: 'If, as is plain, we have to recognize the existence of certain circumstances in which justice cannot be attained at the trial without a disclosure of prior offences, the utmost vigilance at least should be maintained in restricting

the number of such cases, and in seeing that the general rule of the criminal law of England' (recognized, as he points out, by the Legislature in creating exceptions to it), 'which (to the credit, in my opinion, of English justice) excludes evidence of prior offences, is not broken or frittered away by the creation of novel and anomalous exceptions.' "

In the very recent case of *Rex* v. *Bridgwater* (1905), 1 K.B. 131, a Crown case reserved, the prisoner was arrested in possession of stolen property, and said in answer to the charge that he was acting under instructions from a detective, and at the trial at quarter sessions the detective was cross-examined as to whether he had not employed the prisoner as an informer. It was held that the nature or conduct of the defence was not such as to involve imputations on the character of the witnesses for the prosecution under section 1, subsection (*f*), (ii) of the Criminal Evidence Act, 1898, so as to render the prisoner liable to be cross-examined as to previous convictions. The *Bridgwater* case was considered in *Rex* v. *Hurd* (1913), 23 W.L.R. 812; 10 D.L.R. 475; 21 Can. Cr. Cas. 98, a prosecution for theft; the accused was asked questions upon cross-examination by counsel for the Crown relating to money which had been lost in sleeping-cars on other occasions when he had been, as suggested, in such cars—the questions were not objected to and were answered by the accused, who denied all knowledge of such losses. The Crown, as in this case, made no attempt to prove the facts suggested. The trial judge directed the jury to disregard these questions and answers, and any inferences suggested by them (which was not done in the case now being considered). It was held that full justice was done to the accused by the trial judge's direction, and it was his duty to give such direction, independently of whether the questions were properly asked or not, and it was not necessary to decide whether they were properly asked. In this case, counsel for the Crown contends that the conduct of the defence involves imputations on the character of the witnesses for the prosecution. Upon reading the whole of the evidence, I cannot so hold.

Lord Alverstone, C.J. in the *Bridgwater* case, *supra*, at p. 134, said:

"I must repeat what I have said before, namely, that raising a defence

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even in forcible language is not of necessity casting imputations on the character of the prosecutor or his witnesses. No doubt imputations may be cast on their character quite independently of the defence raised, either by direct evidence or by questions put to them in cross-examination."

In my opinion, although I am compelled to admit it would not appear to be error in his not doing it, the learned trial judge might have very properly disallowed the questions as being at the very least vexatious and not relevant to any matter proper to be inquired into, being questions as to alleged occurrences of remote date, not affecting present credibility, the defence having given no evidence of the good character of the accused. (Taylor on Evidence, 10th Ed., Vol. 2, sec. 1460; 36 Sol. Jo. 158; Stephens's Criminal Law, 2nd Ed., 27).

It follows that I am constrained to answer question 2 in the affirmative.

As to question 3: Apparently this is permissible, if it is not intended to contradict the witness by the writing, and I assume we must in this case concede that such was not the intention. A matter for remark, though, is this: the Crown counsel stated at the trial, although he proceeded to examine the accused upon the depositions, that he had never seen them. I feel entitled, though, to assume, and do assume, that in the cross-examination the Crown counsel was instructed by some person who heard the accused give his testimony, otherwise his questions could only be hypothetical.

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Although the course adopted here may be technically allowable, it would seem to me to be very close to working substantial wrong, unless the trial judge in charging the jury makes it plain to them that the answers of the accused having relation to what he said at the coroner's inquest must be taken as true. In the circumstances of this case I would answer question 3 in the affirmative.

Question 1 now remains for consideration: It would appear from the statement of facts accompanying the question, that the accused was without means and was undefended by counsel. The learned trial judge, however, requested Mr. *A. D. Macintyre,* who was present in Court, to act for the accused, and Mr. *Macintyre* acceded to the request made.

It then developed that the two witnesses mentioned above were to be called, not being witnesses examined upon the preliminary inquiry. Mr. *Macintyre* urged that the prisoner was surprised by the proposed calling of these witnesses, and the evidence to be adduced, and that the case should be traversed to the spring Assizes (a postponement to the Vernon or Kamloops Assizes would have been profitless to the accused). The grounds urged were that the accused was a stranger in the Province, and had been since his arrest incarcerated in gaol in New Westminster, a place far distant from the scene of the occurrence; and this evidence—of greater cogency than any given at the preliminary inquiry, to be now adduced—was such that time ought to be allowed to the accused to meet it. It would not appear that any affidavits were filed to support the application made, but the whole application proceeded upon the statements of counsel, which I will assume will be deemed the material upon which this question is to be reviewed by this Court—if reviewable, and it is to be noted that the application was renewed during the course of the trial.

The facts here would seem to be within *Reg.* v. *Flannagan and Higgins* (1884), 15 Cox, C.C. 403, where a postponement was granted upon the ground that evidence additional to that adduced before the magistrate, and not communicated to the prisoner before the trial, was intended to be introduced. The section of the Code dealing with the subject is 901.

In *Reg.* v. *Johnson* (1847), 2 Car. & K. 354, Alderson, B. refused to postpone the trial of a prisoner charged with murder, on the ground that an opportunity might be afforded of investigating the evidence and characters of certain witnesses who had not been examined before the magistrate, but who were to be called for the prosecution to prove previous attempts by the prisoner on the life of the deceased. I am not, though, of the opinion that questions of postponement of trial can be concluded upon precedents—they surely must be decided upon the particular facts of each case. Conditions in this country greatly differ from those obtaining in England, especially

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where, as in this case, the scene of the occurrence is remote, and means of communication most difficult. The question for consideration is—was the denial of the application for a postponement something not according to law done at the trial? And the further question, if answered in the affirmative—did the denial cause some substantial wrong or miscarriage? To arrive at a correct conclusion in such a grave matter is indeed most trying, and to do so justly all the proceedings, in my opinion, preliminary, subsequent, or incidental to the trial, may be rightly looked at. I cannot dismiss from my mind that the submission of the question to the Court of Appeal indicates that the learned trial judge has some considerable doubt in the matter, and who could be better advised as to all the surrounding facts, and the position in which the accused was placed—a stranger in the country, without means, and undefended up to the day of trial, and then has for the first time brought to his notice the fact that two witnesses, not called at the preliminary inquiry, although resident at the place of the occurrence, are to give evidence against him. Further, without the evidence of these witnesses it is reasonable to suppose no conviction could have been obtained, or, if obtained, would have been most probably set aside; as without the evidence of these witnesses, at most it would only have been a mere suspicion of guilt, and would lack the material ingredients necessary to constitute proof of the offence.

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In passing, it may be remarked that the learned trial judge said in his charge, referring to the evidence of Olson and Sarvent:

"It is the whole strength of the Crown's case."

Take the case as presented by the Crown—it is only one based upon circumstantial evidence, and in the result the accused was compelled to go to trial for murder there and then, with only his own evidence available as to the attendant facts regarding his own acts upon the night of the occurrence. Nothing is to be done to rob the subject of a fair trial, and to admit of this, there must be reasonable opportunity afforded for the accused to meet the accusation brought against him, otherwise it offends against natural justice. It is difficult to

deal with this question by the citation of authorities. It is, however, instructive to find what the common law was, and although we now have section 901, subsection (2) in the Code, in my opinion the trial judge must exercise his discretion judicially upon any application made for postponement, and must proceed upon legal and judicial grounds, and if he fails in this, it is reviewable. In *Rex* v. *Crippen* (1910), 80 L.J., K.B. 290, Darling, J. at p. 293 said:

"It does not appear to have been laid down in any case that if a judge exercises his discretion in a way different from that in which the Court of Appeal would have exercised it, that fact alone is sufficient ground for quashing a conviction. The only case in which anything of the kind was suggested was *Wright* v. *Wilcox* (1850), 19 L.J., C.P. 333; 9 C.B. 650, where Chief Justice Wilde said, 'The time at which evidence is to be received must be in the discretion of the judge, the exercise of that discretion being subject to the review of the Court.' None of the other judges said anything to that effect."

But we have here the learned trial judge himself exhibiting doubt as to the exercise of his discretion by granting a reserved case. Darling, J. at the same page, further said:

"The evidence admitted in this case was admissible evidence, and the Lord Chief Justice saw no reason why it should not be given. He exercised his discretion, and there is no reason why we should interfere, even if we have the power to do so. At the same time, if it were shewn that the prosecution had done anything unfair—had set what has been called a trap—which had resulted in injustice to the prisoner, this Court would have full power to deal with the matter. In such a case the Court would probably come to the conclusion that there had been a miscarriage of justice, and would exercise the power conferred upon them by section 4 of the Criminal Appeal Act, 1907."

Section 4 of the Criminal Appeal Act, 1907, in part reads as follows:

"4.—(1) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that . . . the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, in any other case shall dismiss the appeal."

Unquestionably we have as complete power, in fact, greater power in that we can grant a new trial where we come to the conclusion that a miscarriage has resulted. I unhesitatingly acquit the Crown counsel in this case of intentionally setting a trap, but in the result it has amounted to

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that, and the refusal of postponement to the spring Assizes worked, in my opinion, unfairness to, and caused injustice to the accused, and thereby a miscarriage of justice took place.

In Russell on Crimes, 7th Ed., Vol. 2, p. 1997, footnote (*a*), this language is to be found:

"At common law a person indicted for misdemeanour was entitled to traverse, or postpone the trial till the assizes or sessions next after the finding of the indictment. See 4 Bl. Com. 351; 4 Chit. Cr. L. 278; 2 Pollock & Maitland Hist. Eng. Law, 649."

Now what is the Court to do? Here follows section 901, subsection (2) of the Code:

"If the Court before which any person is so indicted, upon the application of such person or otherwise, is of opinion that he ought to be allowed a further time to plead or demur or to prepare for his defence, or otherwise, such Court may grant such further time and may adjourn the trial of such person to a future time in the sittings of the Court, or to the next or any subsequent session or sittings of the Court, and upon such terms, as to bail or otherwise, as to the Court seem meet, and may, in the case of adjournment to another session or sittings, respite the recognizances of the prosecutor and witnesses accordingly."

The Court may grant further time, adjourn the trial to a future time in the same sittings, or to the next or any subsequent sittings of the Court, but surely he must do this judicially, and how can it be done judicially if well-accepted and understood principles of law are ignored? In Halsbury's Laws of England, Vol. 9, at p. 365, par. 709 in part reads:

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"The prosecution may call witnesses who were not examined before the committing justices and whose names are not on the back of the indictment. Notice of intention to call such witnesses should be given to the defendant, and copies of their proofs should be supplied to the defendant and to the Court."

The case of *Reg.* v. *Ward* (1848), 2 Car. & K. 759, is referred to as the authority for the proposition. Cresswell, J. at p. 760, said:

"It is, therefore, by no means incumbent on the prosecution to abstain from giving, at the trial, any additional evidence which may be discovered subsequently to the taking of the depositions. But, at the same time, it is only fair that the prisoner's counsel should be apprised of the character of such evidence."

It would appear that this evidence was known to the prosecution on the 19th of August, if not before, and counsel for the accused complains that not only was it for the first time mentioned at the eleventh hour, the 15th of October, the day of

trial, but as given was not as disclosed in the memorandum for the first time handed to him on that same day. The learned trial judge in the reserved case states this:

"During the course of the trial Mr. *Macintyre* claimed that the memorandum of the evidence [and it was not brought before this Court] given to him of the evidence to be given by Roy Olson and Joseph Sarvent did not all disclose the evidence as actually given by them, and intimated that he would ask for a reserved case on the ground that without the evidence of these two witnesses it would be impossible to convict the accused, and that, in fact, the case against the accused depended upon their evidence."

I am of the opinion, with all due and proper deference to the learned trial judge, who had a most difficult task to perform—sitting in a remote district of the Province—at a Court of Assize—where witnesses had come from great distance and at great expense, and an adjournment might have meant probable loss of evidence, that the refusal of the adjournment of the trial to the spring Assizes, upon the peculiar and extraordinary circumstances then presented to the learned trial judge, namely, the accused undefended to the last moment, and no knowledge of the most material evidence to be adduced against him until the last moment; detained in custody since arrest hundreds of miles away from the scene of the occurrence, and tried likewise hundreds of miles away from any possible witnesses on his behalf; the means of communication being one of long delay and most expensive; the accused being without means and, perhaps, unaware, by being undefended up to the moment of trial, that the Crown would at its expense, if requested, summon and produce all available witnesses the accused desired, was not a right exercise of the discretion committed to the learned trial judge, and that he did not proceed judicially, and it was something done not according to law at the trial, and caused the accused substantial wrong, and miscarriage was thereby occasioned at the trial.

In my opinion, and this is said with the greatest of respect for, and deference to the views of my learned brothers, who are of a contrary opinion, that it would be against natural justice in this capital case, to be constrained to hold that the refusal to postpone the trial is a matter—notwithstanding the peculiar and

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extraordinary circumstances—not reviewable by this Court—in my opinion, no legal obstacle stays the arm of this Court.

It follows that, in my opinion, the appeal must be allowed, the conviction quashed, and a new trial directed upon the grounds and for the reasons here stated.

Conviction affirmed, McPhillips, J.A. dissenting.

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CHARLESON v. ROYAL STANDARD INVESTMENT COMPANY.

Contract—Carriers—Incomplete delivery of goods—Acceptance of goods delivered—Divisible contract—Pro rata recovery.

The plaintiff entered into a verbal contract with the defendant Company to freight by pack-train a quantity of supplies, including hydraulic piping, to the defendant's mines (a distance of about 180 miles). While on the trail one of the mules died and the plaintiff was obliged to leave behind 80 feet of hydraulic piping, weighing about 280 pounds. The rest of the freight, about 8,000 pounds, he delivered, and it was accepted by the defendant Company, which made a part payment on the freight charges. The plaintiff sued for the balance, but made no claim for the freight not delivered. The defendant Company alleged that the plaintiff promised to bring in the hydraulic piping as soon as possible, but the plaintiff did not bring it, it having been brought in later by Indians at the instance of the defendant Company, at a cost less than the sum deducted from the plaintiff's contract price. The defendant Company counterclaimed for damages for non-delivery of the hydraulic piping.

Held, that as the subject-matter of the contract was divisible, the delivery of the entire freight was not a condition precedent to the recovery of the contract price, and that the remedy by the Company for short delivery was by an action for damages.

Ritchie v. *Atkinson* (1808), 10 East 295, followed.

Judgment of GRANT, Co. J. reversed.

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APPEAL by plaintiff and cross-appeal by defendant from the judgment of GRANT, Co. J. in an action tried by him at Vancouver, on the 17th of October, 1913, for the recovery of $672.67, being the balance due for freight carried and delivered by plaintiff for the defendant from Hazelton to the defendant's mines on Jamieson Creek. The facts are set out fully in the headnote and reasons for judgment.

Walkem, for plaintiff.
Darling, for defendant Company.

GRANT, Co. J.: As I read from the evidence before me, the contract between the plaintiff and the defendant was to take a consignment of goods from the wharf at Hazelton to the defendant's mines, and to deliver in like good order as they were received, for the sum of 22½ cents a pound. The evidence is clear that the goods were examined carefully, they were weighed out carefully, and they were accepted by the plaintiff for the purpose of delivery. He started within a reasonable time to have made the delivery, and after proceeding some 20 miles, had the misfortune of losing one of his mules. It appears from the evidence that the pack the mule carried was left; it does not appear that any attempt was made by the plaintiff to place the pack upon any other of the horses he had; nor does it appear that he had any reserve mule for just such an emergency. It also appears that after it was learned by the defendant, or by Mr. Fraser, that this pack had been left by the trail, there was a promise given him by the plaintiff, or by one of his agents, that this pack would be taken care of, and forwarded at once, or without any unreasonable delay, and that it never was. Mr. Fraser swears that he agreed to take all the machinery in for 22½ cents a pound; and that is also really embodied in the bill of lading, and in the evidence of the plaintiff himself, practically the same thing; not that he was to get 22½ cents a pound for what he delivered, but he was to take that which he received at the wharf and deliver it all, unless there might be some reasonable excuse, the act of God, or the King's enemies, but

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there is no reason given why he might not have fulfilled his contract, and I may say this, that if Mr. Fraser has not paid him anything, he was under no liability to do so until the contract was completed.

The plaintiff is not entitled to recover, as I treat the contract as indivisible, an entire contract, to take that freight, and to tranship it, or transfer it, from Hazelton to the mines, a thing he did not do, and it does not appear he made any effort whatever to do. He was only 20 miles out, and certainly it appears to me that a man with a saddle-horse might have been sent back the 20 miles, and a mule procured; it was his duty, a duty he owed to the defendant to get that in; that is what he contracted for, and what was being paid for. He knew the purpose for which the material was being taken in, and what it was wanted for; and it really was his duty if he had not sufficient horses or mules to take all the material in, to send back and get more. He made no effort whatever to carry out his part of the contract, and until he completes his part, he cannot expect the defendant Company to complete its part. As far as the action is concerned, it is dismissed.

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Then as to the counterclaim, the dispute note, or counterclaim, is dismissed also. It does not appear in the counterclaim that he seeks to recover damages by reason of having to send any persons to take it. There has been $56 proven, but when I come to look at the counterclaim, I am surprised that objection has not been made to the admission.

The appeal was argued at Vancouver on the 14th and 17th of November, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and MCPHILLIPS, JJ.A.

Argument

Burns, for appellant: The action is for carrying supplies by pack-train to the defendant Company's mining camp. The contract was a verbal one. One of the mules, carrying 280 pounds of hydraulic piping, died on the way. The plaintiff delivered everything but this 280 pounds of piping, which was accepted by the defendant, who paid $1,200 on account of the freight charges. It is claimed by the defendant that the con-

tract is an indivisible one, but when the supplies delivered were accepted they were precluded from making such a claim. The damage they were put to by the non-delivery of the 280 pounds is all they are entitled to: see *Ritchie* v. *Atkinson* (1808), 10 East 295.

R. M. Macdonald, for respondent: The contract was an indivisible one, and we do not have to pay unless it is completed. We did not get the piping that was left behind until the following year. The plaintiff abandoned his contract. The whole question is whether the plaintiff can collect a *quantum meruit* when he has not completed his contract. The piping left behind was required, and the fact of it not having been delivered stopped the mining work altogether. We are entitled to the damages set out in the counterclaim, damages that were in the contemplation of the parties at the time the contract was made: *British Columbia Saw-Mill Co.* v. *Nettleship* (1868), L.R. 3 C.P. 499; Holmested & Langton's Forms and Precedents, 2nd Ed., pp. 105-6. The judge's finding is that the contract was an indivisible one, and he had no right of action until he had delivered all the goods: *Hulle* v. *Heightman* (1802), 2 East 145 at p. 147.

Argument

Burns, in reply: The plaintiff did all he could do to take all the material in; there was no guarantee: see Addison on Contracts, 10th Ed., 922. He should be paid for what he delivered.

Cur. adv. vult.

23rd February, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The defendant employed the plaintiff, who is described as a merchant, but who, it appears, carried on the business of packing with a pack-train of mules, to transport a quantity of freight, consisting of pipes, connections and other plant required in connection with defendant's mines at Jamieson Creek, at the rate of 22½ cents per pound.

In carrying out the said contract, by reason of the death of one of the mules on the trail, the plaintiff was obliged to leave one pack, consisting of 280 pounds of freight, on the trail. The balance of the freight, consisting of over 8,000 pounds, was duly delivered to and accepted by the defendant. It is alleged

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by the defendant that the plaintiff promised to bring in the 280 pounds with as little delay as possible. This was at the close of the packing season, and the said pack was not brought in by plaintiff, but was afterwards brought in by Indians, at defendant's instance, at the cost of $56.

The plaintiff brought this action for a balance of the freight, $672.67, which does not include freight on the pack left on the trail.

Defendant contested the claim, and counterclaimed for damages for non-delivery of said pack, alleging that by reason of its non-delivery defendant was put to expense and loss in respect of work in connection with which the material was to be used. Both the action and the counterclaim were dismissed, and both parties appealed.

The counterclaim was dismissed by the learned trial judge because he thought the damages claimed were not proved, except the said sum of $56, which he thought was not properly claimed in the pleadings. The learned judge thought that the contract was an entire contract, and that until plaintiff had delivered every item of the goods, he could not bring an action for any part of the freight. He said that it was a contract to transport all the goods delivered to him for carriage. That is true in every case where the freight is delivered to the carrier, unless the contract otherwise provides. That, therefore, cannot be the determining factor in ascertaining whether or not a carrier can, in a case like the present, where a small part has not been delivered, claim pro rata for the part delivered.

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In Addison on Contracts, 11 Ed., p. 997, it is said:

"If he [the shipper] agrees to pay by the bale or cask, or at the rate of so much a ton, he is bound to accept and pay for what has been actually brought and tendered to him."

In *Ritchie* v. *Atkinson* (1808), 10 East 295, it was held that the delivery of a complete cargo was not a condition precedent, but that a master might recover freight for a short cargo at a stipulated rate per ton, the freighter having his remedy in damages for such short delivery. Le Blanc, J. at p. 310 said:

"The question depends upon the construction to be put upon this instrument, whether we can say from the whole of it that it was not the intention of the parties that the delivery of a complete cargo should be a

condition precedent to the recovery of any freight at all. This rule was laid down in one of the earlier cases, *Kingston* v. *Preston* [(1773), 2 Dougl. 688], which has been since followed in others. Now, the delivery of the cargo was in its nature divisible; for it consisted of hemp and iron, the freight of which was to be paid for by the ton, according to a different rate of payment for the one and for the other, and, therefore, we cannot collect the intention of the parties to have been to make the delivery of a complete cargo a condition precedent to the payment of freight for any part which was delivered. The rule was laid down in *Boone* v. *Eyre* [(1779), 2 W. Bl. 1312], and approved by this Court in *Campbell* v. *Jones* [(1796), 6 Term Rep. 570], and by the Court of Common Pleas in the *Duke of St. Albans* v. *Shore* [(1789), 1 H. Bl. 270], that where a covenant goes to the whole of the consideration on both sides, there it is a condition precedent; but where it does not go to the whole, but only to a part, there each party must resort to his separate remedy for the breach of the contract by the other. Here it is clear that the delivery of a complete cargo does not go to the whole consideration of the freight; because the failure of bringing home one ton less than the full quantity of 400 tons would prevent the plaintiff from recovering for the 399 tons which he might have brought over. The loss on his part by such a construction would bear no sort of proportion to the injury suffered by the defendant."

And in *Spaight* v. *Farnworth* (1880), 5 Q.B.D. 115 at p. 118, Bowen, J. said:

"If, on the other hand, less has been delivered than shipped, as in the case of goods lost on the way, then freight would be payable on the quantity delivered."

See also *Brown* v. *Muckle* (1861), 7 U.C.L.J. (O.S.) 298.

I have quoted from *Ritchie* v. *Atkinson, supra*, at length because I think the reasoning of it fits the present case. Moreover, the defendant accepted the freight notwithstanding the loss of one pack. I think there was evidence that the parties did not consider the contract indivisible, as on its face it is not. At the time of delivery of the freight, less the one pack, defendants accepted it, and accepted the plaintiff's promise to bring in the missing pack. Defendant's attitude, then, was not that the missing pack must be brought in or no freight would be paid, because had that been the attitude, defendant would not itself have procured the missing pack to be brought in by Indians.

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The claim for special damages is another matter, and unless the shipper can hold back the freight as security for whatever sum (if any) he may be found entitled to in an action for such special damages—a right which he does not possess—then the freight ought to have been paid. Moreover, having failed to

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make out such special damage, as defendant did in this case, how can it justify the further withholding of the freight?

It appears that the cost of bringing in the 280 pounds was less than the freight deducted by the plaintiff on account thereof, hence defendant can claim no deduction for it.

The plaintiff should have his costs of the action and of this appeal.

IRVING, J.A.

IRVING, J.A.: I agree. The case of *Ritchie* v. *Atkinson* (1808), 10 East 295, seems in point. It is cited in Anson on Contracts, 12th Ed., p. 329, under the head of Divisible Promises.

The plaintiff should recover payment for what he had delivered. Defendant should have a remedy by way of deduction, or set-off, for the cost of bringing in the missing freight.

MARTIN, J.A.

MARTIN, J.A.: I agree.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This is an appeal by the plaintiff and cross-appeal by the defendant Company from the judgment of GRANT, Co. J., dismissing both the plaintiff's action, and the defendant Company's counterclaim for damages.

The action is one brought for the carriage of goods, namely, 8,603 pounds of metal piping and connections used in hydraulic mining. It would appear that the contract was a verbal one, entered into in July, 1912, and the agreed-upon charge per pound was 22½ cents. The carriage was to be by pack-train from Hazelton to Jamieson Creek, a distance of 185 miles. It would not appear that it was brought to the knowledge of the plaintiff that there would be necessarily any special or other damage by reason of any delay that might occur on the trip, and further, it was apparently common ground that the trip would be the last of the season. There was no delay in the pack-train starting out on the trip, and all the goods would have been duly delivered had it not been for the loss of a couple of mules, resulting in 280 pounds of the piping not having been got in to the point of destination. It would appear that the piping left on the trail was brought in, in the spring of 1913, by the defendant Company, and 20 cents a pound was paid to Indians

for bringing it in to Jamieson Creek, as against the 22½ cents a pound agreed to be paid to the plaintiff. The total amount for the carriage of the goods would be $1,935.67—that is, 8,603 pounds at 22½ cents per pound. Deducting 280 pounds (the goods left on the trail) at 22½ cents per pound, that is, $63, we have $1,872.67; but as $1,200 was paid to the plaintiff at the time the contract was entered into, only $672.67 remained due to the plaintiff, and that was the amount for which action was brought.

It is quite evident upon the facts that the counterclaim could not be supported, as even as to the goods, in weight 280 pounds, it cost less to have them brought in than the plaintiff was to receive, and the plaintiff is not making any charge therefor; and as to the damages claimed, no evidence, in my opinion, was given to support any such claim, and in any event, counsel for the defendant Company, at the trial, seems to have abandoned same, being satisfied to have the action dismissed.

The question now is, was the learned trial judge right in dismissing the action? It would seem that there was acceptance by the defendant Company of all the goods carried, all having been delivered by the plaintiff save the piping, in amount 280 pounds. It was contended at the trial, and the contention was acceded to by the learned trial judge, that the plaintiff, having failed to deliver all the goods, was not entitled to recover for the carriage of any of them. This is not a case of the carriage of merchandise to be offered for sale, and any loss consequent upon a fallen market. No considerations of that kind arise, nor need determination. One way to test the matter would be to view the case in this way: Suppose the piping—the 280 pounds—left on the trail had been irretrievably lost, what would have been the damage? Further, would it be that no charges for the carriage of the goods delivered and accepted could be recovered? Upon the facts of the case, in my opinion, the damages could not have exceeded the cost of replacing the lost articles at Jamieson Creek, with interest at 5 per cent. on the amount, until payment, by way of compensation for delay. The authority for so stating the law may be found in *Collard* v.

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S.E. Railway Co. (1861), 7 H. & N. 79; 30 L.J., Ex. 393; *British Columbia Saw-Mill Co.* v. *Nettleship* (1868), L.R. 3 C.P. 499; 37 L.J., C.P. 235.

It was held in the *Nettleship* case, *supra,* that "in the absence of notice of the consequences which will ensue from a part of goods shipped being lost, and of any contract express or implied to be answerable for such consequences, the shipper of such goods, on a part thereof being lost, is, over and beyond the sum necessary to replace it, only entitled as for the delay to receive interest on the said sum till payment, even though the rest of the goods have been rendered useless till the portion lost was replaced"; and see the remarks of Bovill, C.J., in 37 L.J., C.P. at pp. 240-241.

Now, the case we have before us is that of the carrier, and some of the goods were delivered and some not, but eventually all got to their destination, there being no evidence sufficient in law to establish any damages. Yet it is urged that by reason of this, nothing can be recovered for the goods carried and delivered by the plaintiff to the defendant Company. Bovill, C.J., in the *Nettleship* case, *supra,* at p. 240, said:

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> "Here, no doubt, the whole machinery was rendered useless by the loss of the portion which was missing; but were these consequences contemplated by the defendant, or did he consider he was to be liable for such consequences? . . . . Again, suppose all the machinery had been lost; would the plaintiff be entitled to claim the whole value, and also the profit which might have accrued if it had been duly carried and delivered? Where is the authority for saying that when goods are lost any such principle of compensation applies?"

And see Willes, J. at p. 241.

Upon the facts, as respects the present case, it is impossible to hold that the plaintiff had brought home to him the possible liability for loss or delay in making delivery of this piping, and in the charge made there is nothing to indicate the acceptance of any unusual liability. The pack was a heavy one, and the piping was unwieldy, and the plaintiff apparently the only packer with mules heavy and strong enough to handle the shipment. In considering a case of this nature, the Court cannot remain unmindful of the conditions existing in the far northern section of the Province, where goods have to be brought into

the interior by pack-train. Here we have a heavy shipment. The plaintiff, in his evidence, said:

"It was a six-weeks' trip, but again I am not absolutely positive, as I have not got the date of their return. It was the hardest load ever taken out of Hazelton. Mr. Fraser [Mr. Fraser is the manager of the defendant Company] had a train of his own that he brought up there; they could not have touched that pack.

"Why? Because mine was the only train strong enough; a piece of, say, 450 pounds is a pretty big load for a mule."

In view of the facts as we have them before us, it seems amply clear that the plaintiff is entitled to succeed upon his claim for the carriage of the goods upon the terms of the agreement entered into, namely, at 22½ cents per pound, and is entitled to judgment for $672.67, the amount sued for, being the balance due to him.

That accidents will take place by this means of carriage, and that delays will occur in making delivery, is quite understandable. The defendant Company did rightly in proceeding to recover the lost goods, and apparently did so at a less cost per pound than that agreed to be paid to the plaintiff, and the defendant Company do not establish any damages against the plaintiff. The contract was, no doubt, to carry in a reasonable time, and that means with reference to all the circumstances, which would include the state of the trail, the season of the year, the remoteness of the territory to be traversed, and all the consequent vicissitudes, the special nature of the goods, and the method of carriage of the same.

It follows that, in my opinion, the appeal should be allowed, the cross-appeal on the counterclaim dismissed, and judgment entered for the plaintiff for the amount sued for.

Appeal allowed.

Solicitor for appellant: *Knox Walkem.*
Solicitor for respondent: *Clarence Darling.*

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IN RE CANADIAN NORTHERN PACIFIC RAILWAY COMPANY AND BRADSHAW.

Costs—Arbitration—Taxation of "costs of the arbitration"—Scale of taxation—Party and party costs—R.S.B.C. 1911, Cap. 194, Sec. 58.

The "costs of the arbitration" mentioned in R.S.B.C. 1911, Cap. 194, Sec. 58, are to be taxed as between party and party, but on a liberal scale.

Statement

APPEAL from the order of GREGORY, J. made in Victoria, on the 19th of January, 1914. The order appealed from was made on an application for directions as to the method of taxing the costs of an arbitration had between the Railway Company and the landowner with respect to certain lands expropriated by the Railway Company. The learned judge made an order which the Court of Appeal considered to be one for the taxation of the costs of the arbitration as between solicitor and client, which was as follows:

"And it is further ordered that the registrar in taxing such costs shall tax the same upon the principles laid down in *Re Canadian Northern Railway and Robinson,* reported in 17 Man. L.R. (1908), on page 582, as follows:

"'All authorities agree that where land has been taken compulsorily the costs should be taxed on a larger scale than in ordinary litigation. Everything that was necessarily or reasonably done, and every expense that was necessarily or reasonably incurred in order to properly present the party's case to the arbitrators should be allowed to him in taxation. But of course he should not be allowed for unnecessary work or expenses, or for costs incurred through over caution or, as said by Smith, L.J. when 'he has indulged in luxuries of costs.'"

The appeal was argued at Victoria, on the 3rd of February, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Mayers, for appellant Company: The case of *Re Canadian Northern Railway and Robinson* (1908), 17 Man. L.R. 579, shews that, apart from the amendment introduced into the Dominion Act, "costs of the arbitration" means costs as between

party and party. The Provincial Act is in identical terms with the Dominion Act, without the amendment; therefore, the words in the Provincial Act mean costs as between party and party: *Re Bronson and Canada Atlantic R. W. Co.* (1890), 13 Pr. 440; *Re Beaty and City of Toronto* (1889), *ib.* 316.

Stacpoole, K.C., for the landowner: The common-law Courts had only power to award costs as between party and party; the Court of Chancery awarded costs as between solicitor and client. Since the Judicature Act the rules of equity prevail: *Mordue* v. *Palmer* (1870), 6 Chy. App. 22.

MACDONALD, C.J.A.: The learned judge has been led into making a statement which is tantamount to saying that the costs shall be taxed as between solicitor and client, because he said that the taxation should be on the principle laid down by Mathers, J. in *Re Canadian Northern Railway and Robinson* (1908), 17 Man. L.R. 579. There is no half way between the two; it must be either solicitor and client, or party and party. By the rule adopted in expropriation cases, party and party costs should be taxed on a liberal scale, and it is for the registrar to pay attention to this principle when taxing the bill.

MACDONALD, C.J.A.

In this case the order is so uncertain that no one can say exactly what it means. The order ought to be reformed so as to declare that the costs should be taxed as between party and party. As it stands, the taxing officer is hampered by a reference to the *Robinson* case, which would indicate that the bill should be taxed as between solicitor and client, whereas the intention really was that it should be taxed as between party and party on the liberal scale pointed out in that case. It is very easy to reform the order, and make it to read, "the registrar is to tax the costs as between party and party," and strike out the reference to the *Robinson* case. It is unfortunate that the matter was not made clear. The appellant was in the position of having to submit to what I think is tantamount to an order for taxation as between solicitor and client, whereas it is now stated that the learned judge did not intend to make that order. This order should be reformed by making it clear that the taxation is to be a party and party taxation, and by

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striking out the quotation. The taxing officer should be governed by the authorities which may be brought to his attention. I think the appeal should be allowed.

IRVING, J.A.: I would dismiss this appeal. The judge ordered that the costs of the arbitration should be borne by the Railway Company. That means, as all orders for costs simpliciter mean, as between party and party. He further ordered that the registrar, in taxing these, should tax on a more liberal scale than in an ordinary party and party taxation; that everything that was reasonably and necessarily done and every expense necessarily and reasonably incurred in order to properly present this case to the arbitrators, should be allowed on taxation, but unnecessary expense or for costs incurred through over caution should not be allowed. I think it was competent and proper for the learned judge to give such direction in his order for taxation, and because he has chosen to do so by extracting the principle laid down in a judgment, and quoting chapter and verse instead of making it appear first hand, that there is no reason to send the case back or to reform the order. To do so would be finding fault with the form of the order, rather than with its merits.

IRVING, J.A.

MARTIN, J.A.: I agree that this appeal should be allowed. It is clear that this order is only essentially one for the payment of costs as between solicitor and client. The citation taken by the learned judge from the case of *Re Canadian Northern Railway and Robinson* (1908), 17 Man. L.R. 579 at p. 582, has application to one thing and one thing only—where costs as between solicitor and client have been ordered. Therefore, to continue to treat the order on a party and party basis would be to perpetuate an inconsistency which should not have been created, and is unworkable on taxation.

MARTIN, J.A.

GALLIHER, J.A.: I would dismiss the appeal, and the view I take of the order is that the citation there is applicable to a taxation on increased scale as to party and party costs. That being my view, I do not think the appeal should have been brought to us at all.

GALLIHER, J.A.

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

In my opinion, all the words after "seeing" in the second line at the foot of page 1 in the order should be struck out and the following words added: "Tax the same as between party and party." In fact, I hardly think these words are necessary, but the point having been brought up, it might be well to make it definite. I think there should be no doubt about the terms of an order as to costs. I would consider that the registrar in this case would be confused by this order. The registrar would very properly say: "I must comply with this order," and, therefore, he would have no discretion.

I understand Mr. *Mayers* does not contend that the owner of the land is wrong in having costs between party and party, and, therefore, if it was a method whereby solicitor and client costs are to be created, it is certainly a wrong method. I consider that the registrar could have only decided in the present case that the costs should be taxed as between party and party, but with this order his hands would be tied and he would have to tax as between solicitor and client.

Appeal allowed, Irving and Galliher, JJ.A. dissenting.

Solicitors for appellants: *Bodwell & Lawson.*
Solicitors for respondents: *Bradshaw & Stacpoole.*

MURPHY, J.

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Jan. 6.

GREGSON v. LAW AND BARRY.

GREGSON v. LAW AND BARRY.

Sale of land—Infant—Conveyance by—Action to recover after majority—Knowledge of illegality of conveyance—Concealment of age—Refusal of Court's assistance to gain benefits through fraudulent acts.

The plaintiff, an infant, conveyed certain land to the defendant Law, who had no knowledge of her minority. She made an acknowledgment representing herself to be of full age, knowing that she was not, and was aware of the legal effect of a minor attempting to convey land.

Held, that she could not be assisted in obtaining advantages based entirely on her own fraudulent act.

Statement

ACTION for the recovery of land conveyed by the plaintiff when an infant, tried at Victoria before MURPHY, J. on the 11th of November, 1913.

Bodwell, K.C. (*Mayers,* with him), for plaintiff.
A. Alexander, for defendant Law.
McLellan, for defendant Barry.

6th January, 1914.

Judgment

MURPHY, J.: In this action I am forced to hold, on the evidence, that the plaintiff well knew when she executed the final deed to Law that, being a minor, she could not legally do so, and that, with such knowledge, she proceeded to complete and execute the same, including the making of an acknowledgment representing herself to be of full age. No hint of the true condition of things was given to Law, and I hold this was done knowingly, and that, therefore, the plaintiff is now coming into Court to take advantage of her own fraud. Whilst, apparently, it is true to say that, being an infant, she could not be made liable on a contract thus brought about, it is, I think, an altogether different proposition to say the Court will actually assist her to obtain advantages based entirely on her own fraudulent act.

The authorities cited in argument shew in fact, I consider, that infants are no more entitled than adults to gain benefits to themselves by fraud, or at any rate, establish the proposition

that the Courts will not become active agents to bring about such a result.

The action is dismissed.

Action dismissed.

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GREGSON v. LAW AND BARRY.

MACGILL & GRANT v. CHIN YOW YOU.

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Feb. 3.

MACGILL & GRANT v. CHIN YOW YOU

Solicitor—Retainer—Conflict of evidence between solicitor and client.

On all questions as to the retainer of a solicitor, where there is no written retainer and there is a conflict of evidence as to the authority between the solicitor and the client without further circumstances, weight must be given to the denial of the party sought to be charged rather than to the affirmation of the solicitor.

APPEAL from the judgment of GRANT, Co. J. in an action for professional services rendered for and at the request of the defendant in defending a relative of the defendant on a criminal charge of procuring, heard at Vancouver on the 14th of November, 1913.

The plaintiffs, who were a firm of solicitors, practising in Vancouver, sued the defendant for costs incurred, as they alleged, in defending a friend of the defendant's at the defendant's request, when the defendant's friend was arraigned on a criminal charge. A member of the plaintiffs' firm gave evidence as to receiving a promise from the defendant to pay the costs of the defence in the criminal trial, while the defendant's evidence consisted in a simple denial of the alleged promise. The learned judge, at the trial, found for the plaintiffs, and judgment was entered in their favour. From this judgment the defendant appealed.

Statement

The appeal was argued at Victoria on the 3rd of February,

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Feb. 3.

MACGILL & GRANT v. CHIN YOW YOU

1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Mayers, for appellant: The learned judge has acted contrary to a rule of law established by the decisions in *Re Paine* (1912), 28 T.L.R. 201; *Crossley* v. *Crowther* (1851), 9 Hare 384; *Allen* v. *Bone* (1841), 4 Beav. 493; *In re Eccles and Carroll,* 1 Ch. Ch. 263.

Argument

Maclean, K.C., for respondents: The cases cited only refer to evidence taken on affidavit, not to evidence taken in Court. Here the learned judge has found for the plaintiffs, and accepted the plaintiffs' evidence.

MACDONALD, C.J.A.

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

The authorities referred to by Mr. *Mayers* make it abundantly clear that a solicitor who undertakes legal business without a written retainer from his client proceeds at his peril. The principles which ought to apply to the trial of a case of this kind are authoritatively laid down in those cases, and, I think, the rule is a salutory one.

IRVING, J.A.

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

MARTIN, J.A.

MARTIN, J.A.: There is nothing to support the suggestion that the rule is different as regards oral evidence on a trial from that which it is admitted to be on affidavit.

GALLIHER, J.A.
MCPHILLIPS, J.A.

GALLIHER and MCPHILLIPS, JJ.A. agreed in allowing the appeal.

Appeal allowed.

Solicitor for appellant: *E. M. Yarwood.*
Solicitors for respondents: *MacGill & Grant.*

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IN RE GARDINER AND DISTRICT REGISTRAR OF TITLES

IN RE GARDINER AND DISTRICT REGISTRAR OF TITLES.

Statute, construction of—Land Registry Act, R.S.B.C. 1911, Cap. 127—Submission of title for registration—Bed of lakes or rivers—Powers of registrar to refuse registration—Rights of Crown—Costs—Crown Costs Act, R.S.B.C. 1911, Cap. 61, Sec. 2.

Upon an application to register the title deeds to certain lands which included within its boundaries a portion of the bed of a river and of a lake, the registrar refused to register on the ground that the map and deeds lodged in support of the application required amendment to exclude the beds of lakes and rivers.

Held, on appeal (MACDONALD, C.J.A. *dubitante*), that every certificate of title must be read as being issued subject to the reservations and limitations expressed in the original grant from the Crown, and a registrar has no authority to refuse to register a title unless the applicant amends his application so as to exclude the beds of the lake and river.

Per IRVING, J.A.: Such a request is an usurpation of authority.

Under the provisions of the Crown Costs Act the appeal was dismissed without costs.

Judgment of MURPHY, J. affirmed.

APPEAL from the judgment of MURPHY, J. on an appeal from the decision of the district registrar of titles at Nelson refusing to register a deed under the Land Registry Act, heard by him at Nelson on the 16th of May, 1913. An application was made by Gardiner in May, 1911, to the district registrar of titles in Nelson for registration on the register of indefeasible fees of the title of a portion of lots 820 and 825, group 1, Kootenay District. On the 16th of December, 1912, a notice was given by the registrar, under section 108 of the Land Registry Act, declining to register, on the ground that the map and deeds lodged in support of the application required amendment to exclude the beds and soil of the lakes and rivers, contending that the same did not pass under the Crown grant, and that the lands coloured red on the map attached were the only lands to which title had been shewn and in respect of which a certificate of indefeasible title could issue, and that he had never known

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of an instance where a certificate of title, indefeasible or absolute, had been granted to the beds and soil of rivers or lakes, coloured blue on the map attached to the Crown grant, through which the title was claimed; and that the only means he had of ascertaining what lands were conveyed by a Crown grant such as that of lots 820 and 825, was by referring to the plans thereto attached, on which, as therein explained, the lands granted are coloured red. A copy of a petition to the Court, under section 108 of the Act, was served on the registrar by the applicant for registration on the 9th of January, 1913.

Hamilton, K.C., and *Wragge*, for applicant.
Moffatt, for the Crown.

19th September, 1913.

MURPHY, J.: In my opinion the question involved in this application is decided by *In re Ward* (1874), 1 B.C. (Pt. 1) 114. That case decided that what is conveyed under a Crown grant worded as these are, is a particular "parcel or lot," and that the boundaries of that parcel or lot are to be determined by the official plan or survey of the particular district in question—in this case, Kootenay District. The affidavit of the surveyor-general shews that these are made up from the field notes. The surveyor's affidavit shews that the areas coloured blue were included within the boundaries made by him and were treated as part of the lands composing the particular lots or parcels, and were calculated in the acreage. This last fact makes the case stronger than *In re Ward, supra.* The attempt to reduce the grant by making the words "coloured red" operate as excepting portions of land undoubtedly included in the field notes and undoubtedly within the official boundaries of the "parcels or lots" is, I think, wrong. The Court in *In re Ward* states the principle of construction as being always one of intention to be collected from the language used with reference to the surrounding circumstances. The intention of the surveyor was clearly that these lands should pass and be part of the "parcels or lots." The Crown adopted his "parcels or lots" without more, and his intent must therefore, I think, be held to be binding on the Crown, under the circumstances. The

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Court, in the case cited, goes on to say: "It can never be a question to be determined by the literal meaning of the words without reference to the circumstances in which they are used." To give the force contended for by the Crown to the words "coloured red," would perforce lead to the exclusion from this grant of everything not so coloured. The area covered by the words "Upper Duncan River" and "Lot 820" (to deal with one lot only), would, therefore, also have to be excluded. As this area depends upon the size of the type used, the absurdity of such construction is self-evident. There will be a direction that this objection taken by the registrar to the registration of the deeds submitted to him is invalid. The applicant will get the costs of this application.

The appeal was argued at Victoria on the 23rd of January, 1914, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Argument

Maclean, K.C., for appellant (the Crown): The bed of Duncan river is not included, as they are only entitled to the portion that is painted red on the map attached, and in any event, the river is navigable. The registrar is something more than a mere ministerial officer. The costs have been given against us, which is contrary to section 2 of the Crown Costs Act.

Harold B. Robertson, for respondent (applicant): The statute as to costs does not apply in a case where the Crown sought and obtained an indulgence, which, if accepted, must carry the conditions imposed with it.

Maclean, in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I am not clear about this case, but as my learned brothers have come to a conclusion I will not delay the decision. I quite concur with what has been said by my learned brother IRVING, that a proceeding of this kind is a most inconvenient way of adjusting the rights of parties under a conveyance of land. It would lead to very great hardship, it seems to me, if disputes were to be tried on proceedings before

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the registrar, carried from him to the Supreme Court, and from the Supreme Court to this Court.

I therefore do not express a concluded opinion upon whether or not it was within the jurisdiction of the registrar to reject the application on the ground upon which he did reject it—that it contained a description of the land which gave to the grantee more than the grantor had to give. I am not prepared to decide that question here, because I do not think it necessary in view of the decision arrived at by my learned brothers.

As to the costs, I think there can be none, because of the provisions of the Crown Costs Act.

IRVING, J.A.: I concur with the learned Chief Justice as to costs.

On the main point I think the registrar's objection should not be allowed. He does not deal with the case under section 61. He says to the applicant, in effect: "I will not register your title unless you acknowledge that the river bed and the lake bed are not included in your Crown grant." He has no right to demand such an admission as a condition of registration. That is an usurpation of authority that can not be justified. As every certificate of title, in my opinion, must be read as being issued subject to reservations and limitations expressed in the original grant from the Crown, it is quite unnecessary. The Crown's rights, if any, can be asserted at any time, notwithstanding the issue of a certificate of title.

IRVING, J.A.

I express no opinion as to whether the river bed and lake bed do fall within the limitations. That question should be determined between the parties in a properly instituted suit, not in the inconvenient and arbitrary method now suggested. I do not proceed on the same ground as the learned judge does. I express no opinion as to whether the river or lake bed falls within the Crown grant or not.

GALLIHER, J.A.

GALLIHER, J.A.: I agree with IRVING, J.A.

Solicitor for appellant: *The Attorney-General.*
Solicitors for respondent: *Hamilton & Wragge.*

COLONIAL DEVELOPMENT COMPANY v. BEACH *ET AL.*

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COLONIAL DEVELOPMENT CO. *v.* BEACH

Company law—Assignments and preferences—Assignment for benefit of creditors—Company as assignee—Invalidity of—Refusal to substitute creditor as plaintiff—Creditors' Trust Deeds Act, R.S.B.C. 1911, Cap. 13, Secs. 3, 29, 42 and 64.

In an action brought by an assignee for the benefit of creditors under the Creditors' Trust Deeds Act to set aside as a preference a conveyance of land made by the assignor:—

Held, on appeal, affirming the judgment of CLEMENT, J. (MCPHILLIPS, J.A. dissenting), that an incorporated company cannot be an assignee for the benefit of creditors under said Act.

An application on the hearing of an appeal to substitute the name of a creditor for the present plaintiff, the invalid assignee, was refused.

APPEAL from the judgment of CLEMENT, J. in an action tried by him at Vancouver on the 16th of May, 1913, to set aside certain conveyances as void against the creditors of the defendant Beach. Beach conveyed the property in question to the defendant Morgan, one of his creditors, and Morgan then conveyed to the defendant the Crane Company, in payment of an indebtedness owing by him to the Crane Company, and the Company went into possession of the property. Beach then assigned for the benefit of his creditors to the Colonial Development Company. Subsequently the False Creek Lumber Company obtained a judgment against Beach, and were later given authority, by order of the Court, to bring this action in the name of the Colonial Development Company, and the last-mentioned Company was then authorized to add the Crane Company as a defendant. The plaintiff intended that the conveyance from Beach to Morgan was void under the provisions of the Fraudulent Preferences Act, and that the conveyance from Morgan to the Crane Company was fraudulent and void. The learned trial judge dismissed the action on the ground that a company cannot be an assignee for the benefit of creditors under the Creditors' Trust Deeds Act. The plaintiff appealed on the

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grounds that the learned trial judge was in error in so holding that sections 29 and 64 of the Creditors' Trust Deeds Act cannot apply to a company; that the defendant the Crane Company were debarred and estopped from denying that the plaintiff was the assignee for the benefit of the creditors of Beach; that he should have held that the conveyances from Beach to Morgan and from Morgan to the Crane Company were fraudulent and void, and on other grounds.

C. J. White, and *Findlay,* for the plaintiff Company.

W. A. Macdonald, K.C., and *Arnold,* for the defendant the Crane Company.

28th May, 1913.

CLEMENT, J.: Were this transaction impeached in a properly-constituted action I do not think it could stand, but I feel forced, reluctantly, to give effect to Mr. *Macdonald's* contention that a company cannot be an assignee for the benefit of creditors under our Creditors' Trust Deeds Act. It was not suggested that the plaintiff Company has any status to attack the transaction in question herein, except as an assignee under the Act, and, as I have stated, I have come to the conclusion that a company is not within the intent of the Act as a possible assignee. As the point was not taken and disposed of at an early stage as a point of law, I dismissed the action, without costs.

No authorities were cited upon the question upon which this judgment turns. Mr. *Macdonald* based his contention upon the words of the section of the Creditors' Trust Deeds Act itself, R.S.B.C. 1911, Cap. 13, and particularly upon sections 42, 29 and 64. I read the Act and these particular sections in the light of the judgment of the House of Lords in the *Pharmaceutical Society* v. *London and Provincial Supply Association* (1880), 49 L.J., K.B. 736, and am of opinion that a human being, and not a fictitious person such as a company, was in the mind of the Legislature in the enactment in question. Section 42, standing alone, would not, in my opinion, preclude a company which might well be a permanent and *bona-fide* resident of the Province: see *Willmott* v. *London Road Car Company,*

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Limited (1910), 2 Ch. 525; 80 L.J., Ch. 1; *Chuter* v. *Freeth & Pocock, Lim.* (1911), 80 L.J., K.B. 1322, and cases cited. In fact, it may be doubted if a Provincial company, acting within its powers, can have a true residence outside the Province: see the judgment of Duff, J. in the *Canadian Pacific Ry. Co.* v. *Ottawa Fire Insurance Co.* (1907), 39 S.C.R. 405 at p. 471. But sections 29 and 64 cannot apply to a company, which cannot suffer imprisonment, and that is the only method provided to insure obedience by an assignee to the orders of the Court respecting the important and comprehensive matters referred to in those sections, particularly section 64.

Reading the Act apart from those sections, the strong impression upon my mind is that a human assignee was contemplated throughout, but the contention is that there is not enough contrary intention shewn to satisfy the clause in the Interpretation Act, under which "person" is to be read as including a corporation unless from the context contrary intent appears. But in my opinion, sections 29 and 64 do shew such clear contrary intent that I am forced to conclude that it was not the Legislature's intention that a company should act as an assignee under the Act in question.

The appeal was argued at Vancouver on the 18th of November, 1913, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Ritchie, K.C., for appellants: The Creditors' Trust Deeds Act does not say an assignment must be made to a person as distinguished from a corporation. The law on the question will be found in *Pharmaceutical Society* v. *London and Provincial Supply Association* (1880), 5 App. Cas. 857. The first general statute as to the meaning of the word "person" is the Interpretation Act, 1889 (52 & 53 Vict., c. 63), Sec. 19. It has always been held that a corporation may be a trustee under the common law: see *In re Thompson's Settlement Trusts* (1905), 1 Ch. 229; Godefroi on Trusts, 3rd Ed., 722; *In re The Queen* v. *Toronto R.W. Co.* (1898), 30 Ont. 214; 2 Can. Cr. Cas. 471; *The King* v. *Dominion Coal Co.* (1907), 41 N.S.

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137 at p. 149. It is immaterial whether the action was brought at the instance of the False Creek Lumber Company or not. It was brought in the name of the assignee by the creditor, on the assumption that the assignee was validly and properly appointed, and if the appointment was not properly made, we should be made plaintiffs now. A plaintiff can always be changed or substituted for another. We have a judgment, and therefore are not called upon to act for all the creditors: see *Hughes* v. *Pump House Hotel Company (No. 2)* (1902), 2 K.B. 485.

Argument

Martin, K.C., for respondent: This is a case that can only be brought under the provisions of the statute, and it has been brought for the benefit of this man only. By making him plaintiff would bring about an entirely different situation. The only case where an amendment is allowed is where no injustice can be done to any person. The only ground upon which they could get this amendment would be by paying the costs here and below. The judgment they have has nothing to do with the point at issue, and there is no evidence as to when this judgment was obtained. The Act, read as a whole, shews clearly that it is a living person only that should be appointed, and not a corporation: see *Canadian Pacific Ry. Co.* v. *Ottawa Fire Insurance Co.* (1907), 39 S.C.R. 405 at p. 471. By section 64 of the Act, the assignee must be an officer of the Court, and a corporation cannot be an officer of the Court.

Ritchie, in reply: As to the word "person," see *Willmott* v. *London Road Car Company, Limited* (1910), 2 Ch. 525.

Cur. adv. vult.

23rd February, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal should be dismissed for the reasons stated in the Court below.

In Maxwell on the Interpretation of Statutes, 5th Ed., at p. 53, the learned author, after referring to a number of cases analogous to the one at bar, says:

> "In all these instances the Legislature supplied in the context the key to the meaning in which it used expressions which seemed free from doubt; and that meaning, it is obvious, was not that which literally or primarily belonged to them."

In the case at bar the sections of the Act referred to by

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CLEMENT, J. furnish the key to its meaning. The language of said sections are not reconcilable with the idea of a joint-stock company acting as assignee of a debtor for the benefit of his creditors.

I would also dismiss the application to substitute a creditor for the present plaintiff, assuming that we have the power. To do so would at this late stage be of little benefit to anyone.

IRVING, J.A.: The reasons given by CLEMENT, J. seem to me unanswerable. I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: In my opinion, the learned trial judge has, on the authorities cited to us, substantially reached the right conclusion on the question of the assignee being a natural person, though I think that more effect can be given to section 42 than he has seen fit to give, because the expression "no person other than a permanent . . . . and *bona-fide* resident" is not one which could aptly be applied to a company, since it implies that the person whose residence is required to be permanent must have the power to change it, *i.e.,* the power of physical locomotion, otherwise there would be no object in providing against the change. In the proper sense of the word, a company, once it is registered or licensed to do business in this Province, is necessarily fixed here during the existence of its charter or licence, and though it may cease to transact business thereunder, it does not thereby change its residence. For the period covered by said charter or licence it is inevitably permanently within this Province, and therefore, there was no necessity for the Legislature to guard against something that could not happen, which goes to shew that it did not contemplate a corporation filling an office which it was necessary to safeguard in this manner.

I have considered not only the sections that we were chiefly referred to, *viz.*: 3, 29, 42 and 64, but all the sections of the Act, to gather the intention of the Legislature, and have no doubt about it. The special language of section 64, declaring that the "assignee shall be subject to the summary jurisdiction of the Supreme or County Court in the same manner and to the same extent as the ordinary officers of the Court," contem-

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plates a living person, and the fact that the latter part of the section might be partially satisfied by an application to attack the officers of a corporation under rule 609, does not detract from the personal element, and the direction, by section 29, that the assignee "shall be punished by committal as for a contempt of Court" is a different (and inappropriate) procedure from the attachment referred to.

I find this personal note also struck in other sections which have been overlooked and which we were not referred to, *viz.*: in section 61, which provides that the assignee shall be chairman of meetings in a specified case, and that the chairman shall decide all disputes or questions that may be raised at such meetings, etc.; in section 22, which gives the assignee a casting vote; in section 23, which provides for the transfer of the estate of the assignee "to some other person named in such resolution as assignee"; in sections 62 (4) and 63, which refer to his "partner," and the partnership or company of which he is a member; and finally and conclusively in section 49, which empowers him to examine the assignor upon oath touching his estate, business, conduct, causes of insolvency, etc., and "to administer any necessary oath," and with power to adjourn the examination from time to time. It cannot, to my mind, be seriously contended that the judicial functions here bestowed can be discharged by any other than a living person.

MARTIN, J.A.

It follows that the appeal should be dismissed. But we are asked to grant an amendment which was not asked for below, and substitute, under rules 126 and 868, the name of the False Creek Lumber Company, Limited, for the present plaintiff, the invalid assignee, on the ground that all the time the said False Creek Company has been the real plaintiff, suing pursuant to leave granted by order of the 5th of June, 1912, in the name of the said assignee, under section 53, to set aside certain conveyances for its own exclusive benefit, though it is admitted that it would lose this benefit were the amendment granted. I have no doubt that we have the power to do so, but in the circumstances of the case and at this late stage, I think, in the exercise of our discretion, we should refuse to do so, because the terms of the amendment as to costs would have to be so onerous

that little expense would be saved and complications and difficulties might be experienced, so it is better that the proceedings should begin *de novo,* if they are to be begun again.

GALLIHER, J.A. concurred in dismissing the appeal.

MCPHILLIPS, J.A.: The action is one brought to set aside certain conveyances, and for the cancellation of the registration thereof, and for an order directing the district registrar to register the property in the name of the plaintiff Company. The plaintiff Company is the assignee for the benefit of creditors of the defendant Beach, and the allegation is that the defendant Morgan, when unable to pay his debts in full, made a conveyance of the property in question to the defendant Morgan, and that it was a preference, and that the defendant Company, in taking a conveyance from the defendant Morgan of the same property, took it with knowledge of the anterior facts as alleged; that is, that the transaction throughout is impeachable under the Fraudulent Preferences Act, R.S.B.C. 1911, Cap. 94.

The learned trial judge held that the plaintiff Company had no status as assignee under the Creditors' Trust Deeds Act, R.S.B.C. 1911, Cap. 13, holding that a company could not be an assignee under the Act; that the Interpretation Act, R.S.B.C. 1911, Cap. 1, in defining "person," would not admit of a corporation or company being appointed—when the Creditors' Trust Deeds Act was examined, *i.e.,* there exists a contrary intention, that contrary intention appearing in sections 29 and 64 of the Creditors' Trust Deeds Act. In the result at the trial, the action was dismissed, but without costs. From this judgment the plaintiff Company appealed to this Court. The trial judge found the question to be one of much difficulty, and apparently he was not assisted by the citation of authorities upon the point. In his research he relied upon the following decisions: *Pharmaceutical Society* v. *London and Provincial Supply Association* (1880), 49 L.J., Q.B. 736; and *Chuter* v. *Freeth & Pocock, Lim.* (1911), 80 L.J., K.B. 1322.

Pharmaceutical Society v. *London and Provincial Supply Association, supra,* has been referred to and considered in the

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following cases: *Attorney-General* v. *George C. Smith, Limited* (1909), 2 Ch. 524; 78 L.J., Ch. 781; *In re Royal Naval School* (1910), 1 Ch. 806; 79 L.J., Ch. 366; *Edwards* v. *Pharmaceutical Society of Great Britain* (1910), 2 K.B. 766; 79 L.J., K.B. 859; *Attorney-General* v. *Churchill's Veterinary Sanatorium, Limited* (1910), 2 Ch. 401; 79 L.J., Ch. 741.

Upon a careful examination of the decision of the House of Lords in *Pharmaceutical Society* v. *London and Provincial Supply Association, supra,* it will be seen that it is not a decision that is as wide as it may at first seem, but is confined to holding that sections 1 and 15 of the Pharmacy Act, 1868, which prohibit, under a penalty, any person not being a duly registered chemist from selling or keeping open shop for the sale of poisons, or using the name of chemist or druggist, the word "person" not including a corporation, and a corporation having a department for sale of drugs under the management of a duly registered chemist is not liable to the penalty. It is not a decision that a corporation did not come within at least one provision of the Act, namely, section 17, being regulations to be observed in the sale of poisons. This is pointed out by Bray, J. in *Edwards* v. *Pharmaceutical Society of Great Britain, supra,* at pp. 775 and 866 respectively.

MCPHILLIPS, J.A.

The decision of the House of Lords may be said to have been, in effect, that, viewing the special circumstances, the corporation was not liable for penalties, but that the question in all cases will be whether the word "person" in a statute includes a corporation, depending in each case on the object of the Act and the enactments by which it was attained. See the judgment of the Lord Chancellor in *Pharmaceutical Society* v. *London and Provincial Supply Association* (1880), 49 L.J., Q.B. 736 at p. 738, and of Lord Blackburn at p. 741.

In view of present-day conditions, when corporations do so much of the work connected with the winding up and management of estates, is it not reasonable and probable that the Legislature fully intended to admit of a corporation becoming an assignee for the benefit of creditors under the Creditors' Trust Deeds Act? It is to be observed that there is no interpretation of the word "assignee" in the Act, neither is there in

the Interpretation Act. The Act, until we reach section 23, always refers to "assignor" and "assignee." In the latter part of that section we first have the word "person" used, referring to a change of assignee—that is, where the assignee is changed, it is enacted "and thereupon such person so named shall become and be the assignee of such estate under the provisions of this Act." Then we have the word "person" used in section 27 as applicable to the assignee, where provision is made for the removal of the assignee by a judge of the Supreme Court. Taking the enactments as a whole, unquestionably the word "person" is used in a sufficient manner to entitle reference being made to and reliance being placed upon section 26, subsection (19) of the Interpretation Act, R.S.B.C. 1911, Cap. 1, which reads as follows:

> "'Person' shall include any body corporate or politic, or party, and the heirs, executors, administrators, or other legal representatives of such person, to whom the context can apply according to law."

To indicate that the Legislature would not seem to have had any doubt that a corporation might properly discharge the duties devolving upon an assignee under the Creditors' Trust Deeds Act, reference may be made to the Administration Act, R.S.B.C. 1911, Cap. 4, Secs. 99, 100 and 101, where it is provided that the executor or administrator administering an estate, finding the estate insufficient to pay debts, may file a declaration of that fact, and thereafter such executor or administrator is to be deemed a trustee for the benefit of the creditors of the person whose estate is being administered, subject to the provisions of the Creditors' Trust Deeds Act. Admittedly a corporation may be appointed executor or administrator, and if so, in this way a corporation would be acting as an assignee under the Creditors' Trust Deeds Act. This certainly shews the clear intention of the Legislature, and strongly points to there being no intention to exclude a corporation from acting under the Creditors' Trust Deeds Act.

In *Pearks, Gunston & Tee, Lim.* v. *Ward* (1902), 71 L.J., K.B. 656, it was held that a limited company is a "person" within the meaning of section 6 of the Sale of Foods and Drugs Act, 1875 (38 & 39 Vict., c. 63): see the judgment of Lord Alverstone, C.J. at pp. 660, 661 and 662.

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In *Chuter* v. *Freeth & Pocock, Lim.* (1911), 80 L.J., K.B. 1322, it was held that a limited company is liable to be convicted under section 20, subsection (6) of the Sale of Food and Drugs Act, 1899, for giving to a purchaser a false warranty in writing in respect of an article of food or drug sold by a company as principal or agent. See the judgment of Lord Alverstone, C.J. on the construction of the subsection at pp. 1324-25.

In Palmer's Company Law, 9th Ed., at p. 55, it says:

"'A corporation is a legal *persona* just as much as an individual.' *Per* Cave, J. in *Re Sheffield &c. Society* (1889), 22 Q.B.D. 476; 58 L.J., Q.B. 265; *Att.-Gen.* v. *Smith* (1909), 2 Ch. 524, in which it was held that a company was a person within the Dentists Act, 1878."

Then we have *Willmott* v. *London Road Car Company, Limited* (1910), 80 L.J., Ch. 1. That was a case of a lease and covenant not to assign without consent—consent not to be withheld in respect of "respectable and responsible person"—and it was held that a limited company may be a "respectable and responsible person" within the meaning of a covenant by a lessee not to assign without the consent of the lessor (such consent not to be withheld in the case of a "respectable and responsible person"). The Court of Appeal in this case reversed the decision of Neville, J. (79 L.J., Ch. 431), and overruled on this point *Harrison, Ainslie, and Company* v. *Corporation of Barrow-in-Furness* (1891), 63 L.T.N.S. 834. The judgment of Cozens-Hardy, M.R. at pp. 3, 4 and 5 is fully explanatory of the analogous question under consideration here. See also the judgment of Fletcher Moulton, L.J. to the same effect.

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I do not see anything in the judgment of Duff, J. in the *Canadian Pacific Ry. Co.* v. *Ottawa Fire Insurance Co.* (1907), 39 S.C.R. 405 at p. 471, referred to by the learned trial judge, which in any way throws any doubt upon the power of the plaintiff Company to be an assignee under the Creditors' Trust Deeds Act. The plaintiff Company has corporate existence in this Province, and no question has been raised, nor do I understand that it has been at all questioned that the plaintiff Company has corporate powers—admitting of it discharging the business which would devolve upon an assignee under the Act.

In passing, it may be remarked that Duff, J. agreed with Idington and Maclennan, JJ. in that case, that a company incorporated under the authority of a Provincial Legislature to carry on the business of fire insurance, is not inherently incapable of entering, outside the boundaries of its Province of origin, into a valid contract of insurance relating to property also outside of those limits—giving countenance to the wide and, what I submit, is, the true exposition of the law that a company is a legal *persona,* and to deny the efficacy of contract, we must find positive and effective legal inhibition, otherwise, as with the individual, the contract is valid.

In *The Union Colliery Company v. The Queen* (1900), 31 S.C.R. 81, it was held that, under section 213 of the Criminal Code, a corporation may be indicted for omitting without lawful excuse to perform the duty of avoiding danger to human life from anything in its charge or under its control; the fact that the consequence of the omission to perform such duty might have justified an indictment for manslaughter in the case of an individual is not ground for quashing the indictment; and that as section 213 provided no punishment for the offence, the common-law punishment of a fine might be imposed on a corporation indicted under it. Mr. Justice Sedgewick, in an elaborate judgment, dealt with a number of the cases, and amongst others with *Pharmaceutical Society* v. *London and Provincial Supply Association, supra.* At p. 84, Sedgewick, J. (who delivered the judgment of the majority of the Court) said:

"It was at one time thought that a private corporation could not commit torts or be held liable for the wrongful acts of its officers or agents, but this has long since been exploded."

And at p. 88 he further said:

"It was, however, contended that 'everyone' at the beginning of the section, does not include a corporation. I think it does. Section 3 (*t*) states: 'The expression 'person,' 'owner' and other expressions of the same kind include Her Majesty and all public bodies, bodies corporate, societies, companies, and inhabitants of counties, parishes, municipalities or other districts, in relation to such acts and things as they are capable of doing and owning respectively.' 'Everyone' is an expression of the same kind as 'person,' and therefore includes bodies corporate unless the context requires otherwise."

See also Lewin on Trusts, 12th Ed., at p. 30.

In *In re Thompson's Settlement Trusts* (1904), 74 L.J., Ch.

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133, it was held that a limited company may be a trustee; see also the judgment of Swinfen Eady, J. at pp. 134-5.

The learned trial judge would appear to have been most affected by the provisions of sections 29 and 64 of the Creditors' Trust Deeds Act, and, with those provisions in mind, came to the conclusion that the plaintiff Company could not be an assignee. In my opinion, sections 29 and 64 do not compel any such conclusion, because there is ample authority to enforce compliance by a company with any and all of the provisions of the Act. The situation is not one such as Lord Selborne was dealing with in *Pharmaceutical Society* v. *London and Provincial Supply Association, supra,* where at p. 738 he said,

"that if a statute provides that a person shall not do a particular act, except on condition of his complying with a certain proviso, *prima facie* it is the natural and reasonable construction of such a statute, unless there be something in the context, or in the manifest object of the statute, or in the nature of the subject-matter to exclude it—*prima facie* I say it is the natural and reasonable construction of such a clause that by the use of the word 'person' the Legislature contemplates one of a class of persons who may or may not do the act, or who are capable of doing the act, the doing of which is to take them out of the scope of the provision."

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There—in that a corporation could not be a chemist—the chemist having to submit to examination, which of course was impossible in the case of a corporation, and could only mean an individual person, it followed that "person" would not include a corporation. But here we have no such case. There is no provision in the Creditors' Trust Deeds Act providing that a company or corporation shall not be an assignee, nor providing for any qualification or test that an individual person only could be intended. I cannot satisfy myself that this public statute does not include a person in law, that is, a corporation, as well as a natural person, nor can I see any provisions of the Act which disentitle me from saying that a company or corporation may not reasonably be intended by the Legislature to be admitted to become an assignee thereunder.

With all respect to the learned trial judge, I must say that to determine the question upon the consideration of the two sections referred to, *viz.*: sections 29 and 64, and upon the inability to impose imprisonment against a corporation is,

indeed, to proceed upon too narrow a ground. Further, can it be said effectively that a corporation is not subject to being proceeded against for contempt, or proceedings of an analogous nature? See Oswald on Contempt of Court, 3rd Ed., dealing with disobedience to orders, at pp. 96, 102, 223 and 224. The authority cited is R.S.C., O. 42, r. 31, and notes in the Yearly Practice, 1910, 593. We have this same rule, being marginal rule 609. See also Order 42, rr. 4 and 7, marginal rules 582 and 585.

Unquestionably the plaintiff Company, acting as assignee, would have to act by and through its managers and agents, and there is, it would seem to me, quite sufficient elasticity in the Creditors' Trust Deeds Act to admit of their so acting and complying in every way with its provisions, and being held answerable for due and proper compliance with all the provisions of the Act. The plaintiff Company being a legal entity, capable of holding real and personal property, and capable of being an assign under any deed, has had assigned to it the property of a debtor for the purpose of paying and satisfying rateably or proportionately, and without preference or priority, all the creditors of such debtor; and now it is asserted that the assignment is invalid upon the ground that a company or corporation is excluded from being an assignee under the Act. What can be said to be the ground work for any such contention? I submit that the authorities do not support any such contention. The Act itself imposes no exclusion of company or corporation, no inhibition from acting as assignee, and it is a general principle of law that "a corporation is a legal *persona* just as much as an individual": *per* Cave, J. in *In re Sheffield and South Yorkshire Permanent Building Society* (1889), 22 Q.B.D. 476. To hold that a company or corporation cannot be named as assignee under the Act amounts to holding that the legislation is a trap, as what is there to bring to the mind of the assignor—the debtor about to make an assignment under the Act—that he cannot select a corporation as assignee? Nothing whatever, and every day is witnessed transactions in the way of disposition of real and personal property to which corporations are parties.

To indicate the intention of the Legislature in the matter,

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and to maintain the validity of the assignment once made it is only necessary to read section 3 of the Creditors' Trust Deeds Act. Note the last words of the section: "and shall not be set aside or defeated on any account whatsoever except actual fraud, any statute or law to the contrary notwithstanding."

In view of the nature of the legislation, and the plain intention of the Legislature to encourage the equitable, rateable and proportionate payment of debts—where the debtor is unable to pay his creditors in full—and to preclude preference or priority, intractable language, I submit, must be found to impel and rightly entitle the Court to hold that the assignment is invalid because of the fact that the assignee is a corporation.

It cannot be contended, in my opinion, that the property set forth in the assignment has not passed and become vested in the assignee, nor can it be successfully contended, in my opinion, that the assignee is not capable of discharging the duties which devolve upon an assignee under the Act. It is to be noted that once the assignment was made to the plaintiff Company, it was compelled to proceed under the provisions of the Act, and in default, was subject to penalties, and, in my opinion, all such penalties could have been enforced against the plaintiff Company if there had been default.

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It follows that, in my opinion, the learned trial judge was wrong in holding that a company could not be an assignee for the benefit of creditors under the Creditors' Trust Deeds Act. In my opinion the assignment to the plaintiff Company was valid and effective, and the appeal should be allowed.

Having arrived at that conclusion, it necessarily follows—taking the same view as the learned trial judge as to the merits of the case—that the impeached conveyances should be set aside; that the district registrar do cancel the registration thereof, and the certificate of title in the name of the defendant Crane Company; that the district registrar do register the property in the name of the plaintiff Company, subject to the mortgage, and do issue a certificate of title therefor to the plaintiff Company, and that the defendant Crane Company do

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pay to the plaintiff Company the rents and profits derived from the property since the 15th of December, 1911.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellants: *L. B. McLellan.*
Solicitor for respondent: *C. S. Arnold.*

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REX *v.* ANGELO

Criminal law—Motion—Criminal Code, Sec. 1015—Refusal of trial judge to reserve certain questions—Admissibility at trial of deposition taken at preliminary hearing—Absence from Canada—Facts from which absence can be reasonably inferred—Variance between judge's notes and the official transcript of evidence—Criminal Code, Secs. 999 and 1017.

Upon leave to appeal being granted on motion under section 1015 of the Criminal Code owing to the refusal of the Court below to reserve a question, the Court will not thereupon hear and deal with the question upon the agreement of counsel and the evidence before the Court as though the case had been stated by the Court below. The Court cannot substitute itself for the tribunal nominated by statute to discharge that duty.

Rex v. *Armstrong* (1907), 15 O.L.R. 47, not followed.

The official stenographer's transcript of the evidence should not be taken as the only evidence of what took place at the trial; reference may be made to the judge's notes appearing in the stated case in which he stated that the stenographic notes were imperfect. The evidence of the chief constable at Nanaimo that a constable in his district, who had given evidence in the preliminary examination of one of several prisoners charged with rioting and from whom he had last heard within Canada from Vancouver, and later from Seattle, Washington, had failed to report for duty and had absconded, were sufficient facts on which the trial judge could reasonably infer that the witness was absent from Canada at the date of the trial a month later.

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CRIMINAL APPEAL by way of case stated from a conviction by MORRISON, J. on the verdict of a jury at New Westminster on the 7th of January, 1914, on an indictment charging the prisoner with riotous demolition of property, riotous damage to property, riot and unlawful assembly at Extension, on Vancouver Island, on the 13th of August, 1913.

At the trial the Crown proposed to put in the evidence of a constable, taken at the preliminary hearing, who was absent from Canada, and tendered the evidence of the chief constable of the Nanaimo District to prove his absence. The chief constable stated in effect that he had heard from the constable in question from Vancouver on the 4th of December, 1913, and later from Seattle, in the State of Washington; that he had not heard from him since; that he had failed to report for duty; and that he had absconded. On these facts the judge held that he might reasonably infer that the witness was absent from Canada and admitted the deposition. A verdict of "guilty" was returned against the prisoner on all counts of the indictment. Counsel for the prisoner asked the judge to state a case for the Court of Appeal on sixteen points, one of them being the admissibility of the evidence of the constable. The trial judge refused the case on all points. Counsel for the prisoner then moved the Court of Appeal for leave to appeal and that Court granted leave on the first point, *viz.*: the admissibility of the evidence of the constable, and directed that a case should be stated on that point. On the case being presented to the trial judge embodying the stenographic notes, he refused to sign it on the ground that the notes were incorrect.

Statement

The hearing of the stated case by the Court of Appeal had been fixed for the 8th of February, 1914. On the case being called, counsel for the prisoner appeared and stated that the trial judge had refused to state the case as presented. The Court of Appeal referred the matter back with directions that the trial judge should state the case in the form he considered right. A case was then stated in the following form, and heard on the 10th of February, 1914:

"Did I err in allowing the depositions of George Hannay, as taken at

the preliminary hearing, to be admitted as evidence at the trial, on the evidence of David Stephenson, which was substantially as follows:

"'That the said George Hannay, one of the constables on his staff at Nanaimo, had failed to report for duty. He left on leave about the 4th of December, since which time he had not seen him. He heard from him later at Vancouver and again from Seattle, U.S.A. He had failed to report and he said he had absconded.'

"The transcript from Question 6 on page 2, down to line 16, is unintelligible to me. There was cross-firing by counsel and remonstrance by me. It would be quite impossible for even the most expert stenographer to have caught the significance of the dialogue.

"As to the observations of Mr. *Bird* in line 21, my clear recollection is that what he urged upon me was that there was no evidence that Hannay is now out of Canada. I, however, held that that evidence was sufficient upon which to base a reasonable inference that he was still out of Canada. The rest of the subjointed transcript strikes me as not containing all that took place; for example, the last page, beginning at line 11, where there is a clear omission.

"My own recollection of the fact that chief constable Stephenson stated that he had heard of Hannay in Seattle is borne out by my notes made at the time, which read: 'Hannay, 4th December, Vancouver, Seattle, absconded,' and the word 'Seattle' in margin underlined. He mentioned Seattle in reply to a question put by me after counsel had subsided."

The stenographic report of what occurred at the trial is as follows:

"David Stephenson, recalled. Examined by Mr. *Taylor*.

"You have already told us that you are the chief constable in Nanaimo. There was a constable named Hannay under you at Nanaimo? Yes.

"When did you last see Hannay? On the 4th, I think it was on the 4th of December.

Statement

"The Court: Perhaps Mr. *Bird* will admit that this man absconded and ran away. It is no use pretending that you do not know a thing about it. It is taking up the time of the jury about the thing.

"Mr. *Bird*: I have no objection to Mr. Stephenson.

"Mr. *Taylor*: I think it is fair to the accused.

"The Court: Mr. *Bird* says he has no objection. He has absconded, and you do not know where he is? Yes, he has gone away.

"Mr. *Taylor*: I will put in the evidence of Hannay taken at the preliminary hearing.

"Mr. *Bird*: Of course, I do not want to admit that Mr. Hannay has absconded.

"The Court: You are not admitting anything. The chief of police has sworn to it.

"Mr. *Bird*: The chief of police does not know that he is out of Canada.

"The Court: If you know where he is you had better produce him.

"Mr. *Taylor*: This is the evidence of constable Hannay taken at the preliminary hearing in this matter.

"Mr. *Leighton*: We are not admitting those photographs.

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"Mr. *Taylor*: If this evidence of Hannay's is worth anything, Hannay identified all these photographs.

"Mr. *Leighton*: If it relates to the damage, we are not disputing it.

"The Court: I will leave out that in regard to the photographs.

"(Mr. *Taylor* continues to read the evidence of Constable Hannay).

"The Court: Now, gentlemen of the jury, you have already said that you were not disposed to hear any more evidence as to the houses being burned; and that apparently is what Mr. *Taylor* is doing.

"Foreman: I do not think we need to hear that.

"The Court: We have heard that over and over again.

"Mr. *Taylor*: I thought I had left out all the references to the photographs, my Lord.

"The Court: It is entirely in the hands of counsel, and if they choose to ignore—that is not disputed. We have had fifteen witnesses on that very matter.

"Mr. *Bird*: My learned friend must put in all the evidence with relation to this man; evidence for the accused as well as evidence against the accused.

"Mr. *Taylor*: I was trying to.

"The Court: You are repeating matters after objection by the jury to leave out evidence they have heard, and about which there is no dispute. Anything relating to the prisoner we want to hear—all about the prisoner.

Statement

"Mr. *Taylor*: I submit that Hannay's identification of the photographs should go in.

"The Court: We want to hear the prisoner's connection with these things."

"Mr. *Taylor*: All right."

The appeal was argued at Victoria on the 2nd of February, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

J. W. deB. Farris (*Leighton*, with him), for appellant: There were no facts from which the judge might infer that Hannay was absent from the Province at the time of the trial. The stenographer's notes alone should be taken as evidence of what occurred, and no reference can be made to the notes made by the judge. Section 35 of the Canada Evidence Act provides that the law of evidence in the Province in which proceedings were taken shall apply. Under the Supreme Court Rules the only evidence of what occurs at a trial is the official stenographer's notes. That being the case, and the official stenographer's notes embodied in the stated case, there were no facts from which the judge might infer the absence of Hannay.

A. D. Taylor, K.C., for the Crown: It is not a question of

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evidence, but a question of procedure, over which, in criminal matters, the Dominion Parliament has absolute jurisdiction. Section 1017 states what evidence shall be sent to the Court of Appeal, and especially provides that if the judge's notes only are sent up, the Court of Appeal may refer to such other evidence of what has taken place as it thinks fit. Here we have the transcript of the evidence, which the learned trial judge states is defective, and a copy of the judge's notes. This shews that there were facts from which the judge could have reasonably inferred the absence of Hannay at the time of the trial. He cited *Reg.* v. *Nelson* (1882), 1 Ont. 500, a case decided before the alteration of the wording of section 999, which formerly read, "If it is proved that any person . . . . is dead," etc.; and *Reg.* v. *Forsythe* (1900), 5 Can. Cr. Cas. 475.

Argument

Farris, in reply:

Cur. adv. vult.

12th February, 1914.

MACDONALD, C.J.A.

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

IRVING, J.A.

IRVING, J.A.: This is a case stated by MORRISON, J. under section 1014 of the Code for our opinion as to the admission in evidence at the trial under section 999 of a deposition made by Constable Hannay at the preliminary hearing.

The learned judge refused to state a case, and an appeal was taken from his refusal. On reading the stenographer's notes, we thought that a case ought to be stated, and later the learned judge put before us the following:

"Submitted by the Honourable Mr. Justice MORRISON for the opinion of the Court of Appeal for the Province of British Columbia, pursuant to the request of the accused, Joe Angelo, arising out of the trial of the said Joe Angelo, on charges of riotous damage to property, riot and unlawful assembly, against him at the sittings of the special Assizes held at New Westminster, British Columbia, on the 7th of January, 1914.

"Did I err in allowing the depositions of George Hannay, as taken at the preliminary hearing and set out at pages 120 and 142, inclusive, of the appeal book, to be admitted as evidence at the trial, on the evidence of David Stephenson, which was substantially as follows:

"That the said George Hannay, one of the constables on his staff at Nanaimo, had failed to report for duty. He left on leave about the 4th of December, since which time he had not seen him. He heard from him

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later at Vancouver and again from Seattle, U.S.A. He had failed to report, and he said he had absconded."

In my opinion, the last paragraph contains the evidence by which we should be guided in determining the question submitted. What follows in the stated case, I think, is more in the nature of an explanation. The learned judge, in my opinion, acted rightly in putting before us what the stenographer has taken down, and also in setting forth his own hasty notes, because had he not put before us the stenographer's notes, there might have been an application for further evidence under subsection (2). But whether he did what was unnecessary or not, in a conflict between what the judge certifies to and what the stenographer produces, we are bound to accept the statement of the judge. For myself I see no difficulty in reaching the conclusion that the evidence noted in the following words: "Hannay, 4th December, Vancouver, Seattle, absconded" was given immediately before the learned judge asked prisoner's counsel to admit that the man had absconded. It was suggested that the learned judge had introduced the word "absconded." I should think not, because he says lower down, "The chief of police has sworn to it," and Mr. *Bird* in effect said "that may be, but the chief of police does not know and, therefore, cannot swear that he is absent from Canada." The word may not have been used by the witness, but the idea was conveyed to the judge by whatever word was used—whether it was fled, bolted, skipped or disappeared.

IRVING, J.A.

Now, with the evidence certified to by the judge before us, let us consider whether it was rightly admitted under section 999 of the Code. In weighing evidence of this kind—or any kind—the judge (or jury) is permitted to bring to bear his experience and knowledge of the words and to take judicial notice of many matters. In the present case he was at liberty, in my opinion, to take judicial notice that at the time of the commission of the offence charged there had been at Extension and in its vicinity, a great many riots, and that the foundation of the rioting was the feeling between strikers and non-strikers, and he was also entitled to take notice that the case against Angelo was one of the many cases arising out of that strike

which would be dealt with at the special Assize over which he was presiding. He knew from the evidence of the chief of police that Hannay had been a constable at Extension, and it would, therefore, be likely that he would be called as a witness in more than one of these cases. A judge may also be sensible to the fact that feeling for and against persons charged with rioting in these circumstances would run high, and that persons appearing as witnesses in these cases might be made to suffer for having so done, and a judge may take notice of the fact that some people are lacking in moral courage and are averse to committing themselves one way or the other. With these matters present to his mind, can it be said that he was wrong in reaching the conclusion that a constable who was required as a witness at the Assizes, and who, from his having been examined as a witness at the preliminary hearing, must have known that he would be required—had some four weeks before the opening of the Assizes, left his position without explanation, nay, even pretending when he left that he would return (for it must be remembered that the constable had not left the service, he had merely obtained leave of absence), and then, having got away from his post, he had failed to report for duty. In short, had absconded. The word means to remove oneself for the sake of not being discovered by those with whom we are acquainted. But it is argued though Hannay may have absconded, it does not necessarily follow that it is any evidence that he was absent from Canada. Perhaps not—but the United States—or somewhere where the King's writ does not run, would be the most likely place to which he would go, and when the judge hears that the chief of police had heard from him in Vancouver, British Columbia, and then later from Seattle, Washington, all within three or four weeks from the trial, the conclusion that he had gone to the United States seems to me fully justified.

The language of the statute shews that it cannot be expected that absence from Canada will be proved as a positive fact. In most cases—in almost every case—it must be a matter of inference, determined by the probabilities of the case, and in every case common sense and shrewdness may be brought to bear upon the facts elicited.

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In *Richard Evans & Co., Limited* v. *Astley* (1911), A.C. 674 at p. 678, the Lord Chancellor pointed out that Courts, like individuals, habitually act upon a balance of probabilities.

It is not possible for a Court of Appeal to say what degree of proof will support an application of the kind that the learned trial judge had to consider. It is undesirable that any such attempt by the Court of Appeal should be made. Each case must be decided upon its own facts, and if the more probable conclusion is, in the opinion of the trial judge, that the man is absent from Canada, and there is anything pointing to it, then this Court ought not to reverse the finding of fact.

IRVING, J.A.

In the present day, too much importance cannot be attached to the principle referred to by Abbott, C.J. in 1820, in *The Queen's Case,* 2 Br. & B. 284 at p. 315, that, in the administration of justice, "nice and subtle distinctions are avoided in our Courts as much as possible, especially in matters of practice, on account of the delay, confusion, and uncertainty, to which such distinctions naturally lead."

I would answer the question in the negative.

MARTIN, J.A.

MARTIN, J.A.: When this case first came before us on the 2nd instant, on the motion for leave to appeal under section 1015, because the Court below had refused to reserve certain questions, we gave leave to appeal on the first question submitted. But, following the rule we have laid down, we refused to accede to the request of both counsel to thereupon hear and deal with the matter upon the agreement of counsel and the evidence before us just as though that case which section 1016 specifically declares "shall be stated" had been stated by the only tribunal which could state it, *viz.*: the Court before which the question arose. In the stating of a case this Court cannot substitute itself, and should not allow counsel to substitute themselves, for the tribunal nominated by the statute to discharge that duty. In this respect we have again thought it not expedient to follow the course adopted in Ontario in *Rex* v. *Armstrong* (1907), 15 O.L.R. 47, and if I may be permitted to say so, the desirability, indeed necessity, of always requiring these questions to be formally stated, thereby avoiding the like-

lihood of error, has once more been shewn, because, as the matter now comes before us on the stated case, it is clear that if we had dealt with it as requested on the motion, a grave miscarriage of justice would have resulted.

It is beyond question that we are bound by the facts as they are certified to us by the Court below, and cannot go beyond them (save as provided by subsections (2) and (3) of section 1017, as hereinafter noted), even though the result is that they may "state you out of Court," as it is put in *Evans* v. *Hemingway* (1887), 52 J.P. 134, which is an example of a case restated. It cannot, indeed, be otherwise, because we are prohibited from weighing evidence, since only questions of law are appealable under section 1014, consequently we must have sent up to us, as was said in *Re County Council of Cardigan* (1890), 54 J.P. 792, not "abstract questions," but "specific facts which have actually arisen, and the decision come to on those facts," before we can entertain the matter.

In stating the present question the learned judge has stated the facts, and has sent us, as authorized by section 1017, a copy of the material evidence as taken down by the official stenographer, and also a copy of his own notes, and in so doing he informs us that certain specified portions of the stenographer's notes are incorrect, and omit material, indeed, vital, parts of the evidence on the application before him, which he supplements from his own recollection and notes, including one crucial question put by the judge himself to the witness and the answer thereto (respecting the presence of the absconding police constable in Seattle, U.S.A.), which the stenographer entirely omitted. In such circumstances our duty is clear, and it is that we must accept the facts so certified to us. We have no power to refer, in these circumstances, to any "other evidence of what took place at the trial," under subsection (2) of section 1017, because that power is given to this Court "if only the judge's notes are sent and it considers such notes defective." Here the stenographer's notes are also sent. There is no ground for sending the case back to be amended or restated under subsection (3). The obligation and responsibility for stating the facts correctly to this Court are upon the learned

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judge below. We cannot, save under subsection (2), review his finding of fact on what occurred before him.

Turning then to section 999. On its unusual wording it is obvious that it does not require positive proof of the existence of all the conditions precedent to the admission of the evidence. There are two classes of such conditions mentioned in the section. The first relates to (a) the death, (b) illness, or (c) absence from Canada, of the person specified, and to satisfy the existence of any of these three conditions all that is required is the proof of such facts that said existence "can be reasonably inferred." But the section goes on to require positive proof of the existence of the second class, *viz.*: "if it is proved (a) that such evidence was given or such deposition was taken in the presence of the accused"; and (b) that he had full opportunity to cross-examine; "then if the evidence or deposition purports to be signed by the judge or justice . . . it shall be read as evidence in the prosecution," etc. This clearly shews the distinction between the two classes of proof. All that is necessary to be shewn to us is that on the facts before us it "can be reasonably inferred" that condition (c) existed, and the tribunal to draw that inference is not this Court, but the Court below. In this case, all that we can do is to see if there are such facts as would reasonably entitle the judge below to draw the inference he has drawn, to the same extent and in the same manner as would entitle a jury to reach a reasonable finding on facts of more or less cogency before them. We cannot weigh the evidence, but only consider the matter so as to be able to say whether or no there were facts before him from which the inference he has drawn may be said to be reasonable. That is what I understand the Supreme Court of the North-West Territories to hold in *Reg.* v. *Forsythe* (1900), 5 Can. Cr. Cas. 475, when it says (p. 483) that the Court appealed to—

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"ought to answer whether the evidence was sufficient to justify the judge in finding as he did, and not merely to say that it was a matter in his discretion, and that having exercised that discretion as he did, the Court would not interfere."

The word "justify" is used, I take it, in the strict legal sense that a verdict of a jury is "justified" when a Court of Appeal refuses to set it aside because it could not be said that reason-

able men could not reasonably reach the same conclusion on the evidence, though it might appear unsatisfactory to other minds.

Proceeding then to apply this principle to the facts before us, I have no hesitation in saying that the action of the learned judge in drawing the inference he did is fully justified in law, and I shall only add that the word "abscond" has different legal meanings, and, according to the context, may imply that the absconder has fled the country to foreign parts, or, *e.g.*, in the case of certain sections of the English Bankruptcy Acts, that he has "departed from his dwelling-house for the purpose of delaying his creditors and escaping payment of his debts" without leaving England, in which country he was in fact rightly held to have been arrested as an absconder in *Reg.* v. *The Judge of the Northallerton County Court* (1898), 47 W.R. 68. In the case at bar, the expression is clearly used in the former sense.

It follows that I answer the question reserved in the negative.

GALLIHER, J.A.: The questions for us to decide are: (1) Was there evidence adduced at the trial from which the judge could reasonably infer that a certain witness, Hannay, who had given testimony at the preliminary hearing, was absent from Canada so as to permit of his depositions being read as evidence in the prosecution under the provisions of section 999 of the Criminal Code? (2) If such depositions were wrongly admitted, was some substantial wrong or miscarriage thereby occasioned under section 1019 of the Criminal Code?

Dealing with the first question, I am of opinion that the receiving or rejecting of the depositions is not a matter merely in the discretion of the trial judge. It is, therefore, open to this Court, on review, to consider and decide whether the evidence adduced was in law sufficient to permit of the depositions being read as provided by section 999 above referred to; or, to put it in another way, was there legal evidence from which the judge might reasonably infer that the witness Hannay was absent from Canada.

The evidence is that of Mr. Stephenson, chief of police, as it is before us transcribed by the stenographer, with the addition thereto of the trial judge's notes, containing matter which does

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not appear in the stenographer's transcript of the evidence. This, I think, is provided for by section 1017 of the Code, and that we are to look at both the evidence as transcribed and the judge's notes. Taken together, then, the evidence is in substance this: Hannay, who was a constable under Stephenson, was last seen by him on the 4th of December, 1913, when he went away on leave. Stephenson heard from him later at Vancouver and also at Seattle, which latter city is in the State of Washington, without Canada, that he has failed to report, and that he has absconded.

As to the use of the word "absconded" by the witness, there is a conflict between the judge's notes and the transcript, or at least, there appears to me to be such, but assuming the word to have been used by the witness, I do not think from reading the evidence as a whole, we can take it that it means more than that he had left the country, so that the implication that he was out of the country for the country's good, and therefore not likely to have returned, should not attach.

Then, taking the statement that he (Stephenson) heard from Hannay at Seattle, that may be open to two constructions, either that he had heard direct, as by letter, or from some third party. If the latter, that would not be evidence, as it is hearsay; if the former, no evidence is given that there was a letter at all, or that it was dated from or postmarked at Seattle, even if such evidence would be sufficient upon which to found a reasonable inference that he was still absent from Canada, considering the lapse of time and the proximity of Seattle to British Columbia. Further, there is not a tittle of evidence to shew that any efforts whatsoever had been put forth to discover his whereabouts.

GALLIHER, J.A.

The Crown's case, then, rests upon the fact that he left Canada, was heard from in Seattle sometime prior to the trial, that he was a constable on leave and should have reported for duty, and that he had not done so. I have dealt with the first two, and it seems to me they are not sufficient. Does the fact that he was a constable on leave, and has not reported for duty, so strengthen the case as to justify the learned trial judge in admitting the depositions? I must confess that in the absence

of authority I should have entertained some doubt, but we have been referred to *Reg.* v. *Forsythe* (1900), 5 Can. Cr. Cas. 475, a decision of the Supreme Court of the North-West Territories *in banc,* where, under circumstances very similar, the Court unanimously held that the trial judge was justified in admitting the depositions.

This authority is, of course, not binding on us, but besides entertaining a high regard for the opinion of the members of the Court, I think it is desirable (compatible with the interests of justice) that decisions in criminal matters should be as uniform as possible throughout Canada.

I would, therefore, answer the first question in the negative.

It becomes unnecessary to deal with the other phase of the case.

McPhillips, J.A.: The accused was tried and found guilty at the special Assize at New Westminster in January, 1914, of riotous destruction and riotous damage to property, riot and unlawful assembly.

The Crown introduced the evidence of one George Hannay, a provincial constable, at the trial—as given at the preliminary inquiry before the committing magistrate.

The question as submitted by the learned trial judge, following the order of this Court after appeal had, to state a case, reads as follows: [already set out in statement.]

In my opinion, where the accuracy of the evidence adduced at the trial, or its completeness, is questioned, this Court must place the greatest reliance upon the case as stated by the trial judge, and his notes of the evidence. Here we have the evidence, as transcribed by the stenographer, questioned by the trial judge, but we have in precise terms from the trial judge the evidence which is material to warrant the introduction of the evidence of Hannay. That evidence is, that Hannay had failed to report for duty, having left in December, 1913, and had not been seen since, that he had been heard from first in Vancouver, later in Seattle, Wash., and that he had absconded.

Section 999 of the Criminal Code sets forth what is to be proved to admit of the depositions being read as evidence in

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the prosecution—that is, such facts are proved that it can be reasonably inferred therefrom that the person whose evidence was taken before the trial, in the investigation of the charge, is absent from Canada. The Criminal Code unquestionably commits the determination of the matter to the trial judge, and we have the learned judge, in the stated case submitted to this Court, using this language:

"I, however, held that that evidence was sufficient upon which to base a reasonable inference that he was still out of Canada."

It is to be noticed that the trial judge, in his charge to the jury, made this reference to the evidence of Hannay:

"Now, where is Hannay? His evidence was read here because he was out of the jurisdiction of the Court. He cannot be got; otherwise that evidence could not have been read."

Now, what was the course taken by counsel for the accused? The learned trial judge states this:

"As to the observations of Mr. *Bird*, my clear recollection is that what he urged upon me was that there was no evidence that Hannay is now out of Canada."

In the stated case, we have the following statement as having been made by Mr. *Bird* (counsel for the accused), when David Stephenson, the chief constable, was being examined as to Hannay's whereabouts:

"The chief of police does not know that he is out of Canada."

In a previous statement from Mr. *Bird*, he said:

"Of course I do not admit that Mr. Hannay has absconded."

MCPHILLIPS, J.A.

This is followed by this observation from the trial judge:

"You are not admitting anything. The chief of police has sworn to it."

The evidence of Hannay was then read, until the Court and the foreman of the jury intervened with the statement that the evidence as to the houses having been burned had been heard over and over again.

Then we have Mr. *Bird* interposing and saying:

"My learned friend must put in all the evidence with relation to this man—evidence for the accused as well as evidence against the accused."

The Crown counsel, in answer, said:

"I was trying to."

Then, apparently, further discussion between the Court and counsel took place, and finally we have this:

"Mr. *Bird*: I ask my learned friend to put in questions 119 to 138.

"The Court: We want to hear the prisoner's connection with these things.

"Mr. *Taylor*: All right."

It is fair to assume that in the opinion of counsel the questions and answers asked to be read were not prejudicial, but favourable to the accused. However, no doubt the question we have to decide is whether the depositions were properly admitted, as counsel for the Crown frankly admitted that Hannay's testimony may have influenced the verdict of the jury, and if wrongly admitted, would offend against the principle well defined in *Allen* v. *Rex* (1911), 44 S.C.R. 331.

The learned trial judge having heard the evidence as given at the trial as to the whereabouts of Hannay, decided that the evidence adduced entitled him to reasonably infer that Hannay was absent from Canada. In Halsbury's Laws of England, Vol. 9, at p. 366, foot note (*a*), we have this stated:

"The question whether the evidence is sufficient to prove the conditions precedent to the admission of the depositions is one for the determination of the presiding judge (*R.* v. *Stephenson* (1862), Le. & Ca. 165)."

I am not of the opinion that anything unfair was done at the trial, and I must say that even with the objection made to Hannay's evidence, nothing was suggested that would indicate that any prejudice was apprehended from the introduction of the evidence; in fact, as I have pointed out, certain portions of the evidence counsel for the accused desired should be read in evidence, and this is not a case of new evidence being introduced unknown to the accused.

With regard to the evidence as to Hannay being absent from Canada, my opinion is that the learned trial judge had ample evidence upon which to draw the inference that he was absent from Canada. The chief constable, under whom Hannay was, swore in positive terms that Hannay had absconded. This, coming from Hannay's superior officer, and one who must know the seriousness of such a statement, in itself is most convincing proof, along with other testimony given, that Hannay was out of the jurisdiction, and absent from Canada.

The word "abscond" is dealt with in Wharton's Law Lexicon, 10th Ed., p. 13:

"Abscond, to fly the country in order to escape (1) arrest for crime."

This sufficiently indicates the gravity and meaning attachable to the use of the word, and whilst reference is made to the evi-

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dence as given indicating Hannay's absence from Canada, I, of course, do so with all reservation, and not intending, as it would be wrong to do so, to suggest that Hannay has in any way contravened the criminal law; still, it was a matter of evidence before the learned trial judge, potent in its meaning, and from which a strong inference could be drawn that Hannay, a Provincial constable, not having reported for duty, and when last leard from—in the United States—was at the time of the trial absent from Canada. *Reg.* v. *Forsythe* (1900), 5 Can. Cr. Cas. 475, would seem to be an authority strongly in support of the decision arrived at by the trial judge.

The trial judge having proceeded upon the evidence adduced before him, and having drawn the inference that it could be reasonably inferred that Hannay was absent from Canada, what right of review resides in this Court? No doubt, if there was a total absence of evidence, or manifestly not sufficient evidence, then this Court could and would interfere, where of opinion that there had been a miscarriage of justice. But is the case before us one of such a character? In my opinion it is not, and in my opinion the learned trial judge drew the necessary and obvious inference deducible from the evidence adduced before him at the trial—that being, that Hannay was absent from Canada.

MCPHILLIPS, J.A.

It therefore follows that, in my opinion, the question as submitted should be answered in the negative.

Conviction affirmed.

Solicitors for the accused: *Bird & Leighton.*
Solicitors for the Crown: *Taylor & Hulme.*

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SHEARER v. CANADIAN COLLIERIES (DUNSMUIR), LIMITED.

Master and servant—Action at common law and under Employers' Liability Act—Injury to servant—Defective condition of machinery—Damages recoverable under Employers' Liability Act—Verdict for excessive amount—New trial—Jury—Questions to.

Plaintiff, a fire-boss in a mine, was directed by the mine foreman to start a pumping-engine, in doing which he was injured. In an action claiming damages, at common law or under the Employers' Liability Act, the jury brought in a general verdict for $7,500.

Held (IRVING, J.A. dissenting), that the plaintiff having failed to make out a case at common law, the appeal from the verdict should be allowed and a new trial ordered.

Remarks as to questions put to juries to answer.

APPEAL from the judgment of MORRISON, J. and the verdict of a jury in an action tried at Vancouver on the 18th of April, 1913, for damages for injuries sustained by the plaintiff while in the employ of the defendant Company. The plaintiff was employed as a fire-boss in one of the defendant Company's mines. Prior to going to work on the night of the accident he was instructed by the foreman, or pit-boss, that in the event of the pumping engine that cleared the mine of water stopping during his shift, he was to start it going again. On going down the shaft to work, he found that the pump had stopped. The pump-room was full of steam owing to leaks in the valve and steam pipes, but, with the assistance of two men, he tried to set the pump going, and while so engaged the pump suddenly kicked back, striking the plaintiff with great violence and fracturing his skull. The jury awarded $7,500 damages, for which judgment was entered. The defendant Company appealed on the grounds that the damages given could only be recovered at common law and not under the Employers' Liability Act, and that there was no evidence to support a finding of negligence at common law.

Statement

The appeal was argued at Vancouver on the 26th of Novem-

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ber, 1913, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Davis, K.C., for appellants (defendants): The evidence shews the plaintiff did not start the pump the right way, which was the cause of the accident. We admit the right to recover under the Employers' Liability Act, but not at common law. It is alleged there was a defective system, but on the evidence the real cause of the accident was the order to start the pump, and it makes no difference whether the pump was defective or whether there was a defective system. The case of *Canada Woollen Mills* v. *Traplin* (1904), 35 S.C.R. 424, is in conflict with *Wood* v. *Canadian Pacific Ry. Co.* (1910), 20 Man. L.R. 92; (1911), 47 S.C.R. 403.

W. S. Deacon, for respondent (plaintiff): The question is whether the jury could, on the evidence, find that the accident was due to the negligence of the defendants. There is no evidence that the pump was properly installed and there is evidence from which it might be inferred that it was never in proper working order. It was always the duty of the fire-boss to look after the pump when the pump-man was away. It was an automatic pump and should be always subject to the application of steam, and there may be as much negligence in not knowing of the defect as in knowing and not repairing. That the defendant Company had not installed the machinery properly, which was a primary duty: see *Cummings* v. *Vancouver* (1911), 16 B.C. 449; *Thomas* v. *Rhymney Railway Co.* (1871), L.R. 6 Q.B. 266. There might be two proximate causes of the accident, the order to start the pump, and defective machinery.

Argument

Davis, in reply: The original instalment is a question of evidence, but the evidence of the plaintiff shews there was only a temporary defect.

Cur. adv. vult.

23rd February, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: After perusing the evidence, I am convinced that the plaintiff failed to make out a case at common

law. This conclusion is based very largely on his own evidence and that of his witnesses, and not so much on conflicting testimony as between the plaintiff's witnesses and the defendants'. In fact, there is no real conflict on this issue. The pumping-engine in question appears to have been of the usual type, and when kept in proper adjustment and repair, not to have been defective. Like all engines and pumps, it required packing from time to time to keep it in efficient working order, and on the night in question, I think it is apparent from the evidence that it was not then in efficient working order. As a result, the plaintiff was injured in attempting to start the engine. There is quite sufficient evidence to support the jury's conclusion that plaintiff was not guilty of contributory negligence in doing this, and that he did it in response to the orders of the person having superintendence over him. This being so, the plaintiff, though not entitled to succeed at common law, was, in my opinion, entitled to succeed under the Employers' Liability Act. The verdict, however, is admittedly a common-law verdict, being for a much larger sum than could have been given under the Act.

MACDONALD, C.J.A.

The case will therefore have to go back for retrial, so that the damages may be assessed on a proper basis, unless the parties can agree upon the amount which ought to have been awarded by the jury had they awarded them under the Act.

The appeal should, therefore, be allowed, and a new trial ordered.

IRVING, J.A.: The plaintiff was injured by the unexpected starting of the pump, which was out of order, and which the plaintiff was trying to start in an unusual manner. The amount of damages awarded can only be awarded if the action can be sustained at common law. If the case is only maintainable by virtue of the Employers' Liability Act, the amount awarded cannot be reached.

IRVING, J.A.

The action, according to the statement of claim, proceeded on a common-law basis, and also under the Employers' Liability Act. At the close of the plaintiff's case there was no request to withdraw the question of common-law liability. In my opinion the plaintiff established a *prima-facie* case at common law when

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he shewed (a) that he, the fire-boss, was called upon to start the pump, in the event of its stopping during the absence of the pump-man, who was familiar with the extraordinary methods required to set it going; (b) that these extraordinary methods involved a certain amount of danger to a person having to resort to them; (c) that its defective condition had existed for weeks; and (d) repairs were not being made by the pump-man.

The negligence of the defendants was their neglect to remedy the defects, which either might have been in the drum valve and could not be stopped by packing by the pump-man, or which that man—McFarland—was unable to do with the ordinary material supplied to him. There was no evidence by McFarland as to the pump, nor from anyone as to his incompetency. The jury had, then, before them a competent man, supplied with proper material, and yet, nevertheless, this defective state of affairs was allowed to exist for weeks. Now, when an amateur mechanic—such as the plaintiff was—is required to start this pump going whenever it failed to work, I think we have evidence of a defective system.

The judge's charge made no reference to the difference between the two classes of action, until the direction as to damages was given. The learned judge referred to an allowance to be made for pain and suffering. In that connection the defendants' counsel suggested that the damages should be limited to what could be recovered under the Employers' Liability Act. There was no objection to the jury considering this case as one at common law. The argument put before us is that the condition of the pump was one which arose out of its daily or ordinary use, and which could be remedied by the use of packing (which it was said was supplied) by the ordinary pump-man (who, it is said, was in attendance that night). On these points we have no express findings.

IRVING, J.A.

Where a case at common law is made out by the plaintiff, and evidence to displace that case is gone into, and the whole submitted to the jury, without objection, I think we should not be asked to retry the matter.

The defendants, if entitled to anything, are entitled to a new

trial on the ground of misdirection, or non-direction amounting to misdirection, but that point is not open to them.

MARTIN, J.A.: After a careful perusal of the appeal book, I can only reach the conclusion that there was not sufficient evidence to go to the jury in support of the contention that this pump had fallen into such a dilapidated state that the defect in it "was . . . . one arising from [its] general worn-out condition and from the fact that it 'had lived its life,'" to quote from the language used by Davies, J. in *Canada Woollen Mills* v. *Traplin* (1904), 35 S.C.R. 424 at p. 434, and which is relied upon, and, in the circumstances, unless this contention can be sustained, the verdict at common law cannot stand.

It is desirable to add that the fact that the jury did not answer the questions submitted to them by the learned trial judge, MORRISON, J., has added to the difficulty in deciding this matter. It is true that he did nominally submit questions to the jury, but in doing so he made these observations:

"Now, gentlemen, of course, you need not answer these questions. You may bring in a verdict, say for the defendants, if you think the plaintiff is not entitled, or for the plaintiff, however, if for the plaintiff, say, for the plaintiff so much, just a general verdict. You have nothing to do with the costs. I say it is not necessary for you to answer these questions; you may if you desire."

The jury rightly took the view that this was really an invitation to disregard them, which appears from the apt reply of the foreman, who, after announcing a general verdict in favour of the plaintiff for $7,500 said, in answer to an inquiry about the questions:

"We did not bring them in, we tore them up."

It is to be regretted, in the interest of litigants, because it is in their interests that their rights should be correctly and expeditiously determined, that, after repeated statements in reported and unreported judgments of this Court, *e.g., Andrews* v. *B.C. Electric Ry. Co.* (1913), 18 B.C. 25; *Armishaw* v. *B.C. Electric Ry. Co., ib.,* 152; *McElmon* v. *B.C. Electric Ry. Co.* [*ib.*], 522; 4 W.W.R. 1315, and *Cook* v. *Newport Timber Co., infra,* largely based on views expressed in the Supreme Court of Canda cited in *Guthrie* v. *W. E. Huntting Lumber Co.* (1910), 15 B.C. 471, as to the proper course to be adopted in

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questions in negligence cases, some trial judges continue to deprive us of the assistance we are entitled to expect from them in this respect in the discharge of our appellate duty. The last case wherein we drew attention to this matter was *Cook* v. *Newport Timber Co.* (1913), 18 B.C. 624, wherein the same learned judge who decided the case at bar, gave the following directions to the jury on the point:

"Now, as to the questions, I will leave questions to you, but it is not necessary for you to answer them. You need not have any regard as to the trouble that Courts of Appeal and other Courts have in struggling with your verdict, and don't hesitate to come to any conclusion you see fit, and answer the questions or not as you see fit. You haven't anything to do with the subsequent course of the proceedings."

With all due respect, I feel at last constrained to say, since the difficulty is being made so often, that the cases above cited shew, and some of them expressly declare that this is not a proper conception of the duty of the judge or the jury to the litigants or to this Court, and the jury should not be thus discouraged from, but encouraged in answering questions. My long and profitable experience in this encouragement is mentioned in *Guthrie* v. *W. F. Huntting Lumber Co., supra.* And if the answers should be inconclusive or indefinite, the long-established, simple and effective course should be followed of sending the jury back to make their meaning plain: *cf. Rayfield* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 361, which course, I note, is also adopted in Ontario: *cf. Dart* v. *Toronto R. Co.* (1912), 8 D.L.R. 121, wherein it was said, at p. 125:

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"It is much to be regretted that the jury were not required to give more definite and understandable answers to questions six and eight; the failure to do that makes the delay, cost and worry of another trial unavoidable."

The appeal, I think, should be allowed, and a new trial ordered, which is necessary because the judgment as entered, for $7,500, is based only upon a liability at common law, and though a liability under the Employers' Liability Act is admitted, yet the usual course of taking a finding of alternative damages under that Act, so as to avoid a new trial, was, unfortunately, not followed.

GALLIHER, J.A.

GALLIHER, J.A.: I agree that the appeal should be allowed. I do not think the facts of the case bring it within the principle

laid down in the Supreme Court of Canada case, *Canada Woollen Mills* v. *Traplin,* and I regret that the jury did not see fit to bring in an alternative finding as to damages under the Employers' Liability Act, which would have prevented the costs of a new trial here. I see no other course than to send it back for a new trial.

McPHILLIPS, J.A.: This is an appeal in a negligence action from the judgment entered by MORRISON, J. upon a general verdict of the jury finding in favour of the plaintiff, and for $7,500 damages. Questions were submitted to the jury, but were unanswered. The case comes before this Court, in my opinion, in a most unsatisfactory way. The questions should have been answered, and, while it is true, under the practice, the jury may bring in a general verdict, yet, in a case where it is questionable whether there is liability at common law, it is all the more important that questions should be answered. It will become a serious matter for consideration for the law-making authority as to whether or not, in the interests of justice, it should not be obligatory upon a jury to answer questions directed to the specific acts of negligence charged, and where the Employers' Liability Act is invoked, questions directed to those facts which are necessary to be found, without which the workman cannot recover; that is, the Employers' Liability Act, whilst imposing a liability which would not be upon the employer at common law, only imposes it with the necessary facts being found in favour of the workman.

In my opinion it is a most unsatisfactory condition of things to have an action go to trial with a large amount of evidence adduced, and a general verdict found, leaving it to the Court of Appeal to sift that evidence and to determine whether the jury were entitled to find at common law or only under the Employers' Liability Act, especially when invariably there are disputed questions of fact which vitally affect the question as to whether there is or is not liability at common law or under the Employers' Liability Act.

Here the verdict, in amount $7,500, is in excess of the amount which could have been allowed under the Employers'

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Liability Act as I calculate it, taking the estimated earnings for the three years preceding the injury. These may be said to have been $109 a month, and would for three years amount to $3,924, and that sum would be the total amount the plaintiff could be allowed if there is liability only under the Employers' Liability Act. Upon the facts as I glean them, the plaintiff was injured because of the fact that the single ram pump stopped on the centre. It is apparently admitted that a pump in the best of repair may do this. There is evidence that the plaintiff was told to attend to the pump by Gillespie, the overman. The plaintiff was not the pump-man. It is disputed whether at the time of the accident the pump-man was on duty. Without express instructions, the plaintiff would not have any right or duty to interfere with the pump. There was not such evidence as warrants a holding that there was dilapidation, or that the pump was not, as installed, a proper and safe pump. There is not evidence to warrant the holding that fit and proper persons were not in superintendence, and that all facilities were available to make proper repairs; and there is not sufficient evidence to bring home to the defendant Company the disrepair of the pump, but there is evidence that the state of disrepair was known to others in superior authority to the plaintiff, and that the plaintiff was acting under instructions from Gillespie in attempting to keep the pump in action. Therefore, upon the facts as I find them, there is no liability upon the defendant Company at common law, but there is a liability under the Employers' Liability Act, and as I conceive it to be the duty of this Court to in all cases obviate the necessity for a new trial where possible, judgment ought to be entered for the plaintiff for $3,924, and the judgment appealed from varied to that extent.

MCPHILLIPS, J.A.

The jury having found generally in favour of the plaintiff, it may be well considered that they did so upon facts which they have believed sufficient to found liability under the Employers' Liability Act, and if, in my opinion, that conclusion can reasonably be drawn, and that there are no facts remaining *in dubio,* then it is the duty of this Court to enter judgment for the plaintiff for the reduced amount. I am rather supported

in this view by the line of argument of Mr. *Davis,* counsel for the appellants, who, in the course of an able argument directed to establish no liability upon the defendant Company, could not gainsay that the questions of fact were for the jury, and that there was evidence upon which the jury could have found liability against the defendant Company under the Employers' Liability Act. Were such a finding upon the facts an unreasonable one, then only should we send the case back for a new trial.

Paquin, Limited v. *Beauclerk* (1906), A.C. 148; 75 L.J., K.B. 395, is a clear authority for the course which I here adopt in deciding that judgment should be entered for the plaintiff, varying the judgment below as I have stated. Had the jury been instructed, as I submit they should have been, to assess the damages under each branch of the claim, we would not be in the difficulty we now are. But in the interests of justice, and to prevent unnecessary costs being visited upon the litigants, the ends of justice require that this Court should now proceed and dispose of this action in the way of finality, in so far as the due exercise of jurisprudence admits of it being done. I might further add that we could treat the verdict of the jury as being excessive and reduce it to that sum which I have stated would be the correct amount—liability being only under the Employers' Liability Act. Authority for this course is to be found in Order LVIII., r. 5A, marginal rule 869a.

In a review of the law, I think it can be well stated in the language of the Lord Chancellor in *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326 at p. 332:

> "What the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select competent and proper persons to do so, and to furnish them adequate material and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence this is not the negligence of the master."

Upon the facts of this case it cannot, in my opinion, be established that the works and plant were not properly constructed and installed, and the cases which well elucidate the law are: *Rajotte* v. *Canadian Pacific Railway Co.* (1888), 5 Man. L.R. 297; 365; *Matthews* v. *Hamilton Powder Co.*

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(1887), 14 A.R. 261; and *Wood* v. *Canadian Pacific Railway Company* (1899), 6 B.C. 561; 30 S.C.R. 110.

Upon the facts of this case I do not consider that knowledge was brought home to the defendant Company of the defect in the pump, and it follows that there can be no liability at common law. The authorities to support this view are *Williams* v. *Birmingham Battery and Metal Company* (1889), 2 Q.B. 338; and *Matthews* v. *Hamilton Powder Co., supra.* The pump was not in such a state of disrepair that more than ordinary care and attention would have rendered it safe, and there were competent persons in charge, and adequate materials at hand, and the failure was that of, and the negligence only of the persons in superintendence, *i.e.,* this was a case where there was proper machinery and competent servants, but negligence and failure on the part of those in superintendence to do ordinary repairs, and express orders by the overman Gillespie to the plaintiff to attend to the pump; and by reason of this, and only because of the Employers' Liability Act, is there liability. An authority in support of this view is *Henderson* v. *Carron Co.* (1889), 16 R. 633.

Mr. Beven, in his work on Negligence, 3rd Ed., Vol. 1, at pp. 668-9, remarks upon the difference in the law as expounded by the Irish Exchequer Chamber in *Conway* v. *Belfast and Northern Counties Ry. Co.* (1875), Ir. R. 9 C.L. 498; (1877), Ir. R. 11 C.L. 345; and the English Court of Queen's Bench on the point of vice-principal or representative. The Irish Court holds that there is liability for the acts of the *alter ego,* but not so in England.

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Lord Watson, in *Johnson* v. *Lindsay & Co.* (1891), A.C. 387, adopts "the compendious definition of the principle upon which the master's non-liability rests," given by Blackburn, J. in *Howells* v. *Landore Steel Co.* (1874), L.R. 10 Q.B. 62 at p. 64; and see Beven on Negligence, Vol. 1, at p. 670.

It follows, therefore, that in my opinion, and as previously expressed upon the facts of this case, there is no liability at common law, but there is under the Employers' Liability Act. I would, therefore, allow the appeal to the extent of varying

the judgment, by directing a judgment to be entered for the sum of $3,924 damages under the Employers' Liability Act.

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Appeal allowed and new trial ordered, Irving, J.A. dissenting.

Solicitors for appellants: *Davis, Marshall, Macneill & Pugh.*
Solicitors for respondents: *Deacon, Deacon & Wilson.*

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LAFOND v. LAFOND

Will—Subsequent codicil properly executed—Will referred to in codicil—Parol evidence admitted to identify will.

Where a codicil was legally executed and the will (imperfectly attested) was identified by parol evidence to be the document referred to in the codicil as the last will of the testator, the will and codicil will be admitted to probate.

Allen v. *Maddock* (1858), 11 Moore, P.C. 427; 117 R.R. 62, followed.

ACTION to establish a will, tried by MURPHY, J. at Vancouver on the 13th of March, 1914. The will in question was dated the 2nd of February, 1912, and witnesses called to prove the execution were not able to say whether or not the testator had signed in their presence, or, in fact, whether he had affixed his signature to the will before he brought it to them and asked them to sign as witnesses. On the 31st of January, 1913, the testator made a codicil, which was properly executed in the presence of two witnesses, in which the testator said:

Statement

"I . . . . declare that my last will and testament is at the Great Northern Bank, Steveston, B.C., but I also declare that I make a codicil to my last will and this is to appoint Moses Lafond, my nephew, the only executor of all my estate and dispose of it according to the directions of my last will."

The executor testified that he went to the bank in Steveston

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and there found the will in question, and that he found no other will among the testator's papers.

H. S. Wood, for the executor.

D. A. McDonald, for beneficiaries other than the widow.

Woods, and *Noble,* for the widow and daughter.

23rd March, 1914.

MURPHY, J.: In this action I found at the trial that deceased had sufficient mental capacity to make a will. As to the execution, I would hesitate to hold under the authorities that I should not give effect to a presumption of valid execution. However that may be, I think the case clearly falls within *Allen* v. *Maddock* (1858), 11 Moore, P.C. 427; 117 R.R. 62. The codicil was legally executed, and the will was clearly identified by parol evidence to be the document referred to specifically more than once in the codicil as the last will of the testator. I must decree that the will and codicil be admitted to probate. Costs of all parties will be paid out of the estate, as the case, in my opinion, was one in which proof in solemn form was rightly insisted upon.

Judgment

Order accordingly.

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Statute, construction of—Forest Act, B.C. Stats. 1912, Cap. 17, Secs. 100, 102—Restriction on export of lumber—Cedar blocks for manufacture of shingles—"Other sawn lumber"—Meaning of—Application of rule "ejusdem generis."

Under section 100 of the Forest Act "all timber cut on certain areas shall be used in this Province or be manufactured in this Province into boards, deal, joists, lath, shingles, or other sawn lumber." The plaintiff Company manufactured in their mill cedar blocks for export to the United States, where they were made into shingles. The blocks were 16 and 24 inches long, consisting of a section of a tree or log sawn squarely at each end and also sawn longitudinally so as to present a number of even surfaces of varying widths, a small arc only of the original circumference of the log being in evidence. These blocks were seized by the officers of the Department of Lands in course of transit out of the Province in contravention of the Act. On appeal from the order of CLEMENT, J. dismissing the plaintiff's application for a writ of replevin:—

Held (MARTIN, J.A. dissenting), that the *ejusdem generis* rule of construction should be applied in this case as the particular items, "boards, deal, joists, lath, shingles," fall within the class or category of "finished product." The term "finished product" is the category within which the general phrase "or other sawn lumber" must be confined. The cedar blocks, not being a "finished product," did not fall within the general phrase. The seizure, therefore, was justified.

Foss Lumber Co. v. *The King* (1912), 47 S.C.R. 130, followed.

Judgment of CLEMENT, J. affirmed.

APPEAL from the judgment of CLEMENT, J. of the 5th of September, 1913, on an application by the plaintiff for a writ of replevin in respect of a quantity of cedar blocks sitting on the plaintiff's spur track or siding, and a quantity of logs lying at the mill, all on the property of the plaintiff, at Crescent, B.C. The cedar blocks had been seized by the Provincial officers for alleged contravention of Part 10 of the Forest Act, section 100 of which provides that all timber cut upon certain areas "shall be

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used in this Province or be manufactured in this Province into boards, deal, joists, lath, shingles or other sawn lumber, except as hereinafter provided." The cedar blocks were made from timber that was cut on lands covered by the section. Each block was cut either 16 or 20 inches long, and consisted of a section of a cedar log sawn squarely at each end and also sawn longitudinally so as to present a number of even surfaces of varying width. They were cut into this form at the plaintiff's mill and were exported by the plaintiff as "other sawn lumber," within (as the plaintiff contended) the meaning of section 100 of the Act. The main question was whether the cedar blocks were what is known in the lumber business as "shingle bolts," the plaintiff contending they were not, as a "shingle bolt" is made in the bush with an axe or wedge, whereas these blocks were manufactured in the mill. It was, however, admitted that they were exported in order that shingles might be made from them, and the defendants contended that as they were not sawn lumber in the way of a finished product, they could not be exported under the Act. CLEMENT, J. held that the rule of *ejusdem generis* applied, and that the general phrase "other sawn lumber" must be read as limited to lumber falling within the category of boards, deal, joists, lath, shingles, and the application was dismissed. The plaintiff appealed.

Statement

DesBrisay, for plaintiff Company.
A. D. Taylor, K.C., for defendants.

5th September, 1913.

CLEMENT, J.: Motion by plaintiff Company for a replevin order. It claims that certain cedar blocks seized by Provincial officers, in alleged contravention of Part X. of the Forest Act of this Province, were illegally seized. Section 100 provides that all timber cut upon certain areas "shall be used in this Province or be manufactured in this Province into boards, deal, joints, lath, shingles, or other sawn lumber except as hereinafter provided." Counsel agree that "joints" is clearly a misprint for "joists," and that the exception referred to has no direct bearing on the case at bar. It is also admitted that the timber from

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which the cedar blocks were made was cut upon lands covered by the section. Each block is either 16 or 20 inches in length, and consists of a section of cedar log or tree sawn squarely at each end and also sawn longitudinally so as to present a number of even surfaces of varying width, a very small arc only of the original circumference of the log being in evidence. The blocks are brought into this shape at the plaintiff's mill in this Province, and in this shape the plaintiff claims the right to export them as being "other sawn lumber" within the meaning of section 100, above, in part, quoted. It is not disputed that the blocks are intended for the manufacture of shingles; and it is quite clear, in my opinion, that they are not a finished product in the sense that in their present form they can be put to any practical permanent use. If left as they are they might aptly be styled "lumber" in another sense, namely, useless rubbish.

In my opinion, finished products in the sense I have roughly indicated—something available in its present shape to an ultimate consumer—is the *genus* within which falls each of the particular items (boards, deals, joists, lath, shingles), which precede the general phrase "or other sawn lumber," and is the *genus* within which the Legislature intended the general phrase should be confined. I must confess that I would not myself call blocks of wood such as above described "lumber," but I do not put my judgment upon that ground, because I am aware that the word lumber is a word of most uncertain and indefinite meaning. But I am clearly of opinion that this is a case which calls for the application of the *ejusdem generis* rule: see *Tillmanns & Co.* v. *Steamship Knutsford, Lim.* (1908), 77 L.J., K.B. 778, where the cases are reviewed. In *Larsen* v. *Sylvester & Co., ib.* 993, Lord Robertson speaks of the rule as perfectly sound "both in law and also as a matter of literary criticism." The recent cases emphasize this, that there must be a *genus,* a class, or category, within which the particular words fall. Given such a category as I think the statute here indicates, the general phrase which follows must be read as limited to matters falling within such category.

The motion is refused, with costs.

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The appeal was argued at Vancouver on the 20th of November, 1913, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Ritchie, K.C., for appellant: The action involves the construction of Part X. of the Forest Act, B.C. Stats. 1912, Cap. 17. Section 102 is the chief section to consider under which we contend the Government had not the right to seize the blocks in question. When dealing with a statute as to what articles can go in or out of the country, the exact wording of the statute must be followed. The question is whether it was manufactured into sawn lumber? A distinction is drawn between timber and sawn lumber, and we say this is sawn within the meaning of the section. If defendants' argument is to be carried out, the lumber must be manufactured to its highest state of perfection before it can be taken out of the country: *Foss Lumber Co.* v. *The King* (1912), 47 S.C.R. 130; *Tillmanns & Co.* v. *Steamship Knutsford, Lim.* (1908), 77 L.J., K.B. 778 at p. 787. We have not to go beyond the words "sawn lumber": see *Magann* v. *The Queen* (1889), 2 Ex. C.R. 64. "Intent" has nothing to do with the question; if this piece of wood were less cut, *i.e.,* left in 15 or 20 foot lengths, no question would be raised: see Maxwell on Statutes, 5th Ed., 461. This is a category. "Timber cannot be exported; lumber can." Deal ends may be sent to the United States and be made into boxes. This is just as much a contravention of the Act as sending these blocks, even if they are made into shingles when they get there.

Argument

A. D. Taylor, K.C., for respondents: These blocks were intended for shingles, and the manifest intention was to evade the Act. It was held in the Court below that the doctrine of *ejusdem generis* applied in this case. These blocks were intended for the manufacture of shingles. As they were, in the block, they were of no commercial value. The Legislature provided that they must manufacture shingles here with our lumber, and this lumber is cut into blocks that could be used for no other purpose than to be cut into shingles; they cannot, then, be exported.

Ritchie, in reply.

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MACDONALD, C.J.A.: In my opinion the 16 and 24 inch blocks in question in these proceedings were shingle bolts and nothing else.

Until a year or two ago a shingle bolt was understood to be a cedar block four feet long, split by axe and wedge in the forest. Latterly a new species of shingle bolt has come into vogue, made from inferior cedar logs cut into lengths of 16 and 24 inches at a sawmill, and then split by saw. What is done at the sawmill is part of the process of manufacturing shingles. It is not suggested by the appellant that the old-fashioned shingle bolt could be exported when cut from timber limits of the character of those from which the blocks in question were obtained. What it argues is that these blocks are sawn lumber and not shingle bolts, and therefore not within the prohibition of the Forest Act.

The evidence of the witnesses who professed to think that the blocks in question are not shingle bolts is not convincing. It appears to me to be specious and lacking in sincerity. The facts are that the appellant commenced to operate its mill a few months before these proceedings were commenced admittedly for the purpose of cutting cedar logs into blocks of the character in question. They did nothing else during the time its mill was in operation. It shipped the greater quantity of these blocks to a mill at Blaine, in the State of Washington, where they were sawn into shingles. Some few were sold in British Columbia to the owners of shingle mills. The appellant's whole business consisted in the manufacture of these shingle blocks, and, in my opinion, these blocks are not sawn lumber within the meaning of the Act, and their export is prohibited.

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The appeal should be dismissed.

IRVING, J.A.: I concur in the opinion of my brother GALLIHER, and would dismiss the appeal.

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MARTIN, J.A.: This action raises a question of much public importance respecting the export timber trade of this Province, one of our chief industries, to the extent that may be gathered

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from the fact that in the report of the minister of lands recently laid before the last session of the Provincial Parliament, the minister says, at p. D69:

"The life of the timber industry of British Columbia depends upon the profitable export of forest products from the Province, for the local population uses less than one-fifth of the timber annually produced, and the other four-fifths must be exported."

The question to be decided is whether or no the sawn cedar blocks seized herein are "sawn lumber" under section 100 of the Act, which directs that all the timber therein specified "shall be used in this Province, or be manufactured in this Province into boards, deal, joists, lath, shingles, or other sawn lumber. . . ."

At the outset it must, I think, be clear that if, as a fact, any timber can be brought within the category of "other sawn lumber," the statute is at once satisfied, and the timber cannot lose or be deprived of that nature merely because by being further sawed or handled it reaches a higher state of manufacture. The Act itself declares the extent or degree of manufacture that will satisfy it, *viz.*: "sawn lumber," and no more. Once the manufacturer has brought the timber from its original form of a rough log to the state that it becomes "sawn lumber" he has discharged his duty and the manufactured product is free for export, and no further process to which it may be subjected can reduce its acquired character or status, indeed, the more that is done to it, the more is that character impressed upon it.

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What we have before us are cedar blocks sawn from rough cedar logs, sawn lengthwise on all their sides or faces, which may be at least five in number, as in the sample in evidence (which is itself cut from a log section of eight sawn faces, *i.e.*, one quarter of a sawn octagon), and also sawn crosswise into lengths of 16 and 24 inches. There is, in truth, no part of their surfaces which has not been sawn and the bark removed therefrom. Now, it cannot be disputed that this manufactured product, on which $1.90 per thousand feet has, it is sworn and not disproved, been expended (more than, or as much as, the cost of manufacturing the same logs into rough, admittedly exportable, lumber), is in truth and in fact "sawn lumber" just as much as cedar blocks sawn to smaller dimensions (say 8 x 4 x 4 inches) for street paving unquestionably are. As Mr.

Justice Brodeur puts it in *Foss Lumber Co.* v. *The King* (1912), 47 S.C.R. 130 at p. 153:

"It is a sawing process all the same, and the plank, when it has passed through the operation, should be called a sawn plank."

Why, then, cannot they be exported? Because, it is said, the *ejusdem generis* rule applies, and the "other sawn lumber" must be of a similar nature to the "boards, deal, joists, lath and shingles" mentioned, and that these shingle blocks are only partially manufactured shingles. The answer to that, in my opinion, is, first, and in any event, the rule does not on the face of it apply, for the language excludes it. To begin with, the wide and inclusive word "lumber" must be given due effect to, because, as Galt, J. said in *McAdie* v. *Sills* (1875), 24 U.C.C.P. 606 at p. 608:

"It is plain that the term 'lumber' is a word signifying a variety of articles;"

and of itself it is essentially antagonistic to the reason and the application of the rule. Furthermore, the expression is not "boards, deal . . . . or sawn lumber," but ". . . . or *other* sawn lumber," which in itself more intensely negatives the inference that the "other" varieties of sawn lumber should resemble those recited. There is the one group of manufactured (sawn) things, specified in classes, and also the "other" wide and undefined group of manufactured (sawn) things intentionally left unspecified to cover ever increasing and varying requirements of trade. Nor, further, can I see how the rule is to be made to apply to such different things, both as regards shape and purpose, as shingles and dimension timber, often consisting of great sawn and squared logs, 18 inches square, up to any length, such as are exported to Japan and Australia, or sawn railway ties, or sawn fence posts, or pickets, or barrel staves, or paving blocks, yet all of these admittedly are exportable as "other sawn lumber"; great quantities of pickets, for example, are being exported to Australia under that classification. But it is further argued that as these blocks were being exported for the purpose of being further manufactured into shingles they could only be regarded as incomplete shingles, and are therefore prohibited. I am unable, with all due respect, to accede to that argument, because this is

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not a question of partial or incomplete manufacture, or of an unfinished product, but simply one of a course of manufacture to a degree sufficient to attain to the state of "sawn lumber," and the argument seeks to introduce an element into the statute which is wholly wanting, *i.e.,* the intention or purpose of the manufacturer, or the exporter, or the foreign buyer. Can it be seriously argued that a cargo of long sawn and squared logs, *i.e.,* "sawn dimension timber" (officially classified as "manufactured timber" for export: see Minister of Lands' report, *supra,* p. D69) could not be exported under the "other sawn lumber" category because it was the intention to take them to a foreign port and there further manufacture all of them into "boards," and therefore the *ejusdem generis* rule applied, as "boards" are, like shingles, etc., one of the specified classes? I think no one would advance such a contention, and yet, where is the difference in principle between partially manufactured shingles and partially manufactured boards? Some fancied difference is sought for in the fact that the blocks seized here were to be all made into shingles, and it is to meet that point that I have postulated the case of a whole cargo exported for one purpose to make the two cases exactly parallel. There is no escape from this result, that if this Court holds that "sawn lumber" (which includes dimension timber and squared and sawn logs of all description) cannot be exported if it is intended to be made into shingles, one of the specified classes, it must also hold that it likewise cannot be exported if it is intended to be made into any of the other specified classes, *viz.*: "boards, deal, joists and lath," which admittedly are all "sawn lumber"; if the test is to be one of intention, that intention applies to all the classes. Such a ruling would lead to far-reaching and quite unexpected consequences. It speedily becomes clear, as the matter is pursued, that we are in reality being asked to decide this point upon the purpose for which the sawn lumber is to be used, and the extraordinary result may follow that in the hold of the same ship at Victoria there may be two shipments of, say, half a million feet each of the same kind of sawn dimension timber, consigned to the same mill owner in Tacoma, U.S.A., one of which shipments is for the purpose of being further

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manufactured by him into boards and shingles (two of the specified classes) and is therefore not exportable and liable to seizure, and the other into pickets and paving blocks (two of the unspecified classes), and therefore exportable and not seizable. Likewise, and to make the illustration still more apt, there may be two lots of cedar blocks of the same kind, at the same time, in the same mill at Victoria, one of which could not be exported to Oregon because they were to be made into shingles, but the other could, because they were to be made into boxes, or turnings, or even put to unknown uses.

This result is, while unavoidable, almost grotesque, but it is only the beginning of the confusion that would result, because what is to be done when the manufacturer here does not know the purpose for which the "sawn lumber" is to be used when it is exported to Japan? Or what if it is bought by a broker here for an unknown use by one who intends to take it to San Francisco and sell it to any one who may buy it for any purpose, and therefore, at the time of export, no one here knows the purpose for which it may be ultimately used? In such cases is the "sawn lumber" to be seized and held here till its ultimate use is finally determined? And still further, what is to be done if the shipper refuses to state his intention (the Act provides no way to compel him to speak, as does, *e.g.,* the Customs Act), and simply takes the stand that it is "sawn lumber" which he intends to export to Japan for the private purposes of his own business? And are the inquisitorial powers which it is sought to incorporate into this section to be carried out to the extent that the "sawn lumber" is to be dogged by an agent of the Crown across the Pacific so that its ultimate use and true character may be there finally revealed in their true colours? In *Foss Lumber Co.* v. *The King, supra,* at p. 141, the Chief Justice of Canda made a weighty remark which supports my view that we are to exclude the consideration of the purpose of the use, and deal only with the category in which the thing is classed, as follows:

"Whatever may be the object or purpose of those who subject the plank to the process of a second sawing in the planing-mill, the effect is to produce a piece of plank sawn on three sides."

No importance can be attached to the fact that these cedar blocks have no special Government classification, which is not

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strange, because they have only come into use within the last year or two, the plaintiff having engaged in the business in March, 1913, though it already has, as will be seen later, a trade classification as "sawn cedar blocks." With the varying requirements of trade, new kinds of sawn lumber will be manufactured and classified in due time if the circumstances render it necessary. It is quite clear that these blocks are not "cedar bolts," and never have been so called or classed in the trade. Even the principal witness for the defence, H. R. McMillan, the chief forester, in his affidavit, says: "I did not claim that the bolts in question were ordinary cedar bolts, but that they differed from ordinary shingle bolts" in specified particulars. The official classification and grading rules for shingle bolts, which are given at p. D62 of the minister's report above cited, shews that to call these sawn blocks "shingle bolts" is a manifest error. Another witness for the defence, Cameron, the official scaler, calls them "cedar blocks," as do also Cotton and Champion; and the plaintiff's witness, Coyle, says that "in our trade they are classified as sawn 'cedar blocks'"; the evidence of Newton, Haslam, and Hamilton is to the same effect.

I note, though it makes no difference from my point of view, that the evidence is clear the blocks seized herein, which were intended to be made into shingles, could be used for various purposes in this Province, as other cedar blocks are, *e.g.*, underpinnig, "short ends," (and exported under that name) boxes, turnings, stair spindles, and factory stock generally, and base and corner blocks.

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And it should be further noted, though it is the practice of the plaintiff Company to first saw the rough logs, 16 to 40 feet long with the bark on, into 16 and 24 inch lengths, and then re-saw each of the lengths into blocks, cutting off all the bark (in which process the logs go through the saw as much as eight times), yet it appears by the uncontradicted evidence of Haslam, that sometimes the logs are first "split" with the saw and then cut into lengths of 16 to 24 inches. The importance of this is that it must be admitted that these long-sawn logs, before being cut to lengths, have been "manufactured" into "sawn dimension timber," exportable as such, and if the manufacturer

simply took them down to a ship and loaded them into her and entered them for export under that classification, they could not be seized. But this paradox is put forward, that because they are further manufactured by each being sawed crosswise 6 to 12 times more, as the case may be, into short blocks, they lose their classification; in other words, the more they are manufactured (sawed) the more they lose their nature as manufactured (sawn) lumber. The most striking illustration of how entirely the case for the Crown rests upon the purpose to which the sawn lumber is to be put is that if the cedar blocks in question were made of fir or other wood, and not of cedar, they could not, according to the Crown's own contention, be seized, because the sole basis for that contention is that since shingles are made in this Province from cedar, and blocks of this size are used here only for the purpose of making shingles, therefore they must be intended for that purpose only, but there is no such use for fir, pine, spruce or other blocks. I pause here to say that I have already cited the evidence to shew that sawn cedar blocks of various lengths are in fact used in this Province for several purposes, and so the contention of the Crown must be reduced to this: that it is only sawn cedar blocks which are intended to be further manufactured into shingles which cannot be exported.

It is, however, in my opinion, clear that we cannot read into this statute any words which will support such a contention. In addition to the *Foss Lumber Co.* case, already cited, I find the precise point taken in the argument of Messrs. D'Alton McCarthy and Christopher Robinson in *Magann* v. *The Queen* (1889), 2 Ex. C.R. 63 at p. 66, wherein they say:

> "That a piece of white oak lumber could not at one and the same time be shaped or not shaped, dutiable or not dutiable, according to the use to which it was to be put. That Parliament not having enacted, as it had done in other cases, that the article should be dutiable, or not, according to the use to which it was intended to be applied by the importer or his customers,—as, for instance, that a white oak plank 30 feet long which, being imported for no specific purpose or for general purposes, would be free of duty,—it would not become dutiable because the importer intended to cut it into five pieces six feet long, each of which was adapted to, and intended to be used for, some specific purpose."

And this contention was given effect to by the Court, as I

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understand the judgment, because if it were not accepted the judgment must have been the other way, as the whole point in the case turned on it.

When Parliament intends that imports or exports shall be dealt with in the light of the purpose or use to which they may be put, it finds no difficulty in declaring that intention by apt enactment, many examples of which are to be found in the Customs Act, R.S.C. 1906, Cap. 48; *e.g.*, in section 47, respecting the value for duty of material imported to form medicinal or toilet preparations, and "intended to be put up labelled or sold under any proprietary or special name or trade mark"; in section 235, respecting goods imported "for the use of His Majesty's troops or for any purpose for which such goods may be imported free of duty"; in section 236, respecting animals or vehicles or goods brought into Canada by travellers and exempted from duty because of their being used for purposes of travel; in section 237, respecting goods entered for the purpose of being exported; in 286 (*e*), respecting exemption from duty of boards, planks, etc., the produce of Canadian logs which have been exported to the United States for the purpose of being sawn and brought back to Canada; in 286 (*k*), (*l*) and (*m*), putting on the free list and granting drawbacks and reductions of duty on materials and goods to be used in Canadian manufactures, which drawbacks vary with the use, and range from 50 to 99 per cent., as set out in Schedule B. of The Customs Tariff, 1907, Cap. 11; and lastly, in Tariff item No. 183 of Schedule A. of said Act, fixing the duty to be paid on newspapers, etc., which are "partly printed and intended to be completed and published in Canada."

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On the face of it there seems to be something unsound in the suggestion that the classification of export timber should depend upon its domestic use. Sawn cedar blocks may be used for one or more things in this Province and for entirely different things in California, Japan, Australia, India, or South America. We have no evidence at all of the nature of these foreign and distant trades, or the many and unknown purposes for which foreign merchants may buy lumber, or the uses they may put it to. Once manufactured timber has in this Province

reached the stage of "sawn lumber," how can it lose it because it may be used for different purposes in divers foreign countries? and how inconsequent and unsatisfactory it is to seek to determine its present character by its unknown future use. Take these very blocks for example, and assume that they had been manufactured by the plaintiff Company for the sole object of being made into shingles in California, under contract with a mill owner there. But suppose that that mill owner failed and the company here had left on its hands a million of these blocks which it could not dispose of to shingle manufacturers, but was fortunately able to sell them to a dealer who intended to ship them to Australia or South America or Japan to make boxes out of them, or sell them for any purpose on a trade venture, as the foreign markets might take them. What then becomes of the question of purpose or use? If that is to govern, then, because the blocks are no longer to be used for shingles, their nature changes with the intention of their owner for the time being, and it follows that though they were liable to be seized yesterday because they were to be further manufactured into shingles in California, they cannot be seized today because they are now to be further manufactured into boxes in Japan. All of which shews that it comes down to this—that the only way in which this statute can be made workable from the practical business standpoint is to exclude any element of purpose or use, which the Legislature has not provided for, and hold that the classification of sawn lumber is continuous and unalterable, and is fixed once for all when the timber has been manufactured to the extent necessary to bring it into that category. The test is not the purpose of its use, but the fact of its manufacture into "sawn lumber." To hold that its classification may vary with the intention or purpose of the home manufacturer, or exporter, or foreign buyer, or with the ultimate use, or with any change in that use, or any new use, either foreign or domestic, renders the Act unworkable, and introduces an element of uncertainty which the statute does not contemplate, and would hamper that "profitable export of forest products" upon which "the life of the lumber industry of British Columbia depends."

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In conclusion, I would say that while I have no doubt as to

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the construction that should be placed upon this section, yet, if there should be any doubt, it ought, in the case of a statute which is penal and confiscatory in its nature, to be resolved in favour of the subject, according to the rule recognized in *Foss Lumber Co.* v. *The King,* already cited. The literal meaning of the words "sawn lumber," in their "plain, grammatical and ordinary sense, which is said to be the golden rule of interpretation," is completely satisfied by the construction I have endeavoured to place upon them, "and," as Idington, J. says in the last-cited case, at p. 143:

"when we go beyond that literal meaning we depart from the long-established mode of reading a taxing or revenue Act."

And the Chief Justice, at the same page, cited the following language with approval:

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"In cases of serious ambiguity in the language of an Act, or in cases of doubtful classification of articles, the construction should be in favour of the importer, for duties and taxes are never imposed on the citizen upon vague or doubtful interpretation."

It follows that, in my opinion, the appeal should be allowed as to these cedar blocks as well as to the logs seized, which seizure, counsel for the respondent admitted, could not be supported.

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GALLIHER, J.A.: From the evidence it is manifest that the operations carried on by the plaintiff was the partial manufacture of shingles and then exporting them for the purpose of completing their manufacture outside the Province.

In order to determine whether this is a contravention of section 100 of the Forest Act, it is necessary to decide whether the article exported comes within the words "or other sawn lumber" in said section. Section 100 reads as follows:

"All timber cut on Crown lands or on Crown lands granted since the twelfth day of March, 1906, or on Crown lands which shall hereafter be granted, shall be used in this Province, or be manufactured in this Province into boards, deal, joists, lath, shingles, or other sawn lumber, except as hereinafter provided."

What has been understood as shingle bolts in this Province is pieces of timber (chiefly cedar) cut in lengths from 48 to 52 inches and split by axe, and formerly all shingles in this Province were manufactured from these. It is admitted that such timber could not be lawfully exported. Of late years, however,

some of the mills have been taking second-class cedar logs, sawing them into 16 and 24 inch lengths, shaping these up with saws so as to form blocks of different shapes, according to the nature of the timber, and then again, by use of saws, converting these blocks into shingles.

The plaintiff has been for some months carrying on this process up to a point short of finally converting them into shingles, and then shipping them to a mill near Blaine, in the State of Washington, where the process of shingle-making is completed.

The department have recognized the right to export what is known in the building trade as dimension stuff, being pieces of timber cut out of logs, and shaped up with saws in different dimensions and lengths which cannot be said to be boards, deal, joists, lath or shingles, to use the words of the Act, but which are deemed to come under the class "or other sawn lumber."

It is clear from the evidence that what is exported here does not come within the words above enumerated. Then, does it come within the words "or other sawn lumber"? The term "sawn lumber" is a wide one, and it is urged that these blocks, which are only 16 or 24 inches long, would, if they were 8 or 10 or more feet long, be subject for export, and so far as sawing is concerned, quite as much labour is expended on them as on what is termed dimension stuff.

It is contended by the Crown that what is done here is an evasion of the Act, but that does not make it an offence if the wording of the Act permits of that evasion. Had the words "or other sawn lumber" been omitted from the section there could be no question, but we must presume they were placed there for a purpose, and that was to include something not specifically mentioned.

The learned trial judge has found that "boards, deal, joists, lath and shingles" fall within the *genus* of finished products available in its present shape to the consumer, and is the *genus* within which the Legislature intended the general phrase to be confined. In my judgment, dimension stuff, for the purposes for which it is to be used, comes just as much within "the *genus*" as boards, deal or joists. The fitting and framing of dimension

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stuff is no more a process of further manufacture than the planing, sawing and fitting into a building of rough-lumber boards.

In the one example urged upon us, *viz.*: the dimension stuff, it is clear to me that comes within the principle adopted by the trial judge. I do not think this can be said of the shingle blocks in question. It is true considerable labour has been put upon them by sawing before they reach the stage at which they are exported, but they are exported for the very purpose, *viz.*: sawing into shingles, which the Act says shall be done within the Province. It might as well be said that if you saw a log square and export it for the purpose of being converted into boards, that would not be an evasion of the Act. Clearly the Act was never intended in that way. I think it appears from the Act itself that the intention was that, as far as practicable, and in the interest of the industry in this Province, the timber in the Province should be manufactured there. Bearing this in mind, and having regard to the fact that nothing inconsistent with this view was shewn in the manner in which the Act has been administered, and the wording of the section itself, I am of opinion, with the learned trial judge, that the doctrine of *ejusdem generis* applies, and that the authorities cited by him are applicable.

GALLIHER, J.A.

I would dismiss the appeal.

McPHILLIPS, J.A.: I would dismiss this appeal. In my opinion the learned trial judge has arrived at the correct conclusion.

The application made was one for an order for replevin, having reference to four car-loads of cedar blocks, sitting on the plaintiff's spur track or siding connected with the Great Northern Railway at Crescent, B.C., and $1,700 worth of logs lying at the plaintiff's mill at Crescent, B.C., which application was, by consent, treated as the trial of the action, the result being that the action was dismissed.

MCPHILLIPS, J.A.

The timber in question was seized by the officials of the Provincial Government by the exercise of the provisions admitting of seizure under section 102 of the Forest Act, B.C. Stats.

1912, Cap. 17, as amended by section 13 of the Forest Act Amendment Act, 1913, the contention being that the timber in question was cut on Crown lands, and to be in course of transit out of the Province in contravention of the provisions of Part X. of the Forest Act.

There can be no question of the intention of the Legislature, and in my opinion it is very clearly expressed. The timber is to be used in this Province, or if not, it cannot be shipped out of the Province save in the manufactured state that the statute calls for, *i.e.,* it has to be in the shape of boards, deal, joists (I agree with the learned trial judge we must read "joints" as a clerical error; it should be "joists"), lath, shingles or other sawn lumber, the only exception being as provided by section 103 of the Forest Act as amended by section 14 of the Forest Act Amendment Act, 1913, which reads as follows:

"The Lieutenant-Governor in Council may authorize the export by lessees or licensees of the Crown of the following kinds of timber cut on ungranted lands of the Crown, or on lands of the Crown granted since the twelfth day of March, 1906, or which shall hereafter be granted, namely: Piles, pulp-wood, telegraph and telephone poles, ties, and crib timber, although not manufactured nor to be used in the Province. And it is hereby declared that the Lieutenant-Governor in Council was duly authorized under this Act to pass Order in Council No. 810 on the twelfth day of July, 1912; and the said Order in Council and the action of the Lieutenant-Governor in Council in pursuance thereof are hereby ratified and confirmed."

As the timber in question does not come within any of the particularly-described classes, the question that has to be answered is whether it can be defined as sawn lumber. The timber to which apparently all attention was directed at the trial consisted of blocks, one of which we had the opportunity of viewing.

Mr. *Ritchie,* in a most able argument, endeavoured to establish that these blocks are sawn lumber within the terminology of the statute, that it could be said they were a new style of sawn or manufactured lumber, as yet new to the trade, and occupied a distinctive position. I must say that I was greatly impressed with the force of this argument, yet, after the most careful consideration, I have come to the conclusion that the learned trial judge was right. It seems to me the question as

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to whether this timber is or is not sawn lumber, is one of fact, and it is upon evidence this question must be determined. The designation "sawn lumber" is not self-explanatory.

It was held in *McAdie* v. *Sills* (1875), 24 U.C.C.P. 606, in an action on the following agreement: "Due W.M., $100, payable in lumber," etc., that "lumber," being the general term used for different kinds of lumber, parol evidence was admissible to shew what kind of lumber the parties intended, namely, "culls and joists." Hagarty, C.J. at p. 610, said:

"Evidence may, I think, be admitted, that this general term 'lumber' may be fixed and identified as the kind of lumber which defendant had on hand."

And at p. 608, Galt, J. said:

"It is, therefore, plain that the term 'lumber' is a word signifying a variety of articles; and the question is, whether a Court is at liberty to receive parol evidence, not to vary, but to explain a written agreement. There is no doubt that the ambiguity in this case is latent, and not patent; and it has always been held that in such a case parol evidence is admissible. Under the term 'lumber' all descriptions of wood are included—such, for example, as oak, pine, hemlock, walnut, and a variety of others. It must, therefore, of necessity be competent for the parties to shew what particular description of lumber was intended. . . . . It might be open to another question, if merchantable or any other particular description of lumber had been used: for in such case it might well be argued that culls could in no sense be said to fall within such a definition."

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Now, we have here not "merchantable lumber," but we have to some extent—but to some extent only—a particular description, that is, "sawn lumber." Sawn lumber, standing alone, possibly would cover the blocks in question; at least, it would leave the matter in much doubt. But have we not to look to that which has gone before the use of the words "sawn lumber"? I think we have, and it is there seen that each specification is of a particular class of lumber known to the trade, *i.e.*, boards, deal, joists, lath and shingles, and when we have, following these well-known trade descriptions, the words "or other sawn lumber," does it not import sawn lumber of a definite and known trade description?

In Craies's Statute Law, 2nd Ed., at pp. 72 and 73, we find this stated:

"Strictly speaking, there is no place for interpretation or construction except where the words of a statute admit of two meanings. The cardinal rule for the construction of Acts of Parliament is that they should be

construed according to the intention of the Parliament which passed them: *Tasmania* v. *Commonwealth* (1904), 1 Australia C.L.R. 329. '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. In order to understand these 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 Company* v. *Anglo-American Telegraph Company* (1877), 2 App. Cas. 394 at p. 412."

In my opinion it would not be carrying out the well-evidenced meaning of the Leigslature if it were to be held that the act of sawing the timber alone, in a more or less indifferent manner, constituted manufactured in the Province, and compliance with section 100 of the Forest Act. Surely the timber must be brought into some category, *i.e.,* be a manufactured article of some known nature and kind.

Bowen, L.J. in *Curtis* v. *Stovin* (1889), 58 L.J., Q.B. 174 at p. 175, said:

"If it is possible to give the words in an Act of Parliament a sensible meaning, we must adopt it, *ut res magis valeat quam pereat.*"

It would certainly be rendering the statutory enactment, which is plainly aimed at the requirement that the timber to be shipped out of the Province must first be manufactured in the Province, null and void, if some mere perfunctory sawing takes place, creating nothing in the nature of a manufactured article, and that that constitutes compliance with the Act. Here we must interpret the words "or other sawn lumber" following the words descriptive of manufactured timber.

Lord Loreburn, L.C., in *Nairn* v. *University of St. Andrews* (1909), A.C. 147 at p. 161, said:

"It is a dangerous assumption to suppose that the Legislature foresees every possible result that may ensue from the unguarded use of a single word, or that the language used in statutes is so precisely accurate that you can pick out from various Acts this and that expression and, skilfully piecing them together, lay a safe foundation for some remote inference. Your Lordships are aware that from early times Courts of law have been continuously obliged, in endeavouring loyally to carry out the intentions of Parliament, to observe a series of familiar precautions for interpreting statutes, so imperfect and obscure as they often are."

Here we have words that have relation to a very large industry in this Province—the manufacture of lumber of various kinds out of timber, which is one of the greatest of the many natural resources of this Province, and the timber, in the main,

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comes off Crown lands held under lease or licence from the Crown, and the Legislature evidently intends to insure the manufacture of the timber within the Province.

In *The Dunelm* (1884), 9 P.D. 164 at p. 171, Brett, M.R. said:

"My view of an Act of Parliament which is made applicable to a large trade or business is, that it should be construed, if possible, not according to the strictest and nicest interpretation of language, but according to a reasonable and business interpretation of it with regard to the trade or business with which it is dealing."

The learned trial judge proceeded upon affidavit evidence, and upon reference to it I cannot say that there is any evidence which would entitle the timber in question to be rightly termed "sawn lumber" within the language of Brett, M.R.—that is, it is not sawn lumber "according to a reasonable and business interpretation of it with regard to the trade or business with which it is dealing."

Here we have certain well-known classes of timber or lumber named, then the general expression "or other sawn lumber." It is a proper case for the application of the *ejusdem generis* rule, which was the decision of the learned trial judge.

Lord Bramwell, in *Great Western Railway Co.* v. *Swindon and Cheltenham Railway Co.* (1884), 9 App. Cas. 787 at p. 808, said:

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"Where several words are followed by a general expression as here, which is as much applicable to the first and other words as to the last, that expression is not limited to the last, but applies to all."

Lord Campbell, in *Reg.* v. *Edmundson* (1859), 28 L.J., M.C. 213 at p. 215, said:

"I accede to the principle laid down in all the cases which have been cited, that, where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified."

And see the remarks of Lindley, M.R., and Chitty, L.J., in *In re Stockport Ragged, Industrial, and Reformatory Schools* (1898), 68 L.J., Ch. 41 at pp. 44 and 45.

Now we have the words "other sawn lumber." This must be of that type, or of the like class, mentioned, *i.e.*, boards, deal, joists, lath and shingles. But is the lumber in question of that class? The chief forester of the forest branch of the department of lands, in his affidavit, said:

"I do not claim that the bolts in question were ordinary cedar bolts, but that they differed from shingle bolts in that they were cut into sixteen-inch (16") lengths or twenty-four-inch (24") lengths, and were split on a saw instead of an axe, and that these sawn bolts were of the same character as split shingle bolts in that they were of no use or value except for manufacturing into shingles, and that the course of business adopted by the plaintiff Company was merely to commence the manufacture of shingles in this Province and to finish it in the State of Washington."

It canont be successfully contended, in my opinion, that the timber in question is sawn lumber of the type, or a like class to that set forth in the Act. It is to be observed that in *Foss Lumber Co.* v. *The King* (1912), 47 S.C.R. 130, there was a more specific definition, item 504 of Schedule "A" of the Customs Tariff of 1907 reading as follows:

"Planks, boards and other lumber of wood, sawn, split or cut, and dressed on one side only, but not further manufactured. Free."

First we have certain lumber mentioned, as we have in section 100 of the Forest Act, that is, planks and boards are mentioned; but when it comes to defining "other lumber of wood," it is to be "sawn," split or cut and dressed "on one side only but not further manufactured," and is, therefore, fully described.

The Chief Justice of Canada, in *Foss Lumber Co.* v. *The King, supra,* at p. 140, said:

"Taken literally and giving each word used its natural meaning, the section we are asked to construe says that planks of lumber 'sawn' on three sides and dressed on the fourth side (not further manufactured), should be admitted free of duty. The planks in question come, if we are to judge from their physical appearance, in all respects within that description."

And see his further remarks at p. 142.

Following the judgment of the Supreme Court, it is for us to ascertain the intention of Parliament from the words used in section 100 of the Forest Act—from the words used in the section as applied to the facts—and it would appear to me that it is incontrovertible that the sawn lumber must be of some classification, and of a classification similar or like to that enumerated, all being classes known to the trade, *i.e.,* boards, deal, joists, lath and shingles. But, of what class is the timber in question, and in what way is it sawn lumber known in the timber industry?

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Duff, J., in his dissenting judgment in *Foss Lumber Co.* v. *The King, supra,* refers to the planks or boards there under consideration, and said at pp. 148, 149:

"After having been completely manufactured as 'planks' or 'boards' they have been subjected to a further process—a process which forms no part of the procedure by which 'planks' and 'boards' as such are produced from timber and which is a special process that is designed to fit the 'planks' and 'boards' so produced for certain special purposes; and did, in fact, fit them for those purposes. It is true that this special process consisted in part in applying a saw to each of these pieces. But that was not the whole of the process; in addition to that there was manipulation by special devices which reduced the pieces comprised in any parcel to the uniformity of dimensions which was necessary to make them suitable and did, in fact, make them suitable for use as 'joisting' and 'studding,' and by which they were converted into a commercial commodity having, in the lumber trade, a distinctive designation."

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I have already shewn the distinction which exists in the cases, and I think I can well rely upon the line of reasoning here quoted of Duff, J., that section 100 of the Forest Act, adopting the language of Duff, J., requires "other sawn lumber" to be "a commercial commodity having in the lumber trade a distinctive designation," and I would further say, must be of a like or similar class to those mentioned, *i.e.,* boards, deal, joists, lath and shingles.

My conclusion is that the judgment appealed from ought to be affirmed, and the appeal, therefore, dismissed.

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellant: *Bowser, Reid & Wallbridge.*
Solicitors for respondents: *Taylor & Hulme.*

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Trusts and trustees—Crown lands—Pre-emption of—Death of pre-emptor after pre-emption duties partially completed—Completed by brother who obtains Crown grant—Rights of second brother—Abandonment—Laches—Acquiescence—Appeal books—Compilation of.

One Cook pre-empted certain Crown lands in British Columbia and, after doing some work on the property, died in 1900, unmarried and intestate, leaving heirs his mother and two brothers. The older brother, the defendant, completed the pre-emption duties and wrote his mother and brother, asking them for quit-claim deeds, in order to facilitate his obtaining a Crown grant. The mother complied with the request, but the brother (the plaintiff) refused, and on the strength of the mother's quit-claim deed he succeeded in obtaining the Crown grant in his name in December, 1892. The mother died in 1900. In 1901 the plaintiff and defendant met, when, according to the defendant, he offered to transfer to the plaintiff his half interest in the property if he would pay his share of the expense incurred, which the plaintiff refused to do, and in this he was corroborated by his wife and another witness. The plaintiff, on the other hand, denied this and said he offered to pay his share of the expense if he would make up his account. In an action for a declaration that the plaintiff was entitled to a half interest in the property, it was held by the trial judge that the defendant took the fee from the Crown as trustee for the heirs, but that the plaintiff had abandoned his interest, and he dismissed the action.

Held, on appeal, reversing the decision of CLEMENT, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that abandonment of a clear right cannot properly be inferred except upon very convincing evidence, and the evidence in this case fell far short of that, even giving the testimony of the defendant the greater credence.

Held, further, that the plaintiff was not barred by laches, delay or acquiescence.

Prendergast v. *Turton* (1843), 13 L.J., Ch. 268, distinguished.

Remarks *per* IRVING, J.A. as to the compilation of appeal books.

Statement

APPEAL from the judgment of CLEMENT, J. in an action tried by him at Vancouver on the 14th of April, 1913. The plaintiff's claim was for a declaration that he was entitled to

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an undivided one-half interest in certain property that had been Crown granted to the defendant and that said defendant holds said undivided half interest in the property for the plaintiff. The facts are set out fully in the headnote and reasons for judgment.

A. D. Taylor, K.C., for plaintiff.
Mowat, for defendant.

26th June, 1913.

CLEMENT, J.: In this case, the late James Cook, who died in September, 1890, at the time of his death had acquired a pre-emption interest in certain land at the mouth of Seymour Creek, and some work in the nature of performance of statutory duties had been done by him. However, he was taken ill and died. Word of his death reached the defendant, a brother who was living at the time in the Province of Quebec, and through him reached the plaintiff, who lived in Scotland. In order to make good, if I may use that expression, upon this pre-emption, immediate intervention had to take place and improvements to be made on the property. John Cook, the plaintiff, was asked to take part and contribute towards the expenditures necessitated by these improvements, which, upon the evidence, amounted to several hundred dollars, moneys actually expended by David Cook, but he paid nothing. He objected to signing the necessary documents to make title, with the result that upon the Crown grant issuing, the brothers were at arms' length and David distinctly told John that if he wanted any interest in the land he would have to get it in a Court of law.

The Crown authorities here finally issued the Crown grant to David, David having procured a quit claim from his mother. It seems that, erroneously, the Crown authorities considered that the mother was solely entitled. The fact is, however, apart from that, that the moral claim was entirely upon the side of David, who had taken the matter up at a time when if it had not been taken up it would have been lost, and the result was that he got the Crown grant.

Nothing then occurred for about ten years. David went on

making the necessary payments of taxes on the property; then the brothers came together in the Province of Quebec. John, apparently a man of means, embarked in certain commercial ventures there and took his brother David into the enterprise, advancing considerable sums. David, at the time, as he says himself, was feeling somewhat grateful to his brother, and offered at that time to make him a deed of half the property, and would not, at that time, as he says himself, have insisted upon being repaid the moneys which up to that time he had paid out. John put the matter off, intimated it was not necessary, or something of that sort. A few years later, when the brothers were not on as good terms as in the beginning, David, as I find on the evidence, distinctly asked John to come in and contribute his share, saying that if he would do so he would give him a deed to half the property, but I find on the evidence that John absolutely declined to take up the burden—said he did not want to have anything to do with bush land in British Columbia. There the matter stood until this action was brought. I may say that, on the evidence, at the time John declined, as I have said, to take up the burden and carry on the property, real estate in the neighbourhood of this property was a drug upon the market. Of late years, as everybody knows, land has increased phenomenally in value. John learned, through some stray newspaper item, that David had some claim on the City for disturbance of his water record as he alleges, and he took steps to question David's title, as a result of which this action was brought.

Mr. *Taylor* argued that the right of John from the beginning has been a legal title under the statute regarding Crown lands. Whatever it may have been prior to the issue of the Crown grant, upon the issue by the Crown of the Crown grant the legal estate then became vested in David, subject to the right of John to get a declaration from the proper Court of his interest, which would mean that David would be a trustee for him of that half interest. That being the position, I think the cases are clear, by analogy, to the Statute of Limitations, where there have been such laches as in this case, the Court would not assist John in enforcing his claim. But even if his claim were

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considered a legal claim, I think the doctrine in *Prendergast* v. *Turton* (1843), 13 L.J., Ch. 268, applies. The time came when he was called upon by the trustee to indemnify his trustee against expenditures. He was called upon to do so and absolutely declined, refused to recognize his position and the position of his brother as trustee for him. A clearer case of abandonment it would be very difficult to find, and I think the action should be dismissed with costs.

The appeal was argued at Vancouver on the 19th of November, 1913, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

A. D. Taylor, K.C., for appellant (plaintiff): The trial judge decided against us on the ground of laches and abandonment. We contend this is a legal right that vested in us when James Cook, the man who pre-empted the property, died, and his rights cannot be parted with except under the Statute of Limitations, or by release under seal.

Argument

Mowat, for respondent (defendant): James Cook had done little work on the property before his death. Practically all the pre-emption work was done by the defendant, who also paid the taxes. The plaintiff neither did any work nor did he send any money up to the time the Crown grant was issued to the defendant. Therefore, he abandoned all right to any interest. The only ground on which the Court could set aside the grant is on the ground of fraud or mistake in fact: see *Farmer* v. *Livingstone* (1883), 8 S.C.R. 140 at p. 157; *Mutchmore* v. *Davis* (1868), 14 Gr. 346; *Templeton* v. *Stewart* (1893), 9 Man. L.R. 487; *Florence Mining Co., Limited* v. *Cobalt Lake Mining Co., Limited* (1909), 18 O.L.R. 275. The defendant obtained the Crown grant in 1897, and from that time until 1909 the plaintiff did absolutely nothing. On the question of laches, see *Erlanger* v. *New Sombrero Phosphate Company* (1878), 3 App. Cas. 1279; *Lindsay Petroleum Company* v. *Hurd* (1874), L.R. 5 P.C. 221. On the question of abandonment and acquiescence, see *Earl Beauchamp* v. *Winn* (1873), L.R. 6 H.L. 223 at p. 233; *De Bussche* v. *Alt* (1878), 8 Ch. D.

286 at p. 314; *Prendergast* v. *Turton* (1843), 13 L.J., Ch. 268.

Taylor, in reply.

Cur. adv. vult.

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MACDONALD, C.J.A.: James Cook died in September, 1890, unmarried and intestate, leaving heirs, his mother and two brothers, the plaintiff and defendant. He had pre-empted land situated about five miles from Vancouver, but had not completed his title to it. The defendant lived in Riviere du Loup, Quebec. The plaintiff and the mother lived in Scotland. A friend of deceased at Vancouver notified defendant of his brother's death, and of his said pre-emption, and of the right of heirs to complete the pre-emption duties, and obtain a Crown grant: see C.S.B.C. 1888, Cap. 66, Sec. 27. Defendant wanted his mother and brother to quit claim to him so that he could obtain the Crown grant in his name, but for the benefit of all. Plaintiff demurred to signing a quit claim, but offered a power of attorney. The mother signed a quit claim, and on this the Crown grant was issued to defendant by the Crown, but manifestly as trustee for the heirs.

The construction put upon section 10 of the Inheritance Act, C.S.B.C. 1888, Cap. 58, by the Crown officers, was that as the mother was entitled to the estate of her son for life, and the brothers to the reversion, the Crown grant might properly be issued to defendant as trustee for her, she having by her deed in effect (and in fact, as the correspondence shews), authorized this to be done. The learned judge, indeed, finds that defendant took the fee from the Crown as trustee for the heirs, and in my opinion, that finding is amply supported by the evidence. The defendant expended, he says, about $700 in perfecting the title, which sum included his solicitor's charges of $300. He rendered no account to the plaintiff, and made no demand that plaintiff should furnish his share. The situation, then, is that on the 9th of December, 1892, the date of the Crown grant, defendant became seized of the fee simple in the land in trust for his mother for life, and at her death for himself and plaintiff in equal shares. Shortly after this, defendant raised $1,000 on the land by means of a mortgage, repaid himself his outlay of

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$700 and gave $200 to his mother, and apparently kept the other $100. This is all the mother appears to have got during the remainder of her lifetime. She died in 1900. Shortly after her death the brothers came together in a business transaction at Fraserville, Quebec, and plaintiff loaned the defendant $12,500 in that connection, which has, admittedly, never been repaid. Their business connection lasted for two years, when defendant severed it. During this time, defendant says he spoke to the plaintiff on three occasions about the British Columbia lands, and offered him a half interest if he would pay his half of the outlay in connection with them, but that plaintiff did not accept his offer. This is supposed to be corroborated by the evidence of defendant's wife, who relates what was said by the plaintiff on the first of these three occasions, but as the defendant himself is very hazy as to what was said, and the wife, as she frankly admits, discussed the matter with her husband before giving her evidence, she is not, I think, speaking from recollection altogether.

Then Montgomery, an adopted son of defendant, tells of a conversation with the plaintiff after the defendant had left Fraserville, and had gone to reside at Vancouver, in which the plaintiff is said to have expressed the opinion that the British Columbia lands were not worth paying taxes on. If the plaintiff had renounced his claim before this, it is at least noteworthy that he should be still curious about the lands a year later.

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Now, the trial judge appears to rest his judgment on this: that defendant asked plaintiff in 1902 to take up his share of the burden, and that plaintiff distinctly refused to have anything to do with these lands, and hence, should be deemed to have abandoned his interest in them, and he relies on *Prendergast* v. *Turton* (1843), 13 L.J., Ch. 268. The plaintiff denies the above, and says that he asked his brother to give him a statement of account, and expressed his willingness to bear his share of the expense, but that his brother replied that as he owed the plaintiff $12,500, he could not expect him to pay anything then. To my mind this story is the more rational and consistent with the facts. It is consistent also with defendant's

own account of their third and last conversation on the subject, in which the defendant says that his brother's reply to his offer to deed him half the land was: "No, no, wait a while; wait a while."

The judge below based his judgment on abandonment. "Abandonment" is an indefinite term when applied to real estate, or an equitable interest in real estate. If it is meant that the plaintiff waived his rights either by express declaration or by laches, then it is clear that this defence must fail.

Sir William Grant, M.R. stated the law on this branch of the case in *Stackhouse* v. *Barnston* (1805), 10 Ves. 453 at p. 466, as follows:

"It is said, there is a positive waiver of their demand, upon letters by Mr. Stackhouse to Sir Richard Acton. As to a waiver, it is difficult to say precisely, what is meant by that term, with reference to the legal effect. A waiver is nothing; unless it amounts to a release. It is by a release, or something equivalent, only, that an equitable demand can be given away. A mere waiver signifies nothing more than an expression of intention not to insist upon the right; which in equity will not without consideration bar the right any more than at law accord without satisfaction would be a plea."

Mere laches short of 20 years from the accrual of the right will not bar the plaintiff's claim: *ib.*, and also the Statute of Limitations, R.S.B.C. 1911, Cap. 145, Sec. 16.

The plaintiff's right to an undivided half interest in the land did not fully accrue until his mother's death. Up to that time he had not failed to bear his share of the burden, or, if it could be said that he was legally or morally bound to contribute to the expense, he was relieved of that duty by the defendant recouping himself out of the mortgage moneys. There is a suggestion that the taxes were heavy, but in the beginning they were but $8 per annum, and this appears to have been the annual tax until 1901 or 1902, when it is suggested that the locality was included within an incorporated municipality, after which the taxes were higher. As to what was done after 1902 we are left pretty much in the dark. I infer that defendant came to Vancouver to reside, but not on these lands, and that they were not improved beyond what was done originally in order to obtain the Crown grant. Defendant further encumbered them at some unstated time or times, because at the trial

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he admits that they were then subject to mortgage in the sum of $5,500. He also subdivided a portion of them into quarter-acre lots, which he sold at from $250 to $400 per lot. When plaintiff heard of these sales two years before the trial, he asserted his right to a share.

Then it comes to this: Must plaintiff's silence from 1902 to 1911 be taken to be an abandonment of his rights? In this connection the evidence of plaintiff that he offered to pay his share of taxes and expenses, and that defendant declared he could not ask that in view of the money put into the Fraserville business by plaintiff, must not be overlooked. The facts and circumstances of this case are such as to exclude the doctrine of *Prendergast* v. *Turton, supra,* assuming that doctrine to be applicable. Defendant has not shewn that he bore the burden. On the contrary, there is enough in the evidence to indicate that the trust property has been made by him to bear much more than the defendant has been out of pocket. Again, the fact of his indebtedness to the plaintiff clearly distinguishes this case from *Prendergast* v. *Turton.* Why should plaintiff have paid money to defendant when the latter owed him a sum far greater than any sum he could claim, even if he had paid the cost of procuring the land, and the subsequent taxes, out of his own pocket? Abandonment of a clear right cannot properly, in my opinion, be inferred except upon very convincing evidence—evidence reasonably consistent only with that conclusion. The evidence in this case falls far short of this, even if that of the defendant be given the greater credence.

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I would allow the appeal.

IRVING, J.A.: The late James Cook, who died on the 9th of September, 1890, had, in February, 1887, acquired a pre-emption right on some 160 acres on Seymour Creek, near Vancouver. The property, afterwards increased to 193 acres, has since become of great value.

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This action, launched on the 18th of January, 1912, by John, the youngest brother of the deceased, against David, an elder brother, is with reference to the ownership of the 193 acres which were granted by the Crown to David on the 18th of

December, 1912. The deceased had a small interest in a building society, and but little else. James, who had done some work on his pre-emption, had not done enough to hold the pre-emption there. His heirs, to obtain any benefit from the lands, had to obtain a certificate of improvements under section 27, C.S.B.C. 1888, Cap. 66, which is as follows:

"In the event of the death of any pre-emptor under this Act, his heirs or devisees (as the case may be) shall be entitled to a Crown grant of the land included in such pre-emption claim, if lawfully held and occupied by such pre-emptor at the time of his decease, but subject to the issuing of the certificate of improvement as aforesaid, and payment for the land; but if no person makes any application in respect of the said pre-empted land, for a period of one year from the death of the said pre-emptor, the Chief Commissioner of Lands and Works may cancel the said record, and all improvements made on the said land, and all moneys paid in respect thereof, shall be forfeited."

Accordingly, James proceeded to occupy the land by an agent, and between the 9th of September, 1890, and the 26th of December of the same year, had done sufficient work to justify him in making to the Government an application for the certificate of improvements. That certificate was issued to him on the 20th of March, 1891.

Although the fact that James had died in September, 1890, and had left a pre-emption claim was made known to the defendant David in the same month, he did not communicate directly with his brother John until July, 1891, that is to say, he delayed making any communication about the land until after he had obtained the certificate of improvements and after an application for issue of a Crown grant to him in his own name, had proved unsuccessful.

Having regard to the speed with which David completed the work necessary to acquire the land, it is difficult to believe that he kept the knowledge that he had acquired as to his brother's estate, and as to the terms upon which his brother's estate would descend to his heirs until July, 1891, and that he—poor man that he was—in the short time should have expended, as he did, some $400 in obtaining the certificate of improvements, without applying to his brother for his share, if he intended that either his mother or brother should share in the land. This conclusion I could not reach on this omission if it

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stood by itself, but the correspondence, or rather, so much of it as we have, bears out the inference that I have drawn, *viz.*: that David meant to hold the land for himself, and that he only communicated with them when he found in the way of his obtaining the grant, obstacles which he could not overcome. The foundation of credibility being honesty, I am driven to the conclusion that he, David, is a thoroughly unreliable witness.

James died on the 9th of September, 1890. He was attended on his death bed by one Jarrett, and through Jarrett, I presume, David got into correspondence with one Wattie, who had property adjoining the pre-emption in question. From a letter written by Wattie on the 9th of December, 1890, it is apparent that Wattie thought that David was the only brother in existence. It is also apparent that David was inter-meddling with the estate of the deceased in respect of matters, other than that of this pre-emption, so he may be regarded as an executor *de son tort*. Wattie advised him as to the means of obtaining a Crown grant, and in that connection, or in connection with the issue of the certificate of improvements says:

"It will be necessary for you to make an affidavit to the effect that you are the only brother and next of kin of the deceased."

The application for the certificate of improvements in the name of David was made on the 26th of December, 1890. It did not issue until the 20th of March, 1891, but from Wattie's letter of the 27th of January, 1891, it is apparent that David was already making enquiries as to the next step, *viz.*: the issue of the Crown grant. On the 22nd of April, 1891, Wattie asked David if he intended to apply for the Crown grant at once. On the 27th of May, 1891, he wrote that he would get "it" (I think referring to certificate of purchase) through at once, and acknowledged receipt of power of attorney from David. This, though not produced, could only have been signed by David.

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On the 6th of June, 1891, Wattie wrote that he had made application for the Crown grant, and advised David that he is now at liberty to sell if he thinks proper. From this it is plain that at this time, June, 1891, neither the name of the plaintiff nor that of the mother was being included in the application.

On the 17th of June, Wattie reports that before the Crown

grant will be issued to David an application to the Supreme Court must be made, and on such application it will be necessary for him to produce an affidavit that he is the only brother, and to file a release by the mother of her interest. Up to this time the fact that there was such a person as the plaintiff had not been declared, although the certificate of improvements had been obtained and an application for the Crown grant had been put forward. No wonder that in March, 1892, the plaintiff, writing to defendant, complained that "no other person got an opportunity of doing anything," that is, to get the certificate of improvements, "but yourself."

David is now compelled to explain to John the fact that James had left some land which would be available to his heirs, and he wrote the following letter:

"My dear Mother, Father and Sister,

"I hope this will find you all in good health as it leaves us at present, for which we thank God our Father for all his love to us. I enclose you some papers one for you and one for John you must transfer all your rights to me in the estate of James and it must be done before the 2nd of September or I will have lots of trouble over this matter, you will have to go before a lawyer, and father with you and have the paper signed that I send you, I have had them drawn up by a lawyer in this place so that you will just have to sign them and you will have to send one to John and let him transfer all his rights to me, you must know that this is only to allow me to get the deed and what the land brings you will both get your share, but in the meantime if you do not want to lose the land and cause me to lose one hundred pounds which I have already spent on the land for improvements you will return those papers signed as soon as you can. You will send the paper to my brother John as I do not know his address and you can send him this letter if you like, he may understand what to do the 2nd of September it is one year since my brother died and we must try and get the deed before that or some one may take the land and give us the trouble to put them off the land. Give our love to all, I hope Aunt Mary is well my dear sister I do not think I will be able to take you out this year.

"We remain your loving son and daughter,

"D. & M. Cook.

"P.S. Mother have you got your marriage lines that is your marriage with my father, you will notice that the paper says that Drunhagart Slolland you can tell the lawyer that it is in Ireland.

"D. C.

"Have this done at once please."

David, in April, 1892, suggests that this is not the first com-

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munication he has made, but to my mind this letter, on its face, shews that no previous communication had been made as to the land. There may have been communication as to James's death. He writes, it is to be noted, that these transfers which he encloses for execution, are only to allow him to get the Crown grant, and whatever "the land brings you will both get your share." He does not ask John to contribute, nor does he mention that he has made any outlay to obtain the estate. I am inclined to think that this letter of the 16th of July, 1891, consitutes a declaration of express trust by David in favour of John.

On the 5th of August, 1891, John acknowledged this letter and complained of having been kept in the dark, to which complaint David, on the 15th of August, 1891, replied that the reason he had gone ahead in the matter of this property without consulting John was because his mother had told him that John thought that as David was the eldest it would be proper for him to act for all. We have not the mother's letter before us, but from the way John wrote on receiving the letter of the 16th of July, it is difficult to believe that he ever wrote to her in that way. John says that he never authorized her to write such a letter. It is noticeable that David does not directly suggest that the letter of the 16th of July, 1891, was not the first advice he had given of James owning, or being entitled to, land. He points out that he had to spend about $500 in completing the title, and adds, "so you can see I would have been glad of your help in more ways than one."

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Then he proceeds (I have already set out in Wattie's letter of the 17th of June, what material would be required on the application to the Court). David now puts it this way:

> "The Crown grant must be given by order of a judge of the Supreme Court, and I had [have, I assume he means] to make affidavit that I am the only brother, or get my mother and brothers, if any, to make [over] their right to me so that I can get the deed in my name, so I went to a lawyer in this place (Fraserville) and had these papers drawn up to save my mother any expense."

Now, as Wattie knew nothing about any other brother, this idea that John should make over his rights to David originated

with David. Then David adds what seems to me must be an untruth:

"I have sent him [Wattie] a power of attorney to act for *us*."

As the power of attorney referred to was sent to Wattie in May, and as in June Wattie was still under the impression that David was the only surviving brother, I say this statement that Wattie was to act for *us* was intended to conceal from John the fact that David had been applying for the Crown grant in his own name. And once more he says:

"Your giving me power will make no difference, you will get one-third of what it [the land] will bring—it is only to save time and trouble."

And he further says:

"The law of British Columbia is that we all share the same."

On the 31st of August, John, who by this time had received from David the correspondence between David and Wattie, writes that he is astonished at finding no word therein of his rights or his existence. On the 18th of August, David wrote to John as to making *our* claim good, and that *we* are the right heirs. On the 7th of September, John wrote that he did not think the property could be sold until after the Crown grant had been obtained, and not then without the consent of all parties, which consent he did not seem disposed to give. The next letter produced is the one dated the 1st of December, 1891, in which David, in a friendly letter, tells John to send in his claim, send it, he says, "to me or Mr. Wattie, and have your name put on the deed. You must (prove) that you are a brother of James Cook, deceased."

It will be convenient to sum up here that at the close of 1891 David had acknowledged John's right, and had abandoned the idea of taking out the Crown grant in his own name, but it will issue in the name of all three, but before reaching that conclusion he has, in my opinion, shewn that he had no intention of letting John in as a participant, until he was compelled to do so.

On the 22nd of January, 1892, David writes in an apprehensive tone:

"I am surprised you have not written to me; neither you nor John answered my last letter, I do not think I have done you any harm."

He then stated that the matter has been placed in the hands of a Vancouver lawyer by Wattie, and that the lawyer had

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advised that John and his mother must sign the quit-claim deed in his favour and that the Government will not issue the deed unless they do, and unless this is done the claim will be cancelled. There is nothing whatever in the evidence to bear this out—this threatened cancellation. He assures them:

"I will give you all your rights when I get the deed. You are only keeping things back."

To this letter John replied on the 8th of February, 1892:

"I have read the Vancouver lawyer's letter and I am willing to sign anything to get the business satisfactorily settled. You will be handsomely repaid both for your trouble and all expenses put out."

Unfortunately, at this stage, David was taken with an illness and a new lawyer was introduced into the correspondence, a Fraserville, Quebec, lawyer, Mr. Waterson, who wrote on the 22nd of February saying that the Government would not issue a grant in the three names, as David expected they would, but insisted that John and his mother should "resign" to David, when the Crown grant would issue to him, as he had made all the necessary improvements on the land and furnished the funds necessary for taxes, etc. There is nothing in the evidence to bear out the statement that the Government had made any such declaration. Mr. Waterson at the same time wrote a letter to John, but it adds nothing to the matter. Here—in the early part of 1892—we have David and his agents deliberately misleading those who had a right to know from him the exact truth.

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John at once declined to sign the quit-claim deed. He says that he has received a letter from Wattie, who says that David has the "only claim," and he adds: "If that is so, there is no use in me signing anything in your favour." He then points out that in obtaining the certificate of improvements,

"You David alone had the opportunity of doing anything, while I am willing to let you have everything back that you spent and also pay you for your trouble, I am not prepared to give you the whole without getting anything. Put my name on the deed as well as yours. It has as much right as yours there, also that of mother."

On the 22nd of April, 1892, he again wrote more fully:

"Dear Brother,—Since I last wrote you I have received information regarding the piece of land left by my bother James, and I find that both Mr. Wattie and yourself has been trying to mislead me to a certain degree. I find that the names of the whole of us that are entitled to participate in the estate can be put upon the deed and I may also inform

you that each of us have an equal right to share the benefit, the value at present is nearly $3000.00 and my man of business in Vancouver is prepared to state that it will become more valuable. Now before I go any further what do you intend doing? I shall certainly look after my own interest in this matter also mother's, but while that is the case I do not wish to put any difficulties in the way of the business being settled in a business-like manner. I simply wish the deed issued in the names of the three heirs I want no mean advantage nor any preference, but I will not sign any paper giving up my claim to any person as my business man in Vancouver says it is not necessary to do so. I will sign any document to allow the claim to be made up and all the names put upon the patent, let me know by return mail what you intend doing and if you still insist upon mother and me signing a quit claim you make a mistake as after the last letter I received from Mr. Wattie I would sign no such document.

* * * * * *

"I know all about it, David, and if you are sensible I will send you an power of attorney for mother and myself giving power to make up the title to the land and get our name on the patent and the legal men can be dispensed with and the ground can be sold at any time suitable."

I must say that this seems to me a most sensible letter, and possibly would have brought these two brothers into harmony but, unfortunately, before its receipt, David had, on the 15th of April, written John a letter upbraiding him for his conduct, and putting forward the statement that David had written to his mother in December, 1890, advising her of the death of James and of the existence of this pre-emption.

As I have already said, this, I believe, is a fabrication so far as the land is concerned. He then takes up the position that John has been guilty of a breach of faith in not returning all this correspondence which has, in my opinion, proved so fatal to him, and goes on:

"You say you do not care how it goes, you want your right. I have offered you your right, but you will not accept it. You say that I insist on your signing the quite-claim deed. That is not true. I have never insisted. If you sign it is also well."

It is difficult to say how he could insist to any greater extent than he or his agents had done, who, without foundation, represented that unless the quit-claim deed was signed the pre-emption would be cancelled.

On the 25th of April, 1892, John wrote another letter, (1) denying that he had any letter from his mother, *i.e.*, in

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December, 1890, or that he had authorized her to tell David to go ahead; (2) recognizing David's right to be recouped for all money spent; and (3) offering to send a power of attorney from his mother and himself, but (4) refusing to sign a quit-claim deed. A fine, manly letter. I do not see how it is possible for anybody to read it without having a good opinion as to the writer's honesty and straightforwardness.

To this letter David replied on the 4th of May, 1892, referring John to the chief commissioner, as if to say he, David, would not act any more on John's behalf. But on the 7th of May David addressed another letter, in which he says, "it will only be the strong arm of the law that will make me consent to put your name or mother's on the patent," and he adds these pregnant words:

> "The whole strain of your letters shews me that if you could do anything without me you would not consult me at all."

With that quotation, which, in my opinion, expresses exactly what David's inclinations were, we can leave this correspondence.

At the trial David said that before he had sent the money to Wattie to pay for the land, he "had asked John to come in and help him." The obvious intention is that the Court should infer that John had refused to help him.

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If we turn to the correspondence, we find that David sent the $400 in May, 1891. It was not until the 15th of August, 1891, until all the money for the land had been paid, that David wrote, "You see that I would have been glad of your help in more ways than one."

At the trial the defendant said that the reason, and the only reason, he insisted on getting a quit-claim deed from the plaintiff was because he, the plaintiff, would not pay any money. The correspondence contains nothing to support that statement. It was put on quite a different ground, *viz.*, that it would facilitate the issue of a Crown grant of land, in which they would all be interested. Later on he says:

> "When I heard my mother was the sole heiress, I told her that John would do nothing and that if she would trust me, I would get the Crown grant in my own name, and John had nothing to do with it."

This statement is astonishing. He was informed in September, 1890, that his mother was the sole heiress. On the 1st of December, 1891, long after the quit-claims had been sent over, he wrote to John, "All our names will be on it." His next letter, 22nd of January, 1892, contained the unproved threat that unless the mother and brother in Scotland released their rights, the claim would be cancelled by the Government. The theory that the Government regarded the mother as the sole heiress was not put forward until the employment of the Vancouver lawyer. I should put the exact date of the Government adopting this theory as May, 1892—just before David wrote "it would only be by the strong arm of the law" that his mother's name would appear on the Crown grant.

We have, then, all sorts of theories put forward by David at the trial. First, that he had applied to John for money to assist him, and that it was in consequence of that refusal that he went on at his own risk. Second, that he acted for his mother alone, and quite independent of John. Thirdly, he represented to his mother that John would do nothing—whereas in 1892, when John was quite willing to send a power of attorney, David said he would not accept from him a power of attorney. To John one story, to his mother a different one. All these are inconsistent with the correspondence, and they are also inconsistent with the reasons put forward by David in his conversations with Alex. Montgomery after 1903 for refusing to recognize John's rights. The reasons given to Montgomery were, first, that John had been unkind to their mother; second, that John was responsible for the failure of the Fraserville business. The last ground seems to me to convey the idea that had the Fraserville business (to which reference will be made later) been a success, John's rights would have been recognized.

A great deal of unnecessary labour has been thrown upon us by the neglect of the solicitor preparing the appeal book to observe the rule which requires exhibits to be placed in order of date. The practice of extending the correspondence produced from the department of Lands and Works in the evidence

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of the clerk producing it, instead of making it an exhibit, is to be condemned.

I now turn to that correspondence. It was late in 1891 that Wattie placed the matter in the hands of a Vancouver lawyer. As the lawyer was paid $300 for obtaining a Crown grant of land to which a certificate of improvements had already been obtained, one naturally asks oneself why was so large a sum paid for so simple a job? If it was to secure the grant in the name of David alone, one can understand the price being a large one. They made an application in December, 1891, in David's name, and it would appear that in May the exact date is not stated, but I would infer prior to the 7th of May, the date of "the strong arm of the law" letter, Mr. Russell had an interview with the chief clerk of the department, and, as a result, a quit-claim deed, executed by the mother alone, was procured in October, 1892, and forwarded to the department. A statement was made in the letter that the defendant was all along morally and equitably entitled to this grant. With that statement I cannot agree.

The department, however, asked for a quit-claim deed from John Cook, but upon obtaining—so it is said—an opinion from the Deputy Attorney-General of the day, that the mother alone was entitled to the Crown grant issued direct to David on the 18th of December, 1892—dated September, 1892.

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Now, is John to be bound by such a decision obtained by David, John's trustee, behind John's back, in order that David may obtain a grant in his own name? I think not. The whole transaction reeks with fraud.

The plaintiff seems to have made some steps towards asserting his rights, but being informed by counsel that he was sufficiently protected, I suppose, by David's letters, did nothing.

After an interval of seven or eight years, the plaintiff came out to Canada—on a visit, I take it—and met his brother in 1900; according to the plaintiff nothing was then said about this land, but in the fall of 1901, when the plaintiff and his mother came out from Scotland and the plaintiff and defendant went into business together, the plaintiff advanced David $12,500 to enable him to become interested in the business to

the same extent that he was. The matter was spoken of and this business lasted some 18 months, when it proved a failure. A quarrel between the brothers followed, because John wanted to charge the defendant with six per cent. interest on the $12,500 loan. After some time, John returned to Scotland in 1906, and David came to British Columbia in the summer of 1903. The mother died while the two sons were in Canada, 13th of November, 1900.

While these people were living in Canada, this property was often spoken of. That is common ground. The plaintiff says:

"I offered to pay my share of the taxes and expenses he had incurred if he would make up his account. That on the day I advanced him the $12,500, David offered to give me an acknowledgment in writing that I had a half interest in the land, but I said that as we were brothers that was not necessary."

The defendant says that on three occasions he offered to let the plaintiff have an interest in the land if he would pay his share—the first time in defendant's house, Riviere du Loup, in 1900, again later in the Fraserville Company's office, and a third time in the New York building in Montreal—but the plaintiff refused to take his share of the property and pay one-half of the cost. The defendant's wife corroborates the first conversation, which, she says, took place in 1901, and she adds off her own bat:

"Yes, and there was a letter that came out from him, and he said he did not want to have anything to do with bush lands."

There is no such letter produced, nor in any of those produced is there a hint of such a thing. From what we have read of the plaintiff's letters, I think it is highly improbable that he would so write. Had he so written, I think it altogether improbable that a document so valuable to the defendant would not have been preserved. The wife's volunteered evidence being so improbable, I feel at liberty to disregard her direct corroboration. But another witness, Alexander Montgomery, who was living with the defendant in Fraserville, says that in the fall of 1903, after David had gone out to British Columbia, the plaintiff said to him that he did not think it worth while paying taxes on bush lands in British Columbia. This young man was adopted and brought up by the defendant, and it may be said that he was favourably dis-

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posed towards him. That may be, but his evidence to me rings true. Accepting it as true, it lends a certain amount of weight to the story told by David, but it does not confirm his testimony as to any of the three conversations detailed by him. Montgomery was speaking of something that had taken place in the fall of 1903. Ten years is a long time to remember the exact words of a conversation concerning a matter in which you have no personal interest. If he has recalled the exact words, they in themselves do not amount to an abandonment. On the other hand, they do shew that the plaintiff in 1903 had not altogether lost interest in the property. We come, then, to examine the defendant's own testimony as to these three offers.

At the time they took place the brothers were friendly, and the plaintiff had advanced $12,500 to the defendant, or on his account. In these circumstances it seems to me unlikely that he, David, would say—"I have obtained this property for my sole benefit, but as I feel the weight of the taxation, I now offer you a chance to obtain at cost price a one-half interest in the property over which we had so much unpleasantness." Surely it would be more natural, more in accordance with that feeling of gratitude which he says he felt to the brother who had assisted him to the tune of $12,500, to speak of himself as a trustee for the other, but subject to repayment of advances. To me it seems difficult to understand how these brothers became reconciled as long as David claimed that he was the sole owner of the property.

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We have the learned trial judge's finding in the defendant's favour, but that is by no means final. This Court has in a case of this kind to rehear the case, and although we must pay great regard to the learned judge's finding, we must not shrink from upsetting his decision if we come to the conclusion that he was wrong. In *Paterson Timber Co.* v. *Canadian Pacific Lumber Co.* (1910), 15 B.C. 225 at p. 236, I dealt at length with the duty of a Court of Appeal in dealing with questions of fact on appeals from a judge. What I said there is quite consistent with the rule laid down by the Judicial Committee in the *Khoo Sit Hoh* v. *Lim Thean Tong* (1912), A.C. 323.

In Story's Equity Jurisprudence (2nd English Ed.) 823,

where implied trusts are divided into two classes, *viz.,* those which stand upon the presumed intention of the parties and, secondly, those which are independent of any such intention, and are forced upon the conscience of the party by operation of law, as, for example, in cases of meditated fraud, imposition, notice of an adverse equity, and other cases of a similar nature, it is said that these latter are usually called constructive trusts, or trusts *ex maleficio.* If the declarations in David's letters do not amount to an express trust—he is certainly a trustee *ex maleficio.*

There is a line of cases of which *Keech* v. *Sandford,* commonly called the *Rumford Market Case* (1726), Sel. Cas. t. King 61; 2 Wh. & T.L.C., 8th Ed., 706, is the leading case. There on a bill brought by an infant against his trustee to have a lease, which had been granted to the trustees for his own benefit, it was shewn clearly that that lessor had refused to renew for the benefit of the infant. King, L.C. at p. 62 said:

"Though I do not say there is a fraud in this case, yet he [the trustee] should rather have let it run out, than to have had the lease to himself."

It was held, on grounds of public policy that the defendant was trustee of the lease for the infant, and must assign the same to him and account for the profits, and that he was entitled to be indemnified from the covenants contained in the lease. That case has been followed again and again. Some striking instances of the principle are to be found in *Griffin* v. *Griffin* (1804), 1 Sch. & Lef. 352; 9 R.R. 51; *Fitzgibbon* v. *Scanlan* (1813), 1 Dow 261; *Mill* v. *Hill* (1852), 3 H.L. Cas. 828. The latest application of its principles is in *Griffith* v. *Owen* (1907), 1 Ch. 195, a decision by then Parker, J. It is there pointed out that the principle is primarily applicable to renewal of leases, but in the notes to White & Tudor's report of the case the learned commentators say the rule applies to all varieties of property and not merely to leaseholds, citing *Cooper* v. *Phibbs* (1867), L.R. 2 H.L. 149 at p. 165. In Canadian Courts the principle has been applied in several cases, *viz.,* in *Foster* v. *McKinnon* (1856), 5 Gr. 510, where defendant took advantage of his position as administrator and completed a pre-emption title. In *Lamont* v. *Lamont* (1859), 7 Gr. 258, a dispute

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between two brothers, the defendant obtained letters of administration, and by virtue of his position and by making false statements, obtained a Crown grant behind the plaintiff's back: a decision by Mowat, V.C., and in *Robinson* v. *Coyne* (1868), 14 Gr. 561 at p. 568, where defendant, though he did not prove the will, was held a trustee. In *Bennett* v. *Gaslight and Coke Co.* (1882), 52 L.J., Ch. 98, where one of the trustees of a lucrative agency agreement procured the agency to be renewed to a firm, in which he was a partner, upon terms, less lucrative, but still beneficial, it was held that the trustees' interest in the renewal agreement formed part of the trust estate. I would hold that the defendant in obtaining the certificate of improvement and subsequently the Crown grant, which was issued to him on the 18th of December, 1892, became a trustee *ex maleficio* for the heirs of the deceased.

It is needless, perhaps, to observe that a person usurping the office of trustee cannot by renouncing his intention of carrying out the duties placed upon him by law, vest the trust property in himself. Much reliance was placed by the defendant's counsel on this letter of the 7th of May, 1892, but on the authority of those cases I think it is clear that the defendant, by interfering in the administration of James Cook's estate and obtaining the certificate of improvement, he, the defendant, thereby constituted himself a trustee for his mother and brother, and

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that it was his duty to protect their interests. I cannot agree that his solicitors were justified in asserting, as they did in October, 1892, that he was all along morally and equitably entitled to the Crown grant. In *Clegg* v. *Edmondson* (1857), 8 De G. M. & G. 787, Turner, L.J. at p. 807, said:

> "It is sufficient for me to state that the mere communication of the intention on the part of the managing partners to apply for the new lease for their own benefit could not, in my opinion, be sufficient for the purpose."

A defence relied on was that allowed in *Farmer* v. *Livingstone* (1883), 8 S.C.R. 140, the principle contended for being that you cannot go behind the Crown grant and have it set aside by the Courts on equities existing before its issue. But how can it be said in this case that the Crown had all the facts before them, when the applicant, who was the trustee for the defendant, was representing that he alone was the person entitled to the

Crown grant? *Farmer* v. *Livingstone, supra,* can have no application to a trustee *de maleficio* making an application in fraud of his *cestui que trust.*

There remains the question of laches, delay and acquiescence. The plaintiff was aware in January, 1893, that the Crown grant had issued. He did not issue his writ until 1912. Their mother did not die until 1900, and the defendant and plaintiff, who both admit this, were talking about sharing the property until 1903. It cannot be said that the plaintiff slept on his rights so long as these conversations as to sharing the property were going on. If we accept the plaintiff's version, the defendant, as late as 1902 or 1903, was assuring the plaintiff that he regarded himself as trustee.

In *Cooper* v. *Phibbs, supra,* the bill was filed in 1863, and it was there held that the defendant, a trustee of property for himself and others, who had acquired, under an Act of Parliament passed in 1837, upon the representation that he was solely entitled, an absolute interest therein was nevertheless a trustee for all parties beneficially interested, subject only to the repayment to him by the parties entitled under the trusts of the moneys properly expended by him in acquiring the property and improving the same.

Prendergast v. *Turton* on appeal (1843), 13 L.J., Ch. 268, was a case of partnership and stands on a somewhat different footing. A partner must not wait to see whether the partnership business will result in a profit.

As to acquiescence, which in its proper sense means standing by and seeing another person about to commit, or in the course of committing, an infringement of your rights in such a manner as really to induce the person committing the act, and who, but for such acquiescence, might have abstained from it, to believe that you assent to its being committed, acquiescence in this sense is not proved. The plaintiff protested again and again that he would not be a party to a quit-claim deed.

Then the defence is reduced to laches. Here acquiescence in its other sense, that is to say, that the plaintiff refrained from seeking redress after he became aware that the Crown grant had issued to the defendant cuts an important figure. But lapse

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of time alone is not sufficient. The other factor, *viz.*, whether there has been any change of position on the defendant's part, must be considered.

In *Rochfoucauld* v. *Boustead* (1897), 1 Ch. 196, lands were purchased in 1873; the plaintiff contended that they had been purchased by the defendant as trustee for her. The defendant became bankrupt, and in 1880 his trustee in bankruptcy repudiated the plaintiff's title. The defendant never expressly did so. The plaintiff apparently thought that it would be better to wait and see whether the defendant would not be able to make some arrangement with his creditors which would enable him to regain control over the property, and then recognize her claim to it. The suit was brought in 1894, twelve years after the correspondence ceased. The Court of Appeal consisted of Lord Halsbury, L.C., Lindley and A. L. Smith, L.JJ. The principle upon which we must proceed is put in one sentence by Lindley, L.J. at p. 209, who delivered the judgment of the Court:

> "The time which has elapsed since the plaintiff knew that her claim to the estate was disputed is so considerable that, before giving the plaintiff the relief to which she would otherwise be entitled, it is necessary to consider what her conduct has been, and whether anything has happened to render it unjust to the defendant to compel him to account now."

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The judgment then refers to the cases cited before us by Mr. *Mowat, viz.*: *Erlanger* v. *New Sombrero Phosphate Company* (1878), 3 App. Cas. 1218 at p. 1279, and then proceeds (p. 211):

> "In questions of this kind it is not only time, but the conduct of the parties which has to be considered."

The Court of Appeal in the *Rochfoucauld* case, *supra,* were dealing with an express trust, and assuming that an express trust cannot be read out from the letters of the 16th of July and the 15th of August, 1891, and the 22nd of January, 1892, the defendant has a right to urge that in dealing with a claim to establish a constructive trust the Courts exact a greater degree of promptitude. That, I think, is so especially where the property is of a speculative nature: see *Clegg* v. *Edmondson, supra,* a case between partners concerning mining property, where nine years were allowed to lapse, the Court held the

plaintiffs were precluded by laches. That case seems to me to be distinguishable, having regard to the property at stake.

Applying the test laid down by Lindley, L.J., in what way has the plaintiff given the defendant to understand that he had abandoned his claim beyond remaining silent from 1902 or 1903 to 1912? Or what equity can the defendant set up to resist the plaintiff's claim? He still owns the estate; the money borrowed by him, except the $300 paid to the lawyer, can be returned to him—and he recovers all he is entitled to.

I would allow the appeal, reverse the judgment and declare the defendant a trustee, with costs below, direct an account, and dismiss the counterclaim. The defendant should have obtained all that he there asks for had he admitted his trustee.

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MARTIN, J.A.: The appeal should be dismissed: the learned judge below has, I think, reached the right conclusion.

GALLIHER, J.A.: So far as the correspondence between the parties is concerned, I can see nothing unreasonable in the attitude that John Cook took in refusing to sign the quit-claim deed, and it is useful here only in so far as it shews the attitude of both parties up to the time at which it ceased. After that the parties were at arms' length.

The learned trial judge has found as a fact, and the evidence justifies that finding, that John Cook, some time subsequent to the issue of the Crown grant to David, refused to assume his share of the burden of procuring the land and paying the taxes thereon. The judgment proceeds upon the ground that after the issue of the Crown grant to David in 1892, David at most was only a trustee for John, and that John's refusal to bear his share of the burden, and repudiation of trusteeship, coupled with the lapse of time which intervened before John made his claim, amounts to abandonment. It is not necessary to inquire what were the respective rights of the parties up to the time the Crown grant issued. Upon the issue of the Crown grant David became a trustee for John in respect of his interest in the property.

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This action is brought to have David declared a trustee, and it resolves itself into a question of whether John, by his acts

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or omissions, has so altered their position as to preclude him from now claiming as a *cestui que trust.*

At the time the Crown grant was issued we find the parties at arms' length, David declaring any interest John got he would have to get through the Courts, and John declaring that he would look after his own interests. The correspondence between the brothers ended, and for a period of some years nothing is said or done between them regarding the property. They then go into business together in a pulp-manufacturing concern in the Province of Quebec, John advancing all the money and advancing for David $12,500, for which David receives shares in the company. This proves a failure, and the moneys advanced by John to David still remain unpaid. At the time of these advances David says he offered to deed half of the property in question to John, but John said it was not necessary, or something to that effect. Later, the evidence is that David again offered to deed half the property to John, but this time insisted on John paying one-half the cost of procuring and maintaining the property, and that John said he did not want to have anything to do with bush land in British Columbia. This is denied by John, but David is corroborated in this by his wife and one Montgomery, a boy whom David had brought up. Nothing further transpires until John learns in 1909 that David is bringing an action against the City of Vancouver for damages for interference with water rights pertaining to the property, when some correspondence takes place between John and a Mr. Russell, solicitor for David, and this action is finally brought in 1912. From the time of the death of the brother James to the present, David Cook has done all the work and paid all the moneys necessary for procuring the Crown grant, and paid all the taxes on the property in the whole amounting to several hundred dollars. John has contributed nothing directly, but I think we must not overlook the fact that for over ten years David has been indebted to John to the extent of several thousand dollars, and although this is probably outlawed long ere this, yet in considering the equities of the case as to the burden that David has been carrying, and which he urges, it is a matter for consideration. This money loaned to

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David is far in excess of what John could be called upon to pay as his share here. Taking this into consideration, we have left only the statement of John that he did not want to have anything to do with British Columbia bush lands, a statement made at a time when David was largely indebted to him, and was demanding half the expenses incurred by David up to that time. It may very well be that John, so far from considering himself called upon to pay this, concluded not to do so, as the balance was largely the other way; but be that as it may, the circumstances were as stated, and I fail to see under all the circumstances where John has done or omitted to do anything which a Court of equity could construe as an abandonment.

It is true he has lain back for a number of years without actively asserting his rights, but that he might choose to do, relying on them all the time, but choosing his own moment to assert them, and I find nothing which satisfies me that he at any time abandoned those rights, nor do I find anything in the authorities which, in the circumstances of this case, would induce me to refuse the relief prayed.

I would allow the appeal with costs. Judgment should be for the plaintiff as prayed, and the defendant should have judgment on his counterclaim with costs.

McPHILLIPS, J.A.: This action is one brought to have it declared that the plaintiff is entitled to an undivided half share or interest in certain lands in New Westminster District, consisting of 193 acres, situate near the mouth of Seymour Creek and numbered lot 851, group 1, New Westminster District. The land was held under a pre-emption record from the Crown by James Cook, who died in September, 1890.

It would appear that the defendant, being a brother of the deceased pre-emptor, obtained the Crown grant to the land, having seen to all the provisions of the Land Act being complied with, also having obtained a quit-claim deed, under date the 18th of December, 1897, from his mother, the father of the deceased being dead. The contention of the plaintiff being that, as the mother died on the 13th of November, 1900, the land

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became the absolute property of the plaintiff and defendant, in the proportions of one undivided half share to each.

It was alleged that the defendant, well knowing that the plaintiff was one of the heirs at law of the deceased pre-emptor —entitled in the same degree as himself to an interest in the land—represented to the mother that she alone was entitled to the land, and upon such representation obtained the quit-claim deed and the grant from the Crown. The trial judge, in a considered judgment, with which I entirely agree, refused—upon the facts adduced at the trial—to hold that the plaintiff established any position based upon which the Court would be entitled to grant relief, and disturb the defendant in his position as the owner of the legal estate in the land—holding the title to the land by grant from the Crown, *i.e.,* that the defendant was not a trustee of the land to the extent of a one-half undivided interest therein for his brother, the plaintiff in the action.

The evidence is somewhat voluminous, and the findings of fact of the learned trial judge are most definite and precise, and I do not consider that it is a case where the Court of Appeal ought to disturb those findings. The learned trial judge had the opportunity to observe the demeanour of the plaintiff and defendant under examination, and to weigh the evidence, and at best the plaintiff could only succeed by invoking equitable principles—and that against the view of the learned trial judge—the Court of Appeal should now overturn these findings and grant the relief asked—in the face of the laches of the plaintiff and the evident attempt to romp in—if I may be permitted to so express myself—and reap advantages—the risk of which the plaintiff would never assume throughout long years when the defendant alone had to stand by, and without the vigilance of the plaintiff the land would have been irretrievably lost—would offend against all accepted principles of a Court of equity. It seems to me that the decision of the Judicial Committee in *Khoo Sit Hoh* v. *Lim Thean Tong* (1912), 81 L.J., P.C. 176 at p. 177, is very much in point.

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To my mind argument has failed to disturb these findings of the trial judge, and without it being held that the learned

judge is wholly wrong in his findings, the defendant cannot be disturbed in his title, holding as he does by express grant from the Crown.

The quit-claim deed truthfully sets forth the heirs-at-law of the deceased pre-emptor, James Cook, and the Crown was in no way deceived, as the quit-claim deed was filed in the lands department at Victoria before the issue of the Crown grant; and, further, it is to be noted that the Crown is not a party to this action—and with the knowledge that the plaintiff was one of the heirs-at-law, the Crown granted and conveyed the land to the plaintiff. What is the result in law? It seems to me that the plaintiff is powerless to ask the aid and assistance of the Court, especially without the intervention of the Crown. In *Farmer* v. *Livingstone* (1883), 8 S.C.R. 140 at p. 157, Strong, J. said:

"Further, the bill does not shew that the patent was issued by the Crown in ignorance of the plaintiff's possession and improvements. It does not therefore shew that there was error or improvidence in this respect. It has been well settled by numerous decisions in Ontario in suits instituted under a provision similar to that of the statute now in question, that when the Crown has issued the letters patent in view of all the facts, the grant is conclusive, and a party cannot, as it is said, set up equities behind the patent. Now, in the present case there is no sufficient allegation to shew that the patent was issued by the Crown in ignorance of the facts of plaintiff's possession and improvements. It is true it is stated generally in the bill that the patent was issued in ignorance of his rights, but this allegation cannot, on the general rules applicable to equity pleadings, be construed as a sufficient allegation that the Crown was ignorant of the facts of the plaintiff's possession and improvements."

Here there can be no question the Crown was aware of the fact that the plaintiff was one of the heirs-at-law; the quit-claim deed in its recital shewed this, and, as previously pointed out, the Crown is not a party to this action.

In *Templeton* v. *Stewart* (1893), 9 Man. L. R. 487, Bain, J. at p. 499 said:

"The objection is also taken that the Crown having, after due investigation, issued the patents to Mrs. Stewart, this Court has not jurisdiction to grant the relief that is asked in the bill, and that, at all events, the Attorney-General of the Dominion should have been a party to the suit. What the bill asks is that the defendant, the patentee from the Crown, be declared by the Court to be a trustee for the plaintiffs, and that she be ordered to convey the land to them. Now if the land in question had

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been ordinary Crown land, that is, had it been land vested in the Crown, it seems very clear on the authority of *Boulton* v. *Jeffrey* (1845), 1 E. & A. 111, and *Crotty* v. *Vrooman* (1883), 1 Man. L.R. 151, and the cases referred to therein, that this Court would not have any jurisdiction to entertain the suit. The patent is not shewn to have been issued through fraud, error or improvidence, and it is shewn that it was issued after a full investigation into all the circumstances."

The situation here is that it was land vested in the Crown, and the facts as to who were the heirs of the deceased pre-emptor were fully disclosed to the Crown; it cannot be assumed that the Crown acted through legal error as to who were the heirs-at-law—certainly not without the Crown being a party to the action, and so contending—and the documentary evidence is to the contrary.

I may also refer to the case of *Crotty* v. *Vrooman* (1883), 1 Man. L.R. 149, particularly to the judgment of Taylor, J. at pp. 152-3.

I am not unmindful of *Esquimalt and Nanaimo Railway Co.* v. *Fiddick* (1909), 14 B.C. 412, wherein it was decided that in the circumstances of that case the defendant should be permitted on giving notice to the railway company to proceed with her application, and that the Crown need not be a party to the action. The judgment in the action was given by HUNTER, C.J. and went on appeal to the Full Court (IRVING, MORRISON and CLEMENT, JJ.), the judgment of the learned Chief Justice being set aside. I do not think that it can be said that the decision really disturbs the opinion here expressed by me, that the Crown grant cannot be affected, or the title thereunder disturbed, save in an action to which the Attorney-General is a party, as possibly the special circumstances of the case may be such as to render all observations to the contrary as *obiter dicta;* but if it should be the case that such is really the effect of the judgment, I respectfully dissent from that view, and agree with the judgment upon that point as expressed by HUNTER, C.J. at p. 414.

MCPHILLIPS, J.A.

Then unquestionably there has been laches here: see Halsbury's Laws of England, Vol. 13, par. 203, and further at p. 173, par. 209, where the cases are collected. Here we have

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the lapse of fourteen years and one month after the issue of the Crown grant to the defendant before action brought.

In view of present-day conditions, and bearing in mind the decisions of the Courts in later years, I think it can be well said that here we have such delay as would disentitle a Court of equity to grant any relief, were the facts even such as to warrant the Court in so acting if brought in time—which, in my opinion upon the merits, are wholly wanting. I would, therefore, dismiss the appeal.

Appeal allowed,
Martin and McPhillips, JJ.A. dissenting.

Solicitors for appellant: *Taylor & Hulme.*
Solicitors for respondent: *Russell, Mowat, Hancox & Farris.*

NEBRASKA INVESTMENT COMPANY *ET AL.* v. MORESBY ISLAND LUMBER COMPANY, LIMITED.

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Vendor and purchaser—Option—Renewal—Alternative agreement—Termination of option—Inference as to intention of parties.

Upon the payment of $6,000 on account of the purchase price, on the 2nd of September, 1910, B. obtained an exclusive option for 20 days to purchase A.'s mill and timber rights, A. agreeing that in the event of B.'s failure to make a sale, and in the event of one being concluded by himself, he would, in consideration of B.'s assistance and of the use of cruise reports obtained by B., refund him the $6,000. No sale was effected, and on October 5th the parties entered into a further agreement, B. paying A. $20,000 for a renewal of the option until November 22nd, or until B. declared that a deal he had under way with parties in London was off. Under a further clause it was agreed that in the event of the London sale being so declared off, if either party could sell for the price agreed upon, in the case of B. selling the $26,000 already paid would be applied on the purchase

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price, and in the case of A. selling, the $26,000 was to be refunded and considered as a loan. In order that the property could be offered for sale as a running concern, B. advanced A. three further sums upon the terms set out in the agreement of the 5th of October, namely: $5,000 on the 21st of November, $5,000 on the 9th of December, and $2,500 on the 24th of April, 1911. On June 11th, 1911, B. notified A. that the London negotiations were at an end. On June 19th, B. wrote A., proposing another disposition of the property, from which there was an intimation that he regarded the agreement of October 5th as still subsisting, and on July 3rd A. answered this letter and took no exception to that assumption. A. sold the property in December, 1912. In an action by B. for the return of the sums advanced A. as moneys loaned:—

Held, that the contents of the letters of the 19th of June and the 3rd of July, 1911, shewed that, while the exclusive option to B. was at an end, yet the alternative arrangement set forth in the agreement of October 5th was recognized by the parties as still subsisting and was subsisting when A. sold the property.

Judgment of GREGORY, J. reversed.

Statement

APPEAL from the judgment of GREGORY, J. in an action tried by him at Victoria on the 4th, 5th, 8th and 9th of December, 1913. The plaintiffs claimed the sum of $41,500, moneys loaned the defendant Company under a certain agreement in writing of the 5th of October, 1910. The defence was a general denial or, in the alternative, that the defendant did not, under the terms of the agreement, become indebted to the plaintiffs, or, further, that the payments made by the plaintiffs to the defendant were the consideration for a certain option given by the defendant to the plaintiffs for the purchase of timber limits owned by the defendant, and that the plaintiffs failed to comply with the conditions of the said option and the moneys became forfeited to the defendant and the defendant was entitled to retain the same. The trial judge dismissed the action and ordered that the sum of $41,500 paid into Court by the North American Timber Holding Company under a garnishee order be paid out to the defendant on a satisfactory bond being given in the sum of $45,000, pending the result of an appeal. The plaintiffs appealed on the grounds, *inter alia,* that the trial judge erred in his construction of the receipt of the 5th of October, 1910, and in holding that all the moneys paid to the defendant were not paid under an agreement that the same

should be refunded upon the happening of the events set forth in said receipt.

H. W. R. Moore, and *Twigg,* for plaintiffs.
Bodwell, K.C., for defendant.

GREGORY, J.: I suppose it never happens, or rarely happens, that judgment is satisfactory to both sides. It is hardly satisfactory to myself, because there are matters which seem to be inexplicable by the stories of either the plaintiffs or defendant. As far as the witnesses are concerned, I have only this to say: that Mr. Corlett made a favourable impression on me; his evidence was consistent in connection with this transaction. The conversations which took place from time to time between Mr. Corlett and the Nebraska Investment Company did not resemble the conversations of anyone offering to loan or to borrow. The plaintiffs' contention is that the defendant has tied up this valuable property indefinitely in order to give the plaintiffs an option without consideration. Why any man should do that is beyond me; if the option were for a short time only, a few days, it might not be out of the way, but such an option extending over such a length of time was, to say the least, out of the ordinary. It seems to me that the plaintiffs had in their minds all the time and made the payments relying upon the fact that they could sell it—they believed they would get word from Wheeler in London that his deal was closed and they would then be in a position to take up the option, and they were continually urging the defendant to continue the condition of affairs, that is, give them further time, and he consented thereto, or, rather, agreed to refund the money if they bought themselves. The payment of December 9th was paid on the same terms—whether it was a foolish payment or not does not make any difference—it was foolish in any case to make a payment after the option had expired. That option had really expired. It seems to me that the only event in which this money was to be considered a loan has not happened.

The appeal was argued at Victoria on the 28th of January,

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1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

W. J. Taylor, K.C. (*H. W. R. Moore,* with him), for appellants (plaintiffs).

Bodwell, K.C., for respondent (defendant).

Cur. adv. vult.

7th April, 1914.

MACDONALD, C.J.A.: Further consideration of this case serves to confirm the opinion I entertained at the close of the argument that the appeal should be allowed. The case does not depend to a very large extent upon the oral evidence, but rather, in my opinion, upon the documentary evidence. The trial judge has left us untrammeled by any findings or intimations respecting the credibility of witnesses. In his reasons for judgment he states that he found some difficulty in coming to a satisfactory conclusion. That conclusion, as I understand it, did not depend so much upon the impressions made upon him by the oral evidence as by the logic of the one position as against the other. It appeared to him that the case made by the defence, particularly Corlett's evidence, was more consistent with the circumstances in which the transaction was involved than was the plaintiffs' case.

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The documentary evidence, in my opinion, strongly supports the plaintiffs' contention. The bulk of the money sued for was entered in defendant's books as a liability, and while this is not conclusive against them, it is a fact of some significance. A close analysis of the agreement and correspondence coupled with the conduct of the parties, leads me to a firm conclusion in favour of the plaintiffs. Exhibits 4, 16, 7 and 8 must be read to enable one to fix the status of the parties with respect to each other on the 22nd of November, 1910, exhibit 7 being the controlling instrument.

The documents contain alternative agreements: (1) an option in the strict sense of the term, or, to use the words of exhibit 16, "The right (of the plaintiffs) to purchase or contract the sale of" the defendant's mill and assets. This is

exclusive, and while it subsisted the vendors had no right to make a sale to other persons. (2) On notice before the 22nd of November, 1910, that the London negotiations were ended the exclusive option would cease, and the other alternative agreement would come into operation, namely, that plaintiffs might up to the 22nd of November "purchase or contract the sale of" the property at the price of not less than $606,000, but that defendant also might sell to others at a like price, in either of which events plaintiffs should not lose the moneys already paid to the defendant. The extension of this agreement was also contemplated by the terms of the agreement itself, in case the London negotiations should still be pending on the 22nd of November. By exhibit 8, dated the 21st of November, 1910, the day before exhibit 7 would expire, the defendant acknowledged receipt of $5,000 from the plaintiffs in these terms:

> "I have received from the Nebraska Investment Company . . . . the sum of $5,000 this day, which is paid and accepted on the same terms as the $20,000 and $6,000 heretofore paid me and referred to and set out in statement bearing date of October 5th, 1910 [ex. 7], it being agreed and understood that this is a duplicate to be attached to and [form] a part of said mentioned memoranda and agreement."

This is signed by Corlett, defendant's managing director. This memorandum, though inaptly worded, can mean only that the time limit fixed by exhibit 7 is extended. The London negotiations were then still pending and the only reasonable inference is that the $5,000 were paid for an extension of time. This inference, which I draw from the documents themselves, is borne out by the subsequent course of events. I then ask myself what is the effect of that extension? No time limit is fixed, but obviously the primary object was to enable the plaintiffs to carry forward the London negotiations, and when these came to an end and the defendant was notified thereof on the 11th of June, 1911, the exclusive option to "purchase or contract the sale of" the properties, in my opinion, came to an end. Between the date of exhibit 8 and the 11th of June, plaintiffs paid over other sums to defendant to keep the mill in operation, as it was deemed important that it should be offered as a going concern; $5,000 were paid on the 9th of December, 1910, and $2,500 on the 24th of April, 1911, and a personal

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loan was made to Corlett of $3,000 on the 17th of April. In my opinion, all these sums, except possibly the $3,000, would have been lost to the plaintiffs on the termination of the London negotiations had the conduct of the parties thereafter not been such as to imply that, while the exclusive option was at an end, yet the alternative arrangement set forth in exhibit 7 with the time limit removed was still recognized as subsisting. This recognition is best evidenced by the correspondence between the parties subsequent to the 11th of June. The first letter was from plaintiffs to defendant, dated June 19th, and in it the writer assumes that the old agreement still subsisted. The plaintiffs having failed in London, proposed another disposition of the property, but said:

> "It being understood of course that you are to receive the amount provided for under your agreements with the Nebraska Investment Co., the balance of the money due you and the Nebraska Investment Co. to be paid in the following manner."

This is a clear intimation that the plaintiffs regarded the old agreement as still subsisting. In the defendant's reply to that letter, dated 3rd July, 1911, no exception is taken to that assumption, and the correspondence from that time onward to the time defendant itself made a sale of the property on terms within those contemplated by exhibit 7, indicates no departure from that assumption; in fact, to my mind, the correspondence is consistent only with that assumption, there being no evidence of any other new arrangement between the parties. That arrangement could no doubt have been terminated by either party on reasonable notice to the other, or by conduct on the plaintiffs' part from which abandonment could be inferred, but so long as it was allowed to continue each party was entitled to the rights and advantages given by it up to the time when it should be legally terminated. The rights which the plaintiffs could have claimed had the London negotiations been terminated before the 22nd of November, they still could claim after the termination of those negotiations and before the agreement was put an end to, or came to an end in the manner above suggested. That arrangement was not terminated either by notice or by abandonment before the defendant effected a sale

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of the mill at the end of the year 1912, a sale which was within the terms contemplated by exhibit 7.

If this view be the correct one, the solution of the case is very simple. So soon as defendant tired of the arrangement it could, acting in good faith, have put an end to it by giving reasonable notice to the plaintiffs. Had this been done before making the sale, the plaintiffs could, I think, have had no claim to the return of their moneys.

The item of $3,000 stands on a different footing to that of the other items. I confess some doubt as to how this item should be treated. The witness Coleman, for the plaintiffs, said that it was paid to Corlett, the plaintiffs' manager, for the same purposes as were the other sums. It is very clear that Corlett applied to Coleman for this sum for his own personal use, and told Coleman so. That sum was paid to Corlett, who gave a personal due bill for it, but if Coleman did not intend to accept it as such, he should have had the matter put right at once.

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I think it best to resolve what doubt I have in favour of the defendant; the onus of proof being upon the plaintiffs, and leave the plaintiffs, if they should be so advised, to pursue their remedy against Corlett.

The appeal should be allowed and judgment should be entered in favour of the plaintiffs for $38,500. They should also have the costs of the appeal and of the action.

IRVING, J.A.

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

I have read and would adopt the reasons of the learned Chief Justice, except as to the $3,000. I think the plaintiffs are entitled to recover that sum also.

MARTIN, J.A.

MARTIN, J.A. agreed that the appeal should be allowed.

GALLIHER, J.A.

GALLIHER, J.A.: Considerable evidence was adduced at the trial which tends to becloud rather than illuminate the issue, but after the best consideration I can give the case, I cannot adopt the view of the trial judge.

Neither in the document, exhibit 7, nor in any of the correspondence, nor in the entries in the respondent's books or in

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the stand taken by Corlett in his interviews and dealings with the appellants do I find any suggestion that the moneys paid by the appellants were to be treated as forfeited under any circumstances; in fact, the contrary. I can very readily understand and appreciate the case the appellants set up. Here was a property which was going behind in its operations and which the respondent was anxious to sell. Negotiations were entered into with the appellants to endeavour to effect such sale. All parties were on friendly terms, and though it is to be deprecated that the matter was left open to doubt as to what the real understanding between the parties was, yet I have no doubt in my own mind upon the whole evidence what the understanding was.

Where moneys paid under option are to be forfeited upon failure to effect a sale, it is a most usual thing to find it so expressed in the instrument.

This is entirely absent in exhibit 7, and on the other hand we find this clause:

> "And in the event of my selling said property after they [the Nebraska Company] have advised me that the London deal is off, then I [Corlett, for the Moresby Company] agree to pay and refund them the said $26,000, the same in such event to be considered as a loan."

The further sum of $5,000 subsequently advanced was under the same arrangement, and with respect to the further sums advanced (except the $3,000, which I will deal with later) I treat them on the same basis, although not so specifically dealt with.

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I think the true inference to be drawn from the evidence is that the operating Company being in debt and anxious to sell the property, the appellants took an option, agreeing as a consideration for such to advance moneys from time to time, these moneys to be dealt with as provided in exhibit 7.

Outside the $20,000 the comparatively small sums (considering the magnitude of the transaction) advanced from time to time and at short intervals at the request of the respondent cannot, I think, be considered as paid in respect of extensions of the option in the sense that they should become forfeited if the transaction did not go through, and, on the other hand, are quite consistent with the contention of the appellants.

In connection with this there is a piece of evidence interjected by Mr. Corlett, by way of explanation, as follows:

"My proposition was to get as much money as I could from them, believing that they would take up the property, and I owed this $15,000 at the Seattle National Bank."

and this, I think, is not without its significance.

Again, Corlett, when approached by appellants as to repayment of the moneys advanced (after sale made by him), does not say, you have no claim, these moneys are forfeited, but says he wishes to await Coleman's return, as his dealings were mostly with Coleman, and that matters can be adjusted, and in his evidence says that in running the mill at appellants' request a loss of some $14,000 was incurred, and also some losses in connection with a logging contract, intimating, as I regard it, that these might be matters for adjustment; but as the defence here is absolute forfeiture, we are not called upon to go into that phase of the question.

Mr. *Bodwell* suggested that the appellants' contention was unreasonable for two reasons: first, because the appellants could keep the property tied up indefinitely, but that is not so, as provision was made by which either party could sell, and until either party did sell the applicants could not receive back their money advanced; and, secondly, that it was unreasonable that appellants, if they were advancing their money as claimed, would be satisfied to get back merely the principal advanced without interest. The answer to the latter is that they were taking the gambler's chance. If they succeeded in selling they would realize probably much more than moneys advanced, and the money was advanced for the privilege of that opportunity.

I cannot accede to Mr. *Bodwell's* contention that some of the latter advances were in respect of a new option, the first having fallen through. This could only be based upon the supposition that because they were ear-marked by reference to the $26,000 advance in the same way as the $5,000 advanced on the 25th of November, 1910; therefore the old agreement was off and a new one entered into. The evidence will not bear this out.

In respect of the $3,000 for which a personal due bill was given by Corlett, I treat that as a personal debt of Corlett's. I think that is made clear by exhibit 37.

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It may be that the appellants desired that to be treated in the same way as other advances, although it must have been understood that Corlett was applying for it as a personal loan; however, that was not done.

In the result the judgment below should be set aside and judgment entered for the appellants for $38,500, with costs here and below.

McPHILLIPS, J.A.: This is an appeal by the plaintiffs from the judgment of GREGORY, J. in an action to recover $41,500 lent by them to the defendant under an agreement.

I have had the benefit and advantage of being enabled to read the judgment of my brother the Chief Justice, and I may say that with it I entirely agree, and it is in accord with the view that I formed at the time of the hearing of the appeal. I only wish to add some few observations in the way of further explaining my reasons for arriving at the conclusion which has been so forcibly presented by the Chief Justice.

The present case is one that cannot be said to be devoid of difficulty, and the transaction was one of long and tortuous course, and I would be loath to believe that there has been any real intention upon the part of the defendant to evade any legal liability—yet it is manifest to me that to sustain the judgment of the trial judge, and I say this with the utmost deference, would be to ignore the true situation of matters, and the undoubted obligation upon the defendant to repay the moneys received from the plaintiffs—that this is the legal position is, to my mind, clear beyond peradventure—all the attendant facts being looked at and duly analyzed—and especially the documentary evidence—the latter lifting the matter in controversy out of the maze of things—which a voluminous amount of parol evidence—has weighted down this case.

The present case is not one of an option with which we are so familiar, and which may be said to automatically end at a fixed time, and, to my mind, the erroneous belief that it was one of that character has led to the advance of a defence which, I think, is absolutely untenable.

The amounts paid, in all $41,500 (although as to $3,000, same cannot be treated as an advance or loan to the defendant), were not paid only as a consideration for an option—to quote in part from exhibit 7, dated 5th October, 1910, when an acknowledgment was given as to the $26,000 then advanced:

"And in the event of my [Corlett] selling said property after they [the plaintiffs] have advised me that the London deal is off, then I agree to pay and refund them the said $26,000, the same in such event to be considered as a loan, and in case negotiations are still pending with the English syndicate and the shewing is such as to satisfy both parties hereto that the investigations are in good faith being pursued with the prospect of concluding a sale, then it is agreed that further negotiations and continuance of said option will be mutually arranged between the parties hereto."

The way in which I read the evidence, the relationship between the parties—commenced by this document—was never severed, but was continued up to the time the sale was made, and, that being the case, it must and does inevitably follow that not only this sum of $26,000, but the subsequent sums advanced, *viz.*: $5,000 on November 21st, 1910; $5,000 on December 9th, 1910; and $2,500 on April 24th, 1911, in all $38,500, were advanced, as the facts shew, referable only to this assured provision in the document of the 5th of October, 1910, that upon a sale being made under the circumstances detailed therein, then the moneys advanced should be considered as a loan.

That the possible eventuality foreshadowed and provided for occurred, to my mind, cannot be gainsaid; it therefore follows that the moneys advanced must be deemed to have been a loan and constitute a debt due and owing from the defendant to the plaintiffs. The moneys advanced cannot be viewed as a deposit, and were it only a deposit, it could only be forfeited if the plaintiffs failed to carry out the agreement: *Howe* v. *Smith* (1884), 27 Ch. D. 89; *Sprague* v. *Booth* (1909), A.C. 576 at pp. 579-80.

Wherein have the plaintiffs failed to carry out the agreement? I fail to see that there has been any breach upon their part. Then could it be said, if there had been a breach of the agreement upon the part of the plaintiffs, that the whole $38,500 was merely a deposit capable of being forfeited? I

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certainly would not agree to any such contention; and that would appear to be the contention of the defendant.

No doubt some confusion has arisen upon this question owing to the decision of Cozens-Hardy, J. in *Cornwall* v. *Henson* (1899), 2 Ch. 710.

In Williams on Vendor and Purchaser, 2nd Ed., Vol. 2, at p. 1054, dealing with the liability at law where a party rescinds the contract for the other's breach, it states that rescission must, as a rule, be accompanied by *restitutio in integrum,* noting that there is an exception in the case of a deposit, and at pp. 1055-6 it says:

"But it appears that this exception applies only to money paid as a deposit, that is, in earnest or as a guarantee for the payer's due performance of the contract, and does not extend to other sums of money paid on account of the purchase money,"

citing as authority for the proposition *Palmer* v. *Temple* (1839), 9 A. & E. 508, 520, 521; *Cornwall* v. *Henson* (1900), 2 Ch. 298, 302, 305; and refers to note (*d*) at p. 1017 being appended to a statement in the text at pp. 1016-17, which reads: "for the rule is that the rescission of a voidable contract cannot take place without entire restitution."

Note (*d*) reads as follows:

"(*d*) *Clough* v. *London and North Western Railway Co.* (1871), L.R. 7 Ex. 26, 37; *Lagunas Nitrate Company* v. *Lagunas Syndicate* (1899), 2 Ch. 392, 423. It is submitted that this rule was overlooked by Cozens-Hardy, J. in *Cornwall* v. *Henson* (1899), 2 Ch. 710, reversed on another point (1900), 2 Ch. 298, where he decided that on a contract to sell land for a price payable by instalments, the vendor *rescinding* the contract for the purchaser's renunciation of it before payment of the last instalment was nevertheless entitled to retain all the instalments already paid. It became unnecessary to review this decision in the Court of Appeal, but they very plainly intimated their doubts of its correctness: (1900), 2 Ch. 302, 305. The rule in *Whincup* v. *Hughes* (1871), L.R. 6 C.P. 78, to which Cozens-Hardy, J. appealed as the general rule (1899), 2 Ch. 715), was that applicable in the case, not of *recission* of the contract, but of its discharge for impossibility of performance. In such case the contract is not rescinded; the parties are simply excused from further performance."

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I had occasion to express my dissent from the majority view of this Court that instalments could be forfeited in the case of *Vancouver Land and Improvement Co.* v. *Pillsbury Milling Co.* (1914), 19 B.C. 40; 5 W.W.R. 1324 at pp. 1326-7; and it is to be noted that the learned editor of the Western Weekly

Reports appended a memorandum to the report of the case which is valuable in the consideration of this very important point of law.

The decision of this Court, though, in the last case above-cited may be distinguished from the present case in this—that in that case the decision proceeded upon the abandonment of the contract, which is not the present case. Therefore, apart from the question of the moneys being a loan which the defendant is bound to repay, there would be the right of recovery in the plaintiff of the moneys paid to the defendant. Webster, M.R. in *Cornwall* v. *Henson* (1900), 2 Ch. 298 at p. 302, said:

"It is not necessary to deal with the question whether the plaintiff is entitled to a return of the instalments which he has paid, because he has not insisted upon that relief, but I feel very great doubt whether the doctrine of *Howe* v. *Smith* (1884), 27 Ch. D. 89, would apply to a case in which the purchase-money was to be paid in instalments."

And see also the remarks of Collins, L.J. at pp. 304-5.

In my opinion, it is impossible that any intention can be gathered from the documentary evidence that any of the moneys advanced should become forfeited, and certainly when the event contemplated actually did occur—the defendant made a sale—unquestionably the moneys advanced were to be considered as a loan—the agreement is inconsistent with the right of forfeiture of the moneys advanced. Upon this point of claimed forfeiture we have Collins, L.J. saying in *Cornwall* v. *Henson, supra,* at p. 304:

"Indeed, if the contract had contained an express stipulation that, on the non-payment of any instalment, the purchaser should forfeit all the instalments which he had previously paid, I think the Court would have regarded that provision as a penalty, and would have relieved him from it, as was done in *In re Dagenham (Thames) Dock Co.* (1873), 8 Chy. App. 1022."

It may be said in the present case that none of the moneys paid were instalments of purchase-money—upon the view I take—that is so. The moneys, upon the eventuality provided for occurring, *i.e.,* sale by the defendant, were to be treated as moneys loaned by the plaintiffs to the defendant; but if no sale had taken place, the payments would have been, it seems to me, payments analogous to those made upon an agreement for sale not completed by the purchasers—and could they have been forfeited?

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In *Palmer* v. *Temple* (1839), 9 A. & E. 508, Lord Denman, C.J. at p. 520, said:

"The ground on which we rest this opinion is, that, in the absence of any specific provision, the question, whether the deposit is forfeited, depends on the intent of the parties to be collected from the whole instrument; but, as this imposes on either party that should make default a penalty of £1,000, the intent of the parties is clear, that there should be no other remedy."

In my opinion, the period of time admitting of the plaintiffs becoming the purchasers of the property which was sold was still continuing—at the time the defendant effected the sale—but of course then it was rendered impossible by the act of the defendant for the plaintiffs to become the purchasers; and when no provision for forfeiture of the moneys paid is contained in the agreement—the true intent of the parties was that in such event—as I think it has been sufficiently expressed—the moneys paid should be considered as a loan.

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In my opinion, for the reasons expressed, the cause of action of the plaintiffs for the recovery of all the moneys paid—referable to the agreement of October 5th, 1910—in amount $38,500—is well established, and the plaintiffs' claim is clearly one which this Court should enforce. I agree, therefore, that the judgment of the trial judge should be set aside and judgment entered for the plaintiffs for $38,500, with costs in the Court below, the appeal to this Court being allowed.

Appeal allowed.

Solicitor for appellants: *H. Despard Twigg.*
Solicitors for respondent: *Bodwell & Lawson.*

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Principal and agent—Secret profit—Establishment of agency—Misstatement as to price of land fixed by owners.

If an agent, employed to find the lowest price at which property can be purchased, induces his principal to pay a larger amount than the owners will accept, he is liable to the principal for the difference.

The defendant was instructed to offer certain lots for sale by one of the two owners, who were brothers, the one who gave the instructions living near Vancouver and the other in England. The defendant then listed the lots with one A. H., who shortly afterwards offered them for sale to one C. H., who was acting for the plaintiffs. C. H. asked A. H. to cable the English owner for his lowest price. A. H. stated he would do so if a deposit were made. C. H. then gave A. H. a cheque for $25 as a deposit. Shortly afterwards A. H. saw the defendant, gave him the cheque and explained what had taken place. The defendant then saw the owner in Vancouver, the result of which was that he telegraphed his brother that he was offered $75 a foot for the property, and advised acceptance. The next day a reply accepting the offer was received. On the following day the defendant was introduced to C. H. (plaintiff's agent) and he told him he had received a telegram and that the owners wanted $90 per foot, at the same time giving him a receipt for the $25 deposit, which read: "*Re* your deposit of $25 on Lots . . . ., I have received a letter and cable regarding same and am able to sell for $90 per foot," etc.

In an action to recover secret profit, it was held by the trial judge that on the evidence he found as a fact that the defendant agreed to act as agent for the plaintiffs in ascertaining the lowest price at which the property could be bought, and the plaintiffs should recover.

Held, on appeal (MACDONALD, C.J.A. and MARTIN, J.A. dissenting), that the appeal should be dismissed.

Hutchinson v. *Fleming* (1908), 40 S.C.R. 134, followed.

Per MACDONALD, C.J.A.: Where a person enters into an agreement with the owners to purchase land at a certain price, with the intention of selling to others who would give a higher price, but while negotiating he misstates to intending purchasers the price which the owners would take, he may be liable for fraud, but not as an agent for secret profits.

Statement

APPEAL by defendant from the judgment of CLEMENT, J. at Vancouver, on the 19th of June, 1913, in an action for $7,211.25, being the amount of a secret profit or commission which, it was alleged, the defendant, an agent, in fraud of the

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plaintiffs, his principals, made in connection with the purchase by the defendant of certain lands. The facts are set out in the headnote and reasons for judgment.

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W. C. Brown, for plaintiffs.
W. S. Deacon, for defendant.

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CLEMENT, J.: I find as a fact that the defendant agreed to act as agent for the plaintiffs in ascertaining the lowest price at which the property in question could be bought from the then owners and agreed in effect to afford them an opportunity to buy at such lowest price. I further find that he deceived the plaintiffs in this respect, and, upon the representation (false in fact) that $90 per foot was such lowest price, induced them to pay that price instead of $75 per foot, which was in fact the price the then owners were willing to accept.

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On these facts it seems to me that *Hutchinson* v. *Fleming* (1908), 40 S.C.R. 134, is authority for the proposition that the plaintiffs' claim to recover the extra $15 per foot from the defendant is well founded "either on the ground of his agency or of deceit": *per* Idington, J. at p. 136.

There will be judgment, therefore, for the plaintiffs for $7,211.25 with costs.

The appeal was argued at Victoria on the 12th and 13th of January, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

W. S. Deacon, for appellant (defendant): We first purchased the property for ourselves and then sold to the plaintiffs at an advance. The documents are in our favour in this regard. There is conflict in the evidence as to the $25 deposit.

Ritchie, K. C., for respondents (plaintiffs): We asked Yates to cable for the best price, and paid him $25 for that purpose. He received a reply fixing the price at $75 a foot, and told us the price was $90 a foot. If any person undertakes to do something for another and does it dishonestly in his own interest, the other is entitled to recover the amount he receives through the dishonesty. The evidence shews they stood in a fiduciary

relationship: see *Hutchinson* v. *Fleming* (1908), 40 S.C.R. 134, and Halsbury's Laws of England, Vol. 20, p. 722. Where one sues for fraud he is entitled to damages: *Blair* v. *Bromley* (1847), 2 Ph. 353; *Gluckstein* v *Barnes* (1900), A.C. 240 at p. 254; *Kettlewell* v. *Refuge Assurance Company* (1908), 1 K.B. 545 at p. 553; *Whittaker* v. *Taylor* (1911), 1 W.W.R. 259; *Tonucci* v. *Livingstone* (1913), 3 W.W.R. 770.

Deacon, in reply.

Cur. adv. vult.

7th April, 1914.

MACDONALD, C.J.A.: All the parties concerned in this transaction were real-estate brokers and speculators. On the date of the transaction, which was a highly speculative one, there was a lively demand for waterfrontage in the locality of these lots. The lots were owned by Charles Bienemann, residing near Vancouver, and Edgar Bienemann, his brother, residing in England. The defendant Yates was an acquaintance of Charles Bienemann, and was by him given some sort of verbal authority to offer the lots for sale. On the 18th of March, 1913, the defendant "listed" the lots with another agent, named Henderson. "Listing," as I understand the term in this connection, means that defendant informed Henderson that he (Henderson) might offer the lots for sale. Henderson the same afternoon offered the lots to one Harrison, who was on the look-out for lots of this description for his customer, the plaintiff Laselle. I might add that the plaintiff Fry afterwards joined with Laselle in the purchase, so that there is no distinction to be drawn between Fry's position in the case and that of Laselle.

For the purposes of this statement of facts, I accept the evidence of Harrison, the plaintiffs' agent and witness, whenever it conflicts with that of defendant or Henderson. I do this because I think the trial judge did not accept the evidence given by and on behalf of the defendant as reliable, and as I am, with great respect, unable to accept the conclusions of the learned judge, I desire to base my own upon evidence which does not depend for its weight upon the impression made by the demeanour of witnesses.

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When Henderson met Harrison, as above stated, and offered him the lots, Harrison asked him to cable to his customers for the lowest price they would sell at. Henderson replied that he would not care to do this unless a deposit were made. Thereupon a cheque for $25 was given by Harrison to Henderson. The defendant was informed by Henderson of what had taken place, and was given the cheque, which, however, he did not cash. He saw Charles Bienemann that night, and got him to sign a cablegram to his brother that he was offered $75 per foot for the lots and advising acceptance. This cablegram was sent by defendant on the same night, the 18th, and a reply was received on the following day from Edgar Bienemann that he would accept $75 per foot. I think there is no doubt the defendant's scheme was to enter into an agreement with the two brothers to purchase from them at $75 per foot and then re-sell to the person or persons who would give a higher price. It is clear he had not sufficient money of his own to carry out a purchase. His scheme was to finance the purchase from the moneys which he would receive on the resale. Charles Bienemann was aware of, and acquiesced in this, and there is nothing to shew that Edgar Bienemann had been taken advantage of in any way. The next day the defendant was introduced to Harrison and told him he had received a cablegram, and that the owners wanted $90 per foot. Harrison then drew up a form of receipt for the deposit and by way of evidencing the transaction. That receipt, drawn by Harrison and addressed to himself, *inter alia,* said:

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> "*Re* your deposit of $25 on lots, etc., I have cabled owners, who will accept $90 per foot. Papers will be from F. B. Yates to buyer."

This receipt the defendant refused to sign, but drew up one himself, which says:

> "*Re* your deposit of $25 on lots . . . . I have received a letter and cable regarding same, and am able to sell for $90 per foot, etc. Papers will be from Fred. B. Yates to buyer. . . . . It is understood your cheque (for the deposit of $25) is accepted on these conditions, and is forfeited if money is not placed in bank by time mentioned. Mr. Harrison is to have two-thirds of the usual commission of 5% on first $5,000, and 2½% on balance of purchase price."

I do not give the exact words of the latter part of the receipt, but I have fairly stated all that is necessary to state here. In a note at the foot of this receipt signed by defendant it is stated

that Harrison will get his commission when the deal goes through on whatever terms may be finally agreed upon.

I have stated these matters somewhat fully, because the judgment is for the profit made by Yates, namely, the difference between $75 and $90 per foot. The learned judge held that Yates was the agent for the plaintiffs in the transaction and could not retain the secret profit as against them. I am unable to adopt that view. One would be obliged to find, and, in truth, that is the only suggestion upon which the view rests, that because Harrison asked Henderson to send a cablegram to the owner in England, asking his lowest price, a contract was thereby made by which defendant became agent for the proposed buyers, or that because the defendant thereafter sent a cablegram in the name of Charles Bienemann, advising acceptance of an offer at $75 per foot, he became the agent of Harrison and Harrison's clients (the plaintiffs) to procure the lots for them at the owner's lowest price, although it is very clear that he himself was to be the purchaser as between him and the Bienemanns. I think that view is wholly opposed, not only to the evidence on both sides, but quite inconsistent with the conduct of the plaintiffs and their agents, both before and after the cablegram was sent.

An effort was made in the examination of one Lamonde, a partner of Harrison's, to show that the $25 cheque was not given to Henderson as Harrison says, but to Yates, to pay for Yates's cablegram to Edgar Bienemann, for the purpose of supporting an argument that Harrison, having paid for the cablegram, Yates was his agent to send it, and thereby became his agent to obtain the property for plaintiff at the owner's price. Lamonde's evidence in this regard is not, I think, quite reliable. It is opposed to that of Harrison, it is opposed to Harrison's draft receipt, and to the one which was drawn up and signed in substitution therefor by defendant. I think, therefore, it is quite fair to the plaintiff to accept the evidence of Harrison, their own witness, as more accurate and satisfactory than that of Lamonde.

Now, when the cablegram was received, Harrison arranged a meeting between himself, the defendant, and the plaintiffs.

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That meeting took place at the Commercial Club on the 20th of March. Defendant had been asked by Harrison to bring the cablegram to the meeting. When he arrived he was asked for it, and said that if they wanted to see it they could see it at the office of his solicitors, and the matter was allowed to drop at that. That answer was not consistent with the idea that defendant was the plaintiff's agent, but, rather, that he was acting in another capacity and at arm length. The defendant, however, then asserted, as he had to Harrison, that the owners' price was $90 per foot. Plaintiffs agreed to take the property at that price, and to deposit $5,000 in a bank to the joint order of one of the plaintiffs and of the defendant's solicitor, by way of forfeit if, on the return of the necessary documents from England, the plaintiffs declined to carry out the transaction on their part. Again, this, in my opinion, tends to negative the alleged relationship of principal and agent.

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On the return of the papers from England, the plaintiffs discovered the difference between the owners' price and the price at which they had agreed to buy from Yates. They protested, but, nevertheless, elected to complete the transaction. They did not say, "You are our agent and could not, therefore, have honestly made the profit." Their complaint was, "You have deceived us about the owners' price." In my opinion, that was what took place. The defendant, I think, undoubtedly led the plaintiffs to believe that the owners' price was $90 per foot, and that they were to get the property at that price. The plaintiffs did make a claim in the pleadings for damages for deceit, but it is manifest that they cannot succeed on that ground now. They did not repudiate when they discovered the alleged fraud, and, in any case, they have proven no damages; in fact, I think that that branch of the case was not pressed at the trial, nor was it before us.

The case is, therefore, narrowed down to one of secret profits made by Yates while standing in an alleged fiduciary relationship to the plaintiffs—moneys had and received to their use. What position must the plaintiffs take in order to succeed on this issue? There is no doubt that Harrison understood that Henderson and Yates represented the vendors. A contract of

agency, like any other contract, must be based upon consideration. If Harrison employed Henderson as his (Harrison's) agent to procure the property and paid the $25 as consideration for doing it, then Harrison was doing an improper thing; he was engaging the seller's agent as agent for the buyer to deal with the seller. If, on the other hand, as I think, Harrison asked Henderson as seller's agent to find out his clients' lowest price, that was a legitimate and honest request. But the matter must be carried a step further. Harrison did not employ Yates to send the cablegram, according to his own evidence. Therefore, are we to infer that because Yates sent the cablegram, which was not the cablegram Harrison wanted sent, and got a reply and deceived Harrison with respect to it, that he thereby made himself the agent of Harrison, and that he also thereby made himself the agent of the plaintiffs, who, up to that time, had had nothing to do with the transaction, except that Harrison was looking for lots for one of them?

I assume for the purpose of this judgment that the defendant was guilty of fraud; I do not find that he was so guilty, because it is unnecessary to do so. His liability for fraud, if he has been guilty of it, is one thing; it is grounded on tort. His liability to pay over secret profits is another; it is based upon contract, express or implied. There must first be established a contract of agency, because it cannot be suggested that any other fiduciary relationship existed between the parties.

The question, therefore, is contract or no contract. If there was a contract of agency whereby defendant undertook to procure the property for the plaintiff, undoubtedly the judgment below was right. But it is only confusing the issue to mix up the alleged deceitful conduct of the defendant with the question which we have to decide in this action. All the documentary evidence is against the plaintiffs' contention. The evidence of Harrison is against it; the evidence of Lamonde is practically against it; the evidence of Laselle is against it. Fry, in his evidence at the trial, says that at the meeting of the Commercial Club defendant stated that the "best price" he could get the "property for us was for $90 a front foot." The words "for us" are relied upon as indicating that

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defendant was acting for the plaintiffs. However, the evidence of the other witnesses contains no such words, and the evidence of Fry himself on discovery omits them. He said:

"Defendant said that the best price he could get the property for was $90 a foot, and wanted to know if we would take it at that,"

and this answer is repeated in identical words. Throughout all the evidence the plaintiffs and their agents refer to and treated with the defendant as the agent of the vendor or as the vendor.

It may be useful here to draw attention to the confusing way these real-estate agents speak of their commission. Harrison and Lamonde speak as if they were dividing their commission with Henderson or with defendant. The plaintiffs were to pay no commission to their agents. The local usage would appear to be that the vendor always pays the commission to his agent, and that agent sometimes divides it with the agent for the purchaser, and that was the arrangement in this case, to which defendant assented. The fact appears to be that Henderson got one-third of the commission, and Harrison and his partner, Lamonde, the balance.

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It follows that, in my opinion, the appeal should be allowed.

IRVING, J.A.

IRVING, J.A.: I would dismiss this appeal, for the reasons given by the learned trial judge.

MARTIN, J.A.

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

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The appeal is from the judgment of CLEMENT, J. in this action, being one brought by the plaintiffs (respondents) against the defendant (appellant) for the recovery of a secret profit or commission which the defendant, being the agent for the plaintiffs, made in respect of the purchase by the defendant and sale to the plaintiffs—his principals—of a certain parcel of land in Vancouver District.

The learned trial judge has made the express finding of fact that the defendant was the agent of the plaintiffs in the transaction, which was ultimately carried out by the plaintiffs acquiring the land, the title to which was—at the time of the negotiations—vested in Edgar Bienemann, of Croydon, England, and

Charles Bienemann, of the City of Vancouver, B.C., the defendant obtaining from the Bienemanns agreements for sale of the land to himself, dated the 21st of March, 1912, and entered into an agreement for sale with the plaintiffs under the same date of the same land, the purchase price the defendant bought at being $36,556.25 and the price at which the defendant sold being $43,267.50, the difference, $7,211.25, being the amount for which the learned judge entered judgment in favour of the plaintiffs.

Upon the evidence as adduced at the trial it cannot be said that it is clear beyond all contradiction that the defendant was the agent of the plaintiffs, yet, with all deference to the very forceable argument of Mr. *Deacon,* counsel for the appellant, I cannot come to the conclusion that the trial judge had not evidence before him upon which he could reasonably hold that the relationship of principal and agent existed, and when I weigh matters, and consider that the learned judge had the opportunity we have not of seeing the demeanour of the witnesses, and, further, in view of the fact that it cannot be successfully contended that the defendant was a witness who could be said to be candid or frank—but at the trial exhibited himself, as he did throughout the negotiations, as one who was unwilling to make a full and complete disclosure of all that took place—I am the more convinced that the learned judge arrived at the correct conclusion upon the facts. The definition of agent is stated in Bowstead on Agency, 5th Ed., p. 3.

Custom and usage no doubt has a great deal to do with the establishment of the relationship of the parties in transactions relating to the buying and selling of real estate, especially where the market is active and the land is being everywhere sought after. In the present case the defendant was undoubtedly endeavouring to purchase for re-sale the land, but was operating on a "shoe-string," which in effect meant that he was without the money to carry it through, except that he was enabled beforehand to have a purchaser ready, willing and able to buy. The defendant under cross-examination stated that it was a common practice. Now, to accomplish his ends the defendant was not content to earn money on commission upon the transaction, but

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was desirous of increasing his profits by the receipt of an increased price, and his energies were devoted to procuring a purchaser from himself at a greatly increased price, and to do this so conducted himself towards the plaintiffs as to lead them to believe that he, acting in their behalf, would ensure the acquirement of the land at the price as stated by the plaintiff Laselle:

"Of course, we were buying it at what we supposed was the bottom price, that is what Mr. Yates told us was the lowest price."

This "bottom price" was—as the evidence shews—the lowest price that the owners would sell for, and communication was had by cable with the one owner living in England to arrive at the price, and unquestionably the defendant represented to the plaintiffs that the lowest price was $90 per foot, when, in truth and in fact, it was $75 per foot. That the agreement for sale was to be from the defendant to the plaintiffs, in my opinion, does not affect the situation of matters, as undoubtedly it was assumed that it would be the most convenient way to carry out the transaction. The defendant Yates was to be a mere conduit pipe in this regard, although unquestionably it was a part of the design of the defendant Yates, whereby he expected to reap the advantage of the increased price, but this proceeding cannot be countenanced by the Court to establish as a real transaction that which was unreal, and affected by the fraudulent misrepresentation of the defendant. The defendant apparently was not satisfied to earn a reasonable commission, but was willing to so comport himself as to lead the plaintiffs into the belief that, acting for them, he would procure the land at the lowest possible figure from the owners, yet, regardless of the duty he owed to the plaintiffs, his attempt is to justify himself by claiming that the plaintiffs are purchasers from him and that he owed them no duty, although, without the plaintiffs, the transaction, even to the extent of giving to the defendant a reasonable commission, would have been impossible of being carried out. What was the defendant's position with regard to the owners of the land as to what would be coming to him, the transaction being completed? This is best evidenced by the letter of the 21st of March, 1912, as follows:

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"Dear Sir:—On behalf of myself and my co-owner, Edgar Bienemann, I beg to say that we will allow you the usual agents' commission in the form of a discount on the amount of purchase price to be paid by you for lots 68 and 69, subdivision D.L. 258 and 329, New Westminster district. In addition to such commission, you are to be entitled to retain any profit you may make on the sale you are making of the said property."

It is apparent that in this case the owners were paying the commission, and custom and usage has now to a great extent established this—that is, that the person getting the purchase price pays the commission, the agent very often really acting for both parties, and this may be allowable where there is no conflict of duty. In *Robinson* v. *Mollett* (1875), L.R. 7 H.L. 802 at p. 816, Mellor, J. said:

"It is said by Willes, J. in his judgment in the Court of Common Pleas (1872), L.R. 7 C.P. 84 at p. 95, that 'it is an axiom of the law of principal and agent that a broker employed to sell cannot himself become the buyer, nor can a broker employed to buy become himself the seller, without distinct notice to the principal, so that the latter may object if he think proper; a different rule would give the broker an interest against his duty.' I agree in this, and think that, although a custom of trade may control the mode of performance of a contract, it cannot change its intrinsic character."

The Lord Chancellor (Lord Cairns), Lord Hatherley and Lord O'Hagan agreed with the opinion of Mr. Justice Mellor.

It is apparent in the present case that the owners were willing that the defendant should have the usual agent's commission in the form of a discount on the purchase price, and any profit on a resale. It cannot be contended that the defendant owed no duty to the plaintiffs because of the fact that he was not receiving any commission from the plaintiffs; that would be a question of law. In this connection I would quote the language of my brother IRVING in delivering the judgment of this Court in *Canadian Financiers* v. *Hong Wo* (1912), 17 B.C. 8 at p. 10:

"In *Andrews* v. *Ramsay & Co.* (1903), 2 K.B. 635, Lord Alverstone hits the nail on the head at p. 638—'A principal is entitled to an honest agent and it is only the honest agent who is entitled to any commission.'"

The offer cabled by Chas. Bienemann to his brother Edgar was at the instance of the defendant, and the only purchasers in view at the time for the land were the plaintiffs, and what was the defendant's duty at this time? It was most certainly the acquirement of the land at the lowest obtainable price, the plaintiffs to become the purchasers thereof, and the defendant

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was wholly disentitled to become the real purchaser of the land against the duty he had undertaken, as, in becoming the *de facto* purchaser, he really became such purchaser as trustee for the plaintiffs, and, in my opinion upon the facts, the Court would be so entitled to decree. See Williams on Vendors and Purchasers, 2nd Ed., Vol. 2 at p. 991. In *Oliver* v. *Court* (1820), 8 Price 127; 22 R.R. 720, the Lord Chief Baron at pp. 160-1 said:

"I am clearly of opinion, that an auctioneer, while his employment continues, cannot purchase the estate which he is engaged to sell: and that opinion is founded on the well-known and established rule of equity, that persons who are in any way invested with a trust, or an employment to be performed by them to the advantage of their *cestui que trust*, or principal, are, *prima facie*, virtually disqualified from placing themselves in a situation incompatible with the honest discharge of their duty."

Applying the rule to the present case, the defendant was to get the land from the owners for the plaintiffs at the lowest price. Could he, in the honest discharge of his duty, proceed to purchase the land for himself and thereafter claim and retain an increased price, a price not paid to the owners, but an increased price payable to and received by him on his own account? It would seem to me that the contention of the defendant is absolutely untenable. Pursuing the law upon the subject with the attendant facts, the defendant's duty was plain; he was to obtain the land for the plaintiffs at the best possible price, and in this case it was understood that the agreement for sale would be from the defendant to the plaintiffs, but this was understood to be a mere matter of convenient procedure; it would not admit of the defendant buying the land for himself and, by reason thereof, achieving a position unaffected by the relationship existing between the plaintiffs and defendant. The defendant could not in this way honestly discharge his duty.

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It must, therefore, be said that the purchase made by the defendant of the land was a purchase by and on behalf of the plaintiffs and that the defendant only became the purchaser thereof as trustee for the plaintiffs. To admit of the contention of the defendant succeeding would, in fact, offend against the rule quoted by Mellor, J. from the judgment of Willes, J. in *Robinson* v. *Mollett, supra.*

In the present case there was nothing to apprise the plaintiffs of any breach of duty of the defendant in getting title in himself as that was understood, but only as a matter of convenience in conveyancing or some reason of the owners or the defendant which the plaintiffs evidently did not seem to consider they were bound to enquire into, but this did not admit of the defendant expanding a title affected with a trust into a title denuded of that trust; there is no such magic in the document. As a matter of law, the purchase of the defendant is the plaintiffs' purchase; to hold otherwise would be to admit of the broker employed to buy becoming himself the seller, and at an increased price, and to admit of his purchasing his own land from himself for his principals.

It is apparent that when the facts were known that the owners had, in fact, sold at $75 per foot, not at $90, the plaintiffs objected, and objected strenuously, and subsequent payments were made under protest, and this action was brought within two months of notification being received that the documents of title were open to inspection, namely, within two months from Messrs. Deacon, Deacon & Wilson's letter, the solicitors for the defendant, to Messrs. Ellis, Brown & Creagh, the solicitors for the plaintiffs, being so advised under date the 24th of April, 1912, as it was only after the inspection of the documents that the true facts became known to the plaintiffs, and the evidence discloses that the defendant was at once apprised of the position taken by the plaintiffs—that they would not consent to the defendant retaining the increased price. I cannot consider upon the fact that the plaintiffs on account of anything that they have done are in any way precluded from bringing this action or that there has been any unwarranted delay.

Now, as to the rights of the plaintiffs in this action. In my opinion, the plaintiffs are entitled to have the judgment of the trial judge affirmed upon the rules obtaining both at law and in equity.

Williams on Vendor and Purchaser, 2nd Ed., Vol. 1 at p. 806, treats of the question of the two alternatives at common law, where there has been fraudulent representation or deceit—that is, the party misled may avoid the contract, or

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"he might affirm the contract and bring an action of deceit to recover any damages caused by the fraudulent misstatement (*Deposit and General Life Assurance Co.* v. *Ayscough* (1856), 6 El. & Bl. 761; *Oates* v. *Turquand* (1867), L.R. 2 H.L. 325; *Clough* v. *London and North Western Railway Co.* (1871), L.R. 7 Ex. 26; Benjamin on Sale, 2nd Ed., 336, 342, 359.)"

Williams at p. 812, treating of the equity rule, has this to say: "A person induced by fraud to make a contract for the sale of land had, therefore, the like election in equity as he had at law; that is, he might either rescind the contract, or he might affirm it and claim to have the representation made good. (*Rawlins* v. *Wickham* (1858), 3 De G. & J. 304, 314, 315, 321, 322)."

The trial judge has relied upon *Hutchinson* v. *Fleming* (1908), 40 S.C.R. 134, as being an authority to support the judgment given by him, and particularly calls attention to what was said by Idington, J. at p. 136. The effect of that decision is undoubtedly that an agent cannot make any secret profits out of any transaction in which he is acting as agent. In my opinion, what was said by Duff, J. at pp. 137-8 is peculiarly apposite to the present case.

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In the case at bar the purchase was not made in the name of another, but deception was practised on the plaintiffs, and the plaintiffs were led to believe that the owners would sell for nothing less than $90 per foot, and that it was the unalterable decision of the owners, when, in truth and in fact, the owners were only getting $75 per foot, the excess—$15 per foot—not being paid to the owners, "but really passing into the defendant's own pocket."

In my opinion, nothing more can be reasonably said. It follows that the appeal should be dismissed.

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

Solicitors for appellant: *Deacon, Deacon & Wilson.*
Solicitors for respondents: *Ellis & Brown.*

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CLEARY *v.* AITKEN

Mortgage—Deed absolute in form—Contemporaneous agreement—Evidence of surrounding circumstances—Redemption—Costs.

A. assigned to B by instrument in writing under seal, absolute in form, all his interest in certain mineral claims. By contemporaneous memorandum they further agreed that B. might dispose of the property if $500 due him from A. was not paid within 30 days. In an action by A.'s heirs for a declaration that the instruments were given as security by way of mortgage:—

Held, on appeal, affirming the judgment of MORRISON, J., that the assignment and the contemporaneous agreement must be read together, from which it is clear that the transaction was one of mortgage and not of sale.

APPEAL from a decision of MORRISON, J. delivered the 19th of September, 1913. The action was brought by the widow and daughter of one Francis J. Cleary, deceased, for a declaration that two instruments, whereby the said Cleary transferred to the defendant Aitken all his interest in certain mineral claims, were given as security by way of mortgage and not as an absolute assignment; to have an account taken of what was due on the mortgage and to redeem the said property. The facts are set out fully in the reasons for judgment.

Statement

The appeal was argued at Victoria on the 8th of January, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Sir C. H. Tupper, K.C., for appellants (defendants): The properties in question were Crown granted. In 1907 Cleary became embarrassed and borrowed $500 from Aitken. He gave an absolute transfer of the properties to Aitken, and at the same time Aitken wrote a letter, in which he stated that he should be at liberty to sell in 30 days if the $500 was not paid back, to which Cleary agreed. The transfer is absolute, and where documents are absolute in form there must be unanswerable evi-

Argument

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dence that it was a mortgage: see Halsbury's Laws of England, Vol. 21, p. 72; *McMicken* v. *The Ontario Bank* (1892), 20 S.C.R. 548; *Alderson* v. *White* (1858), 2 De G. & J. 97 at p. 105; *Gossip* v. *Wright* (1863), 32 L.J., Ch. 648; *Lisle* v. *Reeve* (1902), 1 Ch. 53; *Manchester, Sheffield, and Lincolnshire Railway Company* v. *North Central Wagon Co.* (1888), 13 App. Cas. 554; *Williams* v. *Owen* (1839), 10 Sim. 386; (1840), 12 L.J., Ch. 207. The evidence must be clear and convincing that it was intended as security: see *Goodman* v. *Grierson* (1813), 2 Ball & B. 274; Fisher on Mortgages, 6th Ed., 14; *Sevier* v. *Greenway* (1815), 19 Ves. 413; *Heath* v. *Chinn* (1908), 98 L.T.N.S. 855.

Whiteside, K.C., for respondents (plaintiffs): The whole question is the construction of the assignment, which should be considered with all the surrounding circumstances that can be accepted in evidence. Cleary & Willes and the other owners had vested the property in a trustee. The property was sold by the trustee, not Aitken. He afterwards tried to get his $500 back with interest, and this consideration was out of all proportion to the value of the property. The Court will not allow the mortgagee to purchase the equity of redemption where the loan and the arrangement to purchase the equity of redemption are one and the same transaction: see *Samuel* v. *Jarrah Timber and Wood Paving Corporation* (1904), A.C. 323; *Waters* v. *Mynn* (1850), 14 Jur. 341; *Fairclough* v. *Swan Brewery Company, Limited* (1912), A.C. 565; Fisher on Mortgages, 6th Ed., par. 8; *Arnold* v. *National Trust Co.* (1912), 7 D.L.R. 754; *In re Alison, Johnson* v. *Mounsey* (1879), 11 Ch. D. 284; Bythewood & Jarman's Conveyancing, 4th Ed., Vol. 3, p. 685. On the question of costs, see *Rourke* v. *Robinson* (1911), 80 L.J., Ch. 295; *Bell* v. *Cochrane* (1897), 5 B.C. 211; *National Bank of Australasia* v. *United Hand-in-Hand and Band of Hope Company* (1879), 4 App. Cas. 391.

Argument

Tupper, in reply.

7th April, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss this appeal.

No useful purpose would be served by my referring to the

evidence in detail. Suffice it to say that I have read it all and find it amply sufficient to sustain the judgment appealed from.

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

The two documents of the 24th of September, 1907, and Cleary's acceptance of the 30-day proposition, satisfy me that the transaction was in the nature of a mortgage to secure the repayment of the sum of $500. The omission to register exhibit 3 with the mining recorder supports this view.

I would dismiss the appeal.

IRVING, J.A.

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

MARTIN, J.A.

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

Upon the evidence and upon the face of the documents themselves, taking exhibits 5 and 3 together, there can be no question as to what the intention of the parties was, and that exhibit 5, though absolute on its face, was merely a security for a debt. The whole transaction shews that.

I have gone carefully through the authorities cited by *Sir Charles Hibbert Tupper,* but when one starts to apply them to the facts in this case they are easily distinguishable. In nearly all of them upon the documents themselves and the facts in evidence it was held that the transaction was an absolute sale with the right to repurchase within a given time. Here, neither upon the documents themselves, nor upon the evidence, could any such conclusion be arrived at.

GALLIHER, J.A.

On the question of costs I see no reason for altering the judgment of the learned trial judge. The sale of the property was not carried out by the defendant, but by the trustee, for the different interest holders. The defendant's contention is, and was before action brought, that he was not a mortgagee, but an absolute owner under exhibits 5 and 3 of all the interests of the deceased Cleary. He had in his hands at the time action brought moneys paid him on account of that interest largely in excess of what he could claim as mortgagee, and under such circumstances, the plaintiffs in their statement of claim offering to redeem, no tender was necessary.

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McPHILLIPS, J.A.: This is an action brought to establish the interest of the plaintiffs in certain mineral claims known as the South Valley properties, the plaintiffs being respectively the son and widow (also administratrix) of the estate of the late Francis Joseph Cleary, and to have it declared that a certain instrument dated the 24th of September, 1907, and a certain other instrument dated the 24th of September, 1907, both made between Francis Joseph Cleary and the defendant Robert Aitken, were in fact documents by way of security given by way of mortgage to the defendant Aitken, and not constituting an absolute transfer to the defendant Aitken, and for an account from the defendant Aitken of all moneys received from the sale of the properties. The properties were held in trust by one William M. Humphreys, of Los Angeles, California, U.S.A., to the extent of ten forty-eighths interest therein for the late Francis Joseph Cleary and one George C. L. Miller. On or about the 9th of October, 1912, Humphreys sold under agreement the properties at the price or sum of $25,000, and when action brought the sum of $14,000 was alleged to have been received by the defendant Aitken and George C. L. Miller. The defendant Aitken contended at the trial that the sale to him was an absolute one, and relied upon the following documents to support his contention:

MCPHILLIPS, J.A.

"Exhibit 5.

"I, Francis J. Cleary, hereby assign and transfer to Robert Aitken all my interest in the South Valley properties held under an agreement by John Humphreys and William M. Humphreys in trust for George C. L. Miller and F. J. Cleary and dated the 1st day of July, 1904, and I hereby authorize Robert Aitken to sign any documents that may be required to transfer same. Value received for same $1.00.

"F. J. Cleary. (Seal)

"Witness:

"John J. Banfield.

"24th Sept. /07."

"Exhibit 3.

"Sept. 24, 1907.

"To F. J. Cleary, Esq.,

"Vancouver, B.C.

"In reference to the ($500.00) five hundred dollars due me and interest thereon for which I hold an assignment of your South Valley property, it is agreed between us that if the ($500.00) Five hundred dollars is not

paid within (30) thirty days from this date I have full power to dispose of same.

"R. Aitken.

"Witness:
"Geo. Miller.

"I hereby agree to this agreement.
"F. J. Cleary."

The trial judge found upon the facts as adduced before him that the sale was not an absolute one—but was in its nature a mortgage transaction, and granted a decree in the terms of the prayer of the statement of claim.

The defendants appeal—the defendant Company, by its counsel, stating that it would abide by any order the Court might make, the defendant Aitken still contending before this Court that he became the absolute owner of the interest in the properties assigned and transferred to him by the late Francis Joseph Cleary under the instrument of transfer of the 24th of September, 1907. In my opinion, it is quite unnecessary to specifically set forth or remark upon the evidence upon which the trial judge proceeded—it is quite sufficient to say that it is ample to support the finding of fact of the trial judge, and it is idle to attempt to canvass it, as it, in my opinion, wholly fails to support the contention as advanced by the defendant Aitken, that he should be held to be the absolute owner of the properties and be under no obligation to render an account. I might pause to remark that the documents relied upon, as hereinbefore set forth, taken in connection with the attendant facts, fully support the plaintiffs' case as made out at the trial. It is only necessary, perhaps, to remark that exhibit 3 indicates in itself the true motive of the transaction, *i.e.*, at most it was a power of sale, but never exercised, as Humphreys, the trustee, effected the sale, and if the defendant Aitken had effected a sale he would have been compelled to account for the moneys received to the same extent as a mortgagee would be required to do when exercising a power of sale.

MCPHILLIPS, J.A.

The lapse of time here has not been great when the facts are looked at, and the sale as made by the trustee was only made in 1912, about five years after the transfer to Aitken, and Cleary having died in the same year and having been ill and unable to

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attend to any business for some three years before his death. There was no entry into possession of, or any exercise of ownership or interest in, the properties by the defendant Aitken, and there is no evidence to shew that the defendant Aitken disbursed any money in relation to the properties; in fact, it was conceded that he did not and that all necessary outlays were made by the trustee.

In *Waters* v. *Wynn* (1850), 14 Jur. 341; 89 R.R. 717, it was held, where an absolute assignment of a reversion was made with a memorandum for reconveyance or repayment with interest in six months and nothing done for eighteen years, that the transaction was a mortgage. The Vice-Chancellor at p. 342 said:

"My opinion is, that it is impossible to attend to the circumstances, without coming to the conclusion that it was a mortgage transaction."

It is likewise clear in the case as presented to this Court, in my opinion.

Counsel for the appellants, *Sir Charles Hibbert Tupper,* very ably argued the appeal from the point of view that the case must be looked at as one within the principle of *Williams* v. *Owen* (1840), 5 Myl. & Cr. 303; 41 E.R. 386; 48 R.R. 322; also referring to *Gossip* v. *Wright* (1863), 32 L.J., Ch. 648 at pp. 652-3; *Lisle* v. *Reeve* (1902), 1 Ch. 53; affirmed (1902), A.C. 461; 71 L.J., Ch. 768, and other cases—that the transaction was in effect a conveyance by way of absolute sale, accompanied, as in *Williams* v. *Owen, supra,* by a contemporaneous agreement for reconveyance upon payment upon a day certain.

MCPHILLIPS, J.A.

With all deference to the argument advanced, the transaction was not one of that nature. Here there was no agreement for reconveyance as in *Williams* v. *Owen, supra,* and no independent transaction not part of the mortgage transaction, as in *Lisle* v. *Reeve, supra.* Upon the surrounding facts and circumstances this amounted to, and amounted to only, a mortgage transaction.

The Lord Chancellor (Cottenham), in *Williams* v. *Owen, supra,* at pp. 306-7, said:

"The question always is—Was the original transaction a *bona fide* sale with a contract for repurchase, or was it a mortgage under the form of a sale? In *Mellon* v. *Lees* (2 Atk. 494) Lord Hardwicke puts the case

thus: 'As to the contract, whether it is a transaction that is in its nature a mortgage, or a defeasible purchase, and subject to a repurchase?'

"In *Goodman* v. *Grierson* ([1813], 2 Ball & B. 274; see p. 279), Lord Manners puts the case upon the same ground and says: 'The fair criterion by which the Court is to decide whether this deed be a mortgage or not, I apprehend to be this—Are the remedies mutual and reciprocal? Has the defendant all the remedies a mortgagee is entitled to?'"

The Lord Chancellor proceeded and said:

"Tried by this test there would be no doubt that, in this case, the transaction was not a mortgage."

In my opinion, however, if this test is obligatory, we have that which was wanting in *Williams* v. *Owen, supra;* the debt is set forth and there is a power of sale, and the document exhibit 3 refers to that debt in this way: "for which I [the defendant Aitken] hold an assignment of your South Valley property." This clearly imports the holding of the property as security or by way of mortgage.

The Lord Chancellor at pp. 307-8 further said:

"In *Sevier* v. *Greenway* ([1815] 19 Ves. 413) Sir W. Grant said that if the case had rested upon the conveyance of November, 1799, possession being taken, he did not see why it should be considered otherwise than as a sale. The transaction of November, 1799, was an absolute conveyance as to a purchaser, with a proviso for reconveyance to the apparent vendor upon payment of the purchase-money within two years. Subsequent instruments between the parties described the premises as 'standing upon mortgage,' and upon that Sir W. Grant decreed a redemption.

"Trying this case by the principle so long established, and settled upon such high authority, what is there to shew that this transaction was, in its origin, a mortgage and not a sale, with a provision, under certain conditions, for a repurchase?

"If the transaction was a mortgage, there must have been a debt; but how could Owen have compelled payment?"

MCPHILLIPS, J.A.

In the case we have before us everything, to my mind, is answered to shew that "in its origin" the transaction was one of mortgage; the contemporaneous agreement gives the amount of the debt—that it carried interest—that, after 30 days, if there was default in payment, a power of sale could be exercised, the remedies would be cumulative—as in all mortgage transactions—and nothing prevented the debt being sued for.

Now, the present case is not one of subsequent agreement. All that was done took place on the same date, and the most that can be said upon the facts in favour of the defendant Aitken is that he had assigned and transferred to him the interest of

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the late Francis Joseph Cleary in the properties, with a contemporaneous agreement, evidencing that the assignment and transfer in the form of an absolute sale was in fact a mortgage or security for the payment of $500 and interest, the money to be paid in 30 days from the 24th of September, 1907, and, at most, the position is that the defendant Aitken still has his security, the money being long overdue, but he has not on his part taken any proceedings by way of foreclosure or sale, nor has he sued for the amount of the debt due to him. Is his position any better than that of any other mortgagee upon an overdue mortgage, and is not the position one that entitles the mortgagor, his heirs or legal representatives, to come in and redeem? In my opinion, that is clear.

The case of *Gossip* v. *Wright* (1863), 32 L.J., Ch. 648, was referred to by Cozens-Hardy, L.J. at p. 52 in the report of the decision of the Court of Appeal in *Lisle* v. *Reeve* (1902), 71 L.J., Ch. 42, and he there said:

"I agree. I desire to adopt the language of Vice-Chancellor Kindersley in the case of *Gossip* v. *Wright*."

Cozens-Hardy, L.J., then proceeds, discussing the facts of the case then before him:

"Now applying that principle and in the absence of a particle of either allegation or evidence to shew that the two deeds of June and July, 1898, were part of the same transaction, it seems to me to come simply to an arrangement made after a mortgage security between a mortgagor and mortgagee."

MCPHILLIPS, J.A.

Now, upon the facts of the present case we have the one transaction at one and the same time, and *Gossip* v. *Wright, supra,* is clear authority that, in view of the facts, this is a case where the broad rule as stated applies.

The case of *Alderson* v. *White* (1858), 2 De G. & J. 97; 119 R.R. 38, was a very different case, and upon the facts was not held to be a mortgage transaction; further, that the party went into possession and it was not until after the lapse of 30 years that the bill to redeem was filed. The Lord Chancellor (Cranworth) there said at p. 105:

"The rule of law on this subject is one dictated by common sense; that *prima facie* an absolute conveyance, containing nothing to shew the relation of debtor and creditor is to exist between parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have the right to repurchase. In every

such case the question is what, upon a fair construction, is the meaning of the instruments?"

In the present case we have "the relation of debtor and creditor" and all the ear-marks which demonstrate that the transaction was one in the nature of security, *i.e.*, a mortgage transaction.

In *Manchester, Sheffield, and Lincolnshire Railway Co.* v. *North Central Wagon Company* (1888), 58 L.J., Ch. 219, it was held that the transaction was not a security for the payment of money. Lord Macnaghten at p. 225 refers with approval to the language of Lord Cranworth in *Alderson* v. *White, supra,* and said:

"In all these cases the question is, what was the real intention of the parties?"

In the present case, can there be any doubt about the real intention? Unquestionably if there was default in payment there was the power of sale, but could the defendant Aitken have sold to himself? Obviously no. But then it may be said that that was unnecessary, as the sale was absolutely complete. Then why the power to sell? It is incontrovertible that the transaction was one of security for the payment of money and not an out and out sale with a right of re-purchase not exercised, as contended by the defendant Aitken.

With regard to *McMicken* v. *The Ontario Bank* (1892), 20 S.C.R. 548, where it was held that to induce a Court to declare a deed absolute on its face to have been intended to operate as a mortgage only, the evidence of such intention must be of the clearest, most conclusive and unquestionable character. The present case has this strong feature that here we have contemporaneous documentary evidence establishing the transaction as one of mortgage and security for the payment of money, whilst in the case before the Supreme Court there was merely parol evidence of the interested parties. Taschereau, J. at p. 550 said:

"The case turns mainly upon the questions of fact, and we cannot, in my opinion, interfere with the finding of the learned judge at the trial, concurred in as it was by the Court *in banco*."

In the present case we have the finding of the trial judge in the converse way to that in *McMicken* v. *The Ontario Bank, supra.*

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Here the finding is that it was a mortgage transaction; there it was held that the deed absolute in form was intended to so operate and was not intended to operate as a mortgage.

In *Samuel* v. *Jarrah Timber and Wood Paving Corporation* (1904), 73 L.J., Ch. 526, it was held that a mortgagee is not allowed at the time of the loan to enter into a contract for the purchase of the mortgaged property. Lord Lindley at p. 528 said:

In *Lisle* v. *Reeve* (1901), 71 L.J., Ch. 42; (1902), 1 Ch. 53, Mr. Justice Buckley suggested some instances in which he considered a mortgagee might validly stipulate for an option to buy the equity of redemption, but although his decision was affirmed first by the Court of Appeal and afterwards by this House—*Reeve* v. *Lisle*—71 L.J., Ch. 768; (1902), A.C. 461—the affirmance proceeded entirely on the fact that the agreement to buy the equity of redemption was no part of the original mortgage transaction, but was entered into subsequently, and was an entirely separate transaction to which no objection could be taken. It is plain that the decision would not have been affirmed if the agreement to buy the equity of redemption had been one of the terms of the original mortgage. The Irish case, *Edwards' Estate, In re* (1861), 11 Ir. Ch. R. 367, is to the same effect."

In the present case, the assignment, together with the memorandum shewing that the assignment was by way of security for a debt, was all one transaction, and may be said to be the original mortgage transaction, and there was no subsequent and entirely separate transaction, which the law requires to negative the continuance of the original condition of things.

MCPHILLIPS, J.A.

Lord Lindley, continuing in the *Samuel* case, *supra*, at p. 529, said:

"Lord Hardwicke said in *Toombs* v. *Conset* (1745), 3 Atk. 261: 'This Court will not suffer, in a deed of mortgage, any agreement in it to prevail, that the estate become an absolute purchase in the mortgagee upon any event whatsoever.' But the doctrine is not confined to deeds creating legal mortgages. It applies to all mortgage transactions. The doctrine 'once a mortgage always a mortgage' means that no contract between a mortgagor and a mortgagee, made at the time of the mortgage and as part of the mortgage transaction—or, in other words, as one of the terms of the loan—can be valid if it prevents the mortgagor from getting back his property on paying off what is due on his security. Any bargain which has that effect is invalid and is inconsistent with the transaction being a mortgage. The principle is fatal to the appellant's contention if the transaction under consideration is a mortgage transaction, as I am of opinion it clearly is."

In *Fairclough* v. *Swan Brewery Company, Limited* (1912),

28 T.L.R. 450, being an appeal from the Supreme Court of Australia, Lord Macnaghten said:

"The arguments of counsel ranged over a very wide field. But the real point was a narrow one. It depended upon a doctrine of equity, which was not open to question. 'There is,' as Vice-Chancellor Kindersley said in *Gossip* v. *Wright* (32 L.J., Ch. 653), 'no doubt that the broad rule is this: that the Court will not allow the right of redemption in any way to be hampered or crippled in that which the parties intended to be a security, either by way of contemporaneous instrument with the deed in question or by anything which this Court would regard as a simultaneous arrangement or part of the same transaction.' The rule in comparatively recent times was unsettled by certain decisions in the Court of Chancery in England, which seemed to have misled the judges in the full Court. But it was now firmly established by the House of Lords that the old rule still prevailed and that equity would not permit any device or contrivance being part of the mortgage transaction or contemporaneous with it to prevent or impede redemption. Counsel on behalf of the respondents admitted, as he was bound to admit, that a mortgage could not be made irredeemable. That was plainly forbidden."

The rule which is to guide the Court is firmly established by the Judicial Committee in *Fairclough* v. *Swan Brewery Company, Limited, supra,* and that rule is the doctrine of equity as set forth in *Gossip* v. *Wright, supra,* by Kindersley, V.-C., and, applying that rule to the present case, can it be at all successfully contended that the facts admit of it being said that it was not a mortgage transaction or assignment by way of security, although in the one instrument in the form of an absolute sale? In my opinion, to hold otherwise would be to ignore the plain and unmistakeable doctrine of equity which has had this very recent approval by the Judicial Committee of the Privy Council.

MCPHILLIPS, J.A.

In the present case the contention is that it was an absolute sale, although the memorandum shews that the assignment was intended to be a security, and, as all was done contemporaneously and simultaneously and all formed part of the same transaction—applying the rule, the Court must not allow the right of redemption to be in any way defeated.

Now, with regard to the question of costs. This is not a case where the mortgagee was in possession, disbursed moneys, made repairs and lasting improvements. Nothing of that kind occurred; nevertheless, had the appellant (the defendant Aitken) not raised an untenable defence—*Heath* v. *Chinn* (1908), 98 L.T.N.S. 858—in my opinion, he would have been

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entitled to his costs: *Sevier* v. *Greenway* (1815), 19 Ves. 413. His proper course was to have submitted to be redeemed—*Bell* v. *Cochrane* (1897), 5 B.C. 211 at p. 214; and there is authority for his being deprived—upon the facts of the case—of the ordinary right to the costs of suit in a redemption action—*National Bank of Australasia* v. *United Hand-in-Hand and Band of Hope Company* (1879), 4 App. Cas. 391—having set up and failed to prove an absolute title to the mortgaged property—and not only not to be allowed his costs of suit, but may have costs given against him.

In *Rourke* v. *Robinson* (1911), 80 L.J., Ch. 295 at p. 298, a redemption action, Warrington, J. said:

> "With regard to the costs of the action, it was laid down by Selborne, L.C., in *Cotterell* v. *Stratton* (1872), 42 L.J., Ch. 417, 419; 8 Chy. App. 295, 302, which is cited in *Kinnaird* v. *Trollope* (1889), 58 L.J., Ch. 556, 560; 42 Ch. D. 610, 619, that the rights of a mortgagee to costs, 'resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of a mortgagee or trustee as may amount to a violation or culpable neglect of his duty under the contract.'"

In my opinion, the contention of the defendant Aitken that the transaction was one of absolute sale not by way of security, *i.e.*, a mortgage transaction, constitutes inequitable conduct, which disentitles him to costs.

MCPHILLIPS, J.A.

Further, under Order LXV., rule 1, marginal rule 976, the costs of the trial follow the event unless it is for a good cause otherwise ordered, save that a mortgagee who has not unreasonably resisted any proceedings shall be entitled to costs, but, in my opinion, in the present case, the defendant Aitken did unreasonably resist this redemption claim. Then, as to the costs of appeal to this Court—Order LVIII., rule 4, marginal rule 868, reads as to costs of appeal as follows:

> "The costs of the appeal and cross-appeal (if any) shall follow the event unless the Court shall otherwise order."

This is not a case, in my opinion, when any departure from the rule should be adopted.

With regard to the other defendant, the Britannia Land Company, Limited, it would not appear to have appealed, and it is to be observed that no pleadings were filed on its behalf. It is to be further observed that Mr. *Armour,* who appeared as counsel for the defendant Aitken, also appeared for the defendant

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Company, and made the statement that it would abide by the order of the Court. I cannot see, in the circumstances, how any costs can be given to the defendant Company, nor upon what authority they could be given—although I must admit that it does seem reasonable that it should be allowed any costs reasonably put to. Possibly the plaintiffs, the successful appellants, will see that all proper allowances will be made in this regard—having made the defendant Company a defendant in the action.

It, therefore, in my opinion, follows that the decision of the trial judge was right and the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Tupper, Kitto & Wightman.*
Solicitor for respondents: *W. F. Hansford.*

HAYWARD & DODDS v. LIM BANG *ET AL.*

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HAYWARD & DODS v. LIM BANG

Landlord and tenant—Sale of goods—Fixtures—Goods purchased under an individual agreement for sale—Sale of Goods Act, R.S.B.C. 1911, Cap. 203, Secs. 28 and 29.

Grill and kitchen fixtures were supplied and installed by their owners in a hotel under a conditional sale agreement with the lessee of the hotel, whereby they were to remain the property of the owner until they were paid for. The agreement was not filed under the Sale of Goods Act. The landlord allowed the lessee to attach the said fixtures to the premises upon the understanding that the articles were to remain attached to the freehold and become the landlord's property.

Held, in an action by the vendors for the recovery of the articles that they had no title to them as against the landlord.

Decision of MURPHY, J. affirmed.

Statement

APPEAL from a decision of MURPHY, J. in an action tried by him at Victoria on the 11th of November, 1913. The

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plaintiffs entered into an agreement with the defendant Graham, who was lessee of the Prince George Hotel, to supply all labour and material necessary to install the grill and kitchen fixtures in the hotel. Under a conditional bill of sale signed by the parties the property in the goods was not to pass until they were paid for in full, but the agreement was never filed in the County Court registry as required by section 28 of the Sale of Goods Act. At the time of the purchase of the goods the defendant Lim Bang, who was the owner of the hotel, agreed, at the request of the lessee Graham, to allow same to be installed and affixed to the premises conditional upon the same being left upon the premises when his tenancy expired. Subsequently, the defendant Graham having failed in the hotel business, the defendant Lim Bang went into possession, and Graham, still owing a balance of $847 on the fixtures, the plaintiffs brought action for the balance due against Graham and for the recovery of the property under the conditional sale agreement from the defendant Lim Bang. The action was dismissed as against the defendant Lim Bang and the plaintiffs appealed on the ground that the dismissal of the action was against the law and against the weight of evidence and that the trial judge erred in finding that the goods in question became the property of the defendant Lim Bang upon their being installed.

Statement

McDiarmid, for plaintiffs.
F. C. Elliott, for defendant Lim Bang.
C. S. Lyons, for defendant Company.

25th November, 1913.

MURPHY, J.

MURPHY, J.: In this case my opinion is that the property in the goods in question passed to the owner of the building, Lim Bang, as soon as they were installed by the tenant; and that the true legal construction of what occurred between the tenant and the landlord was that the landlord was to become the owner of these goods as soon as they were attached to the building, the tenant having the right to enjoy them as long as he remained on the premises as such tenant. If that view is correct, then I think the landlord is a *bona-fide* purchaser for

value without notice. I think, also, under the statute, that his claim to these goods might have been defeated if the conditional bill of sale had been registered within the 21 days, but inasmuch as it has not been, I think on the wording of the statute that notice cannot be held to be equivalent to registration, that is notice acquired subsequently to the transaction being closed. At the time that the landlord acquired that notice he had already given the consideration for the goods.

I may say also that, in my opinion, these goods were fixtures, in fact integral parts of the building, once they were installed. That, I think, answers any contention as to the provisions of the Bills of Sale Act. I am, therefore, of opinion that the defendant is entitled to succeed.

The appeal was argued at Victoria on the 26th of January, 1914, before MACDONALD, C.J.A., IRVING, GALLIHER and MCPHILLIPS, JJ.A.

McDiarmid, for appellants (plaintiffs): It is contended that the goods became the property of the landlord as soon as they were installed in the building, but Lim Bang himself admits he was not to have possession until Graham left the building. He had notice of our claim, but we admit it was after the goods were installed. The giving of notice had the same effect as the registration of the conditional agreement would have had. The goods are chattels and not fixtures, and they never changed their character as chattels: see *Gough* v. *Wood & Co.* (1894), 1 Q.B. 713.

Argument

F. C. Elliott, for respondents (defendants): The plaintiff has no lien and never did have. Although Lim Bang was to receive the goods under the agreement after Graham left the premises, the title passed when the agreement was made, although it was subject to Graham remaining, and the only bar was the filing of the plaintiffs' agreement, which was never done: see judgment of Armour, C.J. in *Angelo* v. *McMath* (1895), 26 Ont. 224 at p. 234; *Laine* v. *Beland* (1896), 26 S.C.R. 219; *Reynolds* v. *Ashby & Son* (1904), A.C. 466. The Acts all require the registration of a lien in order to make it effective. As to chattels, a furnace is a fixture: see *Andrews* v.

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Brown (1909), 19 Man. L.R. 4; *Divine* v. *The Massey-Harris Co. et al.* (1910), 3 Sask. L.R. 18; *Cockshutt Plow Co.* v. *McLoughry* (1909), 2 Sask. L.R. 259. Section 29 of the Sale of Goods Act should be read with section 28, otherwise any portion of a building could be taken away after its being attached as part of the building.

McDiarmid, in reply, referred to *Chapman* v. *Edwards, Clark and Benson* (1911), 16 B.C. 334; *Walker et al.* v. *Hyman* (1877), 1 A.R. 345.

Cur. adv. vult.

7th April, 1914.

MACDONALD, C.J.A.: Unless it can be said that the goods in question did not when attached become part of the freehold, the appeal must fail. The fair result of the evidence is that Lim Bang allowed his tenant to attach the articles in question to the freehold on the definite understanding that they were to remain attached and become the landlord's property. Lim Bang would not consent to the freehold being disturbed on any other terms. The fair result of the evidence rather than the inapt verbal expressions of witnesses, particularly witnesses having an imperfect knowledge of the language, must be given effect to.

MACDONALD, C.J.A.

Had the contract of conditional sale been filed, under section 28 of the Sale of Goods Act, then by virtue of section 29 of that Act the appellants might have recovered the goods notwithstanding that they were affixed, and had become part of the realty, subject, of course, to the conditions mentioned in said section. But the contract was not so filed, and hence the appellants get no assistance from the section dealing with conditional sales. It is unfortunate for the appellants that they should suffer the loss of their goods, or their price, but that result has been brought about by failure on their part to observe the plain provisions of the Act.

I think, therefore, the appeal must be dismissed.

IRVING, J.A.: I would dismiss this appeal.

IRVING, J.A.

Our statute law on the sale of goods and factors is very similar to the English statutes 56 & 57 Vict., c. 71, Sale of

Goods Act, 1893, and 52 & 53 Vict., c. 45, Factors Act, 1889. We have, however, a system (first introduced in 1892), requiring registration of conditional sales, etc., for the protection of subsequent purchasers and mortgagees, without notice, in good faith for valuable consideration, and an amendment, 1903-04, Cap 46, Sec. 2 (now section 29 of the present Act), passed to meet the decision of the Court of Appeal in *Reynolds* v. *Ashby & Son, Limited* (1903), 1 K.B. 87; affirmed (1904), A.C. 466.

Lim Bang, in my opinion, became in December, 1911, certainly in January, 1912, a purchaser or mortgagee without notice of the plaintiffs' lien, in good faith and for valuable consideration, to wit, the alteration of his premises.

The agreement sworn to by Lim Bang that "the fixtures were to be mine when he (the tenant) left" was in truth an agreement that the fixtures were not to be removed in the interim. Had the tenant attempted to remove them at any time during the term of the lease, I think Lim Bang would have been entitled to an injunction on what seems to me the true construction of the agreement between him and his tenant.

The notice, given in March, relied upon by the plaintiffs, cannot, in my opinion, be regarded as sufficient to take the place of the registration which ought to have been made within 21 days of the first delivery, as the contract of sale between Lim Bang and his tenant was an executed contract as soon as the machinery was installed.

Mr. *McDiarmid* suggests that we should apply the principle followed in *Chapman* v. *Edwards, Clark and Benson* (1911), 16 B.C. 334. *Loke Yew* v. *Port Swettenham Rubber Company, Limited* (1913), A.C. 491, seems to support our decision, where the Judicial Committee laid down as a principle of general application even where registration was compulsory, that where the rights of a third person do not intervene, no person can do that which it is not honest to do, and no person can enforce rights which formally belong to them only by reason of their own fraud.

Those cases are entirely different from that now under consideration. Here there is no suggestion of fraud. Our Factors Act expands the doctrine of estoppel to a very great degree,

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but to counter balance this the Bills of Sale Act (now chapter 20, R.S.B.C. 1911) was enacted: see section 7. In *Edwards* v. *Edwards* (1876), 2 Ch. D. 291, the Lords Justice point out that it is not desirable that fine equitable distinctions depending upon the doctrine of notice should not be imported into cases requiring registration.

The plaintiffs have only themselves to blame for the loss of their lien.

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

Section 29 of the Sale of Goods Act, R.S.B.C. 1911, Cap. 203, has no application, as the plaintiffs failed to register their hire or purchase agreement within the time specified. We have then to determine whether the appliances put in by appellants are fixtures in the same way as if section 29 had not been passed. I am of opinion, on the evidence, coupled with the clear intention of the parties, that they are, and are not removable.

The appellants relied upon *Gough* v. *Wood & Co.* (1894), 63 L.J., Q.B. 564, but all that case decided was that where a mortgagee of premises permitted the mortgagor to remain in possession for the carrying on of his trade, and the mortgagor for the purpose of carrying on his occupation installed certain trade fixtures, there was an implied authority that the mortgagor might, during occupancy, remove the fixtures, as also the parties claiming under a hire or purchase agreement with him; while here, so far from authority, express or implied, the landlord has stipulated with the tenant that they shall remain and become the property of the landlord on the tenant leaving the premises.

GALLIHER, J.A.

The matter is put very concisely by Farwell, L.J. in *Ellis* v. *Glover & Hobson, Lim.* (1907), 77 L.J., K.B. 251 at p. 258, and Fletcher Moulton, L.J. at p. 256, says:

> "The same principle applies to the case of landlord and tenant, where it has been held that trade fixtures may become irremovable if on a true interpretation of the contract between the tenant and his landlord it appears that the tenant has renounced his right to take them away during the term."

The Sale of Goods Act before referred to gives ample protection, and the appellants have only themselves to blame for failing to comply with the provisions of that Act.

McPHILLIPS, J.A.: This is an appeal by the plaintiffs from the judgment of MURPHY, J. dismissing the action as against the defendant Lim Bang. The action was one brought by the plaintiffs against the defendants for the return of the grill and kitchen fixtures installed by them in the Prince George Hotel, the premises at that time being held under lease from the defendant Lim Bang, the owner thereof, by the defendant Jason Graham. The learned judge held that the property in the goods in question passed to the owner of the building, the defendant Lim Bang, when attached to the building—becoming fixtures. The action was dismissed as against the defendants other than the defendant Graham, but as against him judgment went for the balance due to the plaintiffs in respect of the goods supplied, and affixed to the premises, namely, $847.26. The appeal is brought upon two grounds as stated, that is, that the dismissal of the action as against the defendant Lim Bang is (a) against the law, and against the weight of evidence; (b) that the learned trial judge erred in finding that the goods in question became the property of the defendant Lim Bang on installation.

The Prince George Hotel was carried on for some time under lease by the defendant Graham, but when action was brought he was out of possession. At the time of the purchase of the goods by the defendant Graham from the plaintiffs, the defendant Lim Bang agreed, at the request of the defendant Graham, to allow same to be installed and affixed to the premises conditional upon the same being left upon the premises when his tenancy expired. The defendant Lim Bang was in no way a party to the purchase of the goods, and knew nothing of the conditional sale agreement at the time it was entered into, and all that is shewn is that some considerable time afterwards—six months or more—the statement was made to him that the plaintiffs held a lien note, but it was never shewn to him, and even this is not admitted by the defendant Lim Bang.

The goods installed were a steam boiler (vertical), 220-gallon storage tank with steam coil ventilating stack, smoke-stack, pipe and fittings, valves, basin in basement, waste-pipe, gas-pipe, hot and cold-water pipes, hangers for coils and ventilators,

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and all connections; there was evidence that the majority of the fittings could be removed from the premises without damage to the building, but would leave openings that would have to be closed or covered, but that this could easily be done and at slight cost. Apparently the intention was—but not carried out by the plaintiffs—to secure themselves by a conditional sale agreement. An agreement was executed by the parties, reciting that "the property or title to the labour and material or goods shall not pass to the purchaser until such purchase-money hereinbefore mentioned shall have been fully paid." The agreed-upon purchase price was $1,382. The plaintiffs, however, did not pursue the provisions of the Sale of Goods Act having reference to conditional sales, and file the agreement in the County Court registry, as required by the Act.

It was strenuously argued by Mr. *McDiarmid,* counsel for the appellants, that as there was evidence, although after the event—that is to say, after the agreement between the defendant Lim Bang and his tenant, the defendant Graham, admitting of the installation of the fixtures conditional upon same becoming part of the freehold, and not capable of being removed by the tenant—that the agreement that the property in the goods would not pass was good and effective as against the defendant Lim Bang without filing in the County Court registry, as his position could not be held to be stronger than that of his tenant; and, further, that the defendant Lim Bang in any case did not come within the protection afforded by the Sale of Goods Act—not being a subsequent purchaser or mortgagee of the goods without notice in good faith for valuable consideration; and that the fact of the goods being affixed to the realty was not conclusive as the Sale of Goods Act provided against the resultant effect—relying upon sections 28 and 29 of the Act.

MCPHILLIPS, J.A.

In my opinion, the property in the goods in question is in the defendant Lim Bang, the owner of the premises, to which the same have been affixed, and that they are fixtures and part of the realty. The defendant Lim Bang upon the facts, in my opinion, is a subsequent purchaser without notice in good faith for valuable consideration—there is no definition of "valuable

consideration" in the Act, but, in my opinion, the facts support it sufficiently and within *Currie* v. *Misa* (1875), L.R. 10 Ex. 162.

To invoke the remedies provided in sections 28 and 29 of the Act as against the defendant Lim Bang, in my opinion, it was necessary for the plaintiffs to establish that a good and sufficient conditional sale agreement was duly filed in the County Court registry, and it is not attempted to establish this —in fact, this was not done. It is to be noted that section 29 of the Act was first enacted in the Sale of Goods Act Amendment Act, 1904, and was subsection (2) to section 25 of Cap. 169, R.S.B.C. 1897. It has become a separate action, but it is still under the heading "Conditional Sales," and follows after section 28, which remains in the same terms as section 25 of chapter 169, R.S.B.C. 1897. In my opinion, the intention of the Legislature was to preserve the right in the bailee of chattels to follow the goods where he had established his position under a duly-filed conditional sale agreement in the County Court registry—notwithstanding that the goods had, by operation of law, become of a changed character, *i.e.,* realty and not personalty.

It is rightly said that it is not for the Courts to balk at giving effect to the statute law upon grounds of inconvenience, or other startling resultant effect, but nevertheless it must be manifestly clear that a radical change in the substantive law is intended and sufficiently expressed before effect is given thereto.

If the argument of counsel for the appellant is to prevail, no security whatever exists in the ownership of realty—as without the filing of any conditional sale agreement, goods or chattels affixed to the realty, or worked into the realty, may be lost by the owner of the realty except he pay the amount due or owing thereon—and no period of limitation whatever as to the time when this right of recovery back of the goods and chattels by the manufacturer, bailor or vendor may take place. It is true that by pursuing the provisions of the Mechanics' Lien Act (R.S.B.C. 1911, Cap. 154), both the workman and the material man may receive protection —but in that Act all proper provisions are found compelling

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prompt proceedings, otherwise the lien expires or is cancelled. In my opinion, it was never intended—reading the Sale of Goods Act as a whole and considering the conditional sales provisions in particular—to enact any such law as would permit of the exercise of the rights here contended for, namely —without compliance with the provisions of section 28 of the Act—to have the right to the return of the goods in question in this action, and that notwithstanding they have become a part of the realty. There is, of course, the further consideration that had the tenant, the defendant Graham, not made the agreement which he did with regard to the transfer of the property in the goods in question, which may, I think, be said to come within the category of trade fixtures, the right of removal of the same could only have existed during the term of the tenancy—and what higher right can the plaintiffs claim than that which at any time resided in the purchaser from them? It would be an act of trespass for a tenant to remove trade fixtures after the expiry of the tenancy without the leave of the landlord; and assuredly would it be an act of trespass for the plaintiffs, upon the facts of the present case, to enter upon the premises of the defendant Lim Bang and possess themselves of the goods in question—yet the Court is asked to declare this right.

MCPHILLIPS, J.A.

In *Meux* v. *Jacob* (1875), 44 L.J., Ch. 481, Lord Hatherley, at p. 485, said:

"I apprehend it is too late, at this time of day, to contend that a regularly-executed mortgage of a lease will not carry the fixtures of that property which is in lease, and of which the deeds are deposited. I apprehend that the reason for that is, not simply because the chattels are there in the house which has been so mortgaged, but because whilst attached to the land, although for the benefit of trade, the law has held that trade fixtures may be, at any time during the limited interest which the owner of the lease may have, removed by him, yet if he do not remove them during the lease (as in the old case which was cited before Holt) he is held to have allowed them to pass to the owner of the reversion, because, and only because, they are attached to his reversion, and if they are not removed, as the law would have enabled the person to remove them during the lease, they must be considered to have passed over at once and finally to the owner of the reversion. The doctrine, therefore, was that they were a part of the land during the time they remained attached, but that, for the benefit of trade, they might, during the interest of that person who had

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only a partial interest in the land, be removed so long as he had that interest, although there was no power whatever given to him for the purpose of removal if he chose to allow the time to pass during which he might have removed them, and so far severed them from the property."

In my opinion, the action fails upon this latter point alone, and apart from the question of the property in the goods in question—passing under the agreement between the defendant Graham and the defendant Lim Bang—the property therein passed by operation of law.

In my opinion, therefore, the decision of the learned trial judge was right, and I would affirm the judgment appealed from and dismiss the appeal.

Appeal dismissed.

Solicitor for appellants: *F. A. McDiarmid.*
Solicitor for respondent: *F. C. Elliott.*

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Municipal law—Building by-law—Permit of engineer—Application therefor and refusal—Erection of building without permit—Right of action for injunction to remove building—Necessity for joining Attorney-General as party.

A municipal corporation applied for a mandatory injunction requiring the defendant to pull down a wooden building he had erected on his land within the municipality without a certificate from the corporation's engineer and contrary to the provisions of the building by-law. The defendant had previously applied for and been refused a certificate on the ground that a wooden building would be a nuisance and increased the danger of fire.

Held (McPHILLIPS, J.A. dissenting), that although a municipal corporation may bring an action for an injunction respecting its own property or where a statute gives it a special protection and breaches thereof are

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being committed; all actions in respect of public nuisances must be brought in the name of the Attorney-General.

APPEAL from a decision of GREGORY, J. delivered in Victoria on the 5th of January, 1914, on a motion for an interim injunction which by consent was turned into a motion for judgment. The defendant, intending to build a wooden garage within the limits of the plaintiff Corporation, made application to the Corporation for the building certificate of the engineer required by the by-laws. The engineer refused to grant the certificate on the ground that it was not considered "in the public interest" and that a wooden garage is a menace to the owners of the adjoining property by reason of the increased hazard of fire. The defendant then proceeded to erect the garage without the certificate, and the Corporation brought this action for a mandatory injunction to compel him to pull the building down. The trial judge granted the injunction, and the defendant appealed on the grounds that the Municipal Council, contrary to the by-law, assumed the power of directing the engineer to refuse his application for a certificate; that the Municipality had no jurisdiction to maintain this action; that the Council have no jurisdiction to establish by resolution fire limits in the municipality, and on other grounds.

Statement

The appeal was argued at Victoria on the 2nd of February, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

McDiarmid (*F. C. Elliott*, with him), for appellant (defendant): We applied for the certificate required before the erection of a building, filed a plan with particulars, but the acting engineer refused to grant it under instructions from the Council. There is no ground upon which the engineer has the right to refuse the permit. This is not an action that can be brought by a corporation. The plaintiffs put it on the ground that it is a nuisance and dangerous on account of the increased chances of fire: see *Wallasey Local Board* v. *Gracey* (1887), 36 Ch. D. 593; *Tottenham Urban District Council* v. *Williamson & Sons* (1896), 2 Q.B. 353. The trial judge should have held that the Municipality was not the guardian of the public, but it was for

Argument

the Attorney-General to act: see *Tompkins* v. *Brockville Rink Co.* (1900), 31 Ont. 124; Halsbury's Laws of England, Vol. 17, pp. 227, 234; *Stoke Parish Council* v. *Price* (1899), 2 Ch. 277; *Attorney-General and Spalding Rural Council* v. *Garner* (1907), 2 K.B. 480. A municipal corporation has a right to protect its right to property, but not to bring an action on the infringement of a by-law. The by-law must be certain and cannot give discretionary power to an engineer: see *Munro* v. *Watson* (1887), 51 J.P. 660. This is not the proper forum, as under section 53, subsection 50 of the Municipal Act they may pass by-laws to pull down buildings. The Council having the right to do this, it ousts the jurisdiction of this Court: see *Jones* v. *The Stanstead, Shefford, and Chambly Railroad Company* (1872), L.R. 4 P.C. 98; Biggar's Municipal Manual, 11th Ed., 610. The penalty excludes the right of action: see *The Queen* v. *Tynemouth Rural District Council* (1896), 2 Q.B. 451; *Rossi* v. *Edinburgh Corporation* (1905), A.C. 21; *Vasilatos* v. *Victoria* (1910), 15 B.C. 153. The by-law itself has not been proved before the Court: see section 205 of the Municipal Act.

Argument

Mayers, for respondent (plaintiff): As to making the Attorney-General a party, the *Tottenham* case does not apply, as the local boards in England are very different from a municipal council. The Council has distinct rights within *Cooper* v. *Whittingham* (1880), 25 Ch. D. 501; *Mayor, &c., of Devonport* v. *Plymouth, Devonport, &c., Tramways Co.* (1885), 52 L.T.N.S. 161; *Hamilton and Milton Road Co.* v. *Raspberry* (1887), 13 Ont. 466. Although there is a remedy by penalties, there is the right to apply for an injunction. As to the Attorney-General not being a party, this is a question of non-joinder of parties and was not raised in the Court below and was not referred to in the notice of appeal: see *St. Victor* v. *Devereux* (1845), 14 L.J., Ch. 244; *Attorney-General* v. *Corporation of City of Victoria* (1884), 1 B.C. (Pt. 2) 107. The building was erected without the permit required by the by-laws: see *Cook* v. *Hainsworth* (1896), 2 Q.B. 85 at p. 92; *The Queen* v. *Tynemouth Rural District Council, ib.* 219.

As to the Council not being able to vest their powers in

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someone else see *Salt* v. *Scott Hall* (1903), 2 K.B. 245 at p. 248; *Love* v. *Phalen* (1901), 87 N.W. 785 at p. 788; *In re Flaherty* (1895), 38 Pac. 981; *Wilson* v. *Eureka City* (1899), 173 U.S. 32 at p. 36; *Lieberman* v. *Van De Carr* (1905), 199 U.S. 552 at p. 561; *Munro* v. *Watson* (1887), 51 J.P. 660. If the engineer decided it is binding and if the Council direct, its decision is final: see *Moffet* v. *Ruttan* (1911), 16 B.C. 342; *Smith* v. *Chorley Rural Council* (1897), 1 Q.B. 678. As to the power to pass the by-law, it is an irregularity that should have been taken in the Court below. Any right in law will be supported by an injunction.

Argument

McDiarmid, in reply: As to the delegation of authority, ministerial, is to be distinguished from legislative, authority: see Dillon on Municipal Corporations, 5th Ed., Vol. 2, Sec. 598.

Cur. adv. vult.

7th April, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would allow the appeal for the reasons given by my brother IRVING.

IRVING, J. A.: The affidavits filed by plaintiff set up (1) that the building in question has been erected in defiance of the by-law; and (2) the building amounts to a menace to the public. The affidavits, in my opinion, would not justify an injunction on the *quia timet* principle: see *Fletcher* v. *Bealey* (1885), 28 Ch. D. 688; 54 L.J., Ch. 424, and the injunction, therefore, if supportable at all, must be by virtue of the by-law.

IRVING, J.A.

The case of *Tompkins* v. *Brockville Rink Co.* (1900), 31 Ont. 124, shews that this action could not be maintained by a private person. Mr. *McDiarmid* contends that it cannot be brought by the corporation, or by any body or person, other than the Attorney-General, assuming that the Supreme Court has jurisdiction in the premises.

We have not been referred to any direct authority which will support the right of the plaintiff to maintain an action where there has been an infringement of their by-laws. *Attorney-General* v. *Campbell* (1872), 19 Gr. 299, was a case very similar to this. The defendant, having been twice fined under the by-law, persisted in building in violation of the by-law. Appli-

cation was made to the Court of Chancery for an injunction. Strong, V.C. expressed a doubt as to whether the infraction of a municipal by-law constituted a nuisance, but he refused the application on the ground that the by-law was in excess of the legislative powers conferred upon the council. That case is a precedent for bringing the action in the name of the Attorney-General.

Attorney-General v. *Tod Heatley* (1897), 1 Ch. 560, shews the Attorney-General is a proper party under the Public Health (London) Act, 1891, to represent the public where the defendant neglects to perform the duty which lies upon him, notwithstanding that power is given by the statute to the corporation to remove the nuisance and charge the cost to the defendant. Under that statute, although the local authority is empowered to cause proceedings to be taken in the High Court, it has been held that this power does not, in the absence of a particular interest, justify them in proceeding in their own names: *Wallasey Local Board* v. *Gracey* (1887), 36 Ch. D. 593; *Tottenham Urban District Council* v. *Williamson & Sons* (1896), 2 Q.B. 353. These cases confirm the decision of Romilly, M.R. in *Vestry of Bermondsey* (1865), L.R. 1 Eq. 204.

In *Attorney-General* v. *Logan* (1891), 2 Q.B. 100, the right of the local board to bring an action in their own name in respect of a nuisance affecting property of which they were the owners was upheld; so, too, where a statute gave the local board a special protection, and breaches of that statute were being committed: *Mayor, &c., of Devonport* v. *Plymouth, Devonport, &c., Tramways Co.* (1884), 52 L.T.N.S. 161. This case was relied upon by Mr. *Mayers,* but I think there is a plain distinction between the specific rights that were there conferred and the breach of the duty of the public which is being dealt with in this action. In the *Plymouth Tramways* case the right might almost be regarded as falling within the principle of the *Logan* case.

In my opinion, this case falls within the general rule that requires that all actions in respect of public nuisances must be brought in the name of the Attorney-General.

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MARTIN and GALLIHER, JJ.A. agreed in allowing the appeal.

MCPHILLIPS, J.A.: This is an appeal by defendant from the decision of GREGORY, J. upon a motion for a mandatory injunction, turned by consent into a motion for judgment, directing by way of a mandatory injunction that the defendant do forthwith pull down and remove a wooden structure erected on his land as being erected without a certificate from the engineer of the Corporation, and contrary to the provisions of the building by-law of the Corporation.

It would appear from the facts upon affidavit before the trial judge that the written certificate called for by the by-law before the erection of the building could be commenced was applied for, but refused—the acting-municipal engineer in a letter stated that it was refused "on the ground that it was not considered in the public interest."

The learned counsel for the appellant contended that upon facts appearing in the affidavits filed that the refusal was wrongful and not justified under the terms of the by-law, and advanced reasons which, if at all forceful, would be efficacious in proceedings by way of *mandamus* to compel the engineer to issue the necessary certificate, but that course was apparently not adopted.

MCPHILLIPS, J.A.

The material provisions of the by-law which require consideration are sections 1, 2 and 3. It is shewn by affidavit on the part of the plaintiff, the Corporation of the District of Oak Bay, that a wooden garage is a menace to the owners of the adjoining property by reason of the increased hazard of fire, and its use will be dangerous to the public safety; however, this would all be matter for consideration upon *mandamus* proceedings. In *The Queen* v. *Tynemouth Rural District Council* (1896), 2 Q.B. 451, *mandamus* proceedings were taken and the Court held that the plans submitted must be approved.

The Court, in approaching all these questions arising with respect to municipal by-laws, will not without good reason come to the conclusion that they are in their terms unreasonable, as the local authority may be said to be the best judge:

Kruse v. *Johnson* (1898), 2 Q.B. 91; 67 L.J., Q.B. 782; *White* v. *Morley* (1899), 2 Q.B. 34; 68 L.J., Q.B. 702; *Salt* v. *Scott Hall* (1903), 2 K.B. 248.

The present case is not one in which it can be said that the by-law is prohibitive, as was the case in *French* v. *Municipality of North Saanich* (1911), 16 B.C. 106; in that case upon an application to quash the by-law it was quashed as being prohibitive.

However, the question of the validity of the by-law, in my opinion, does not come up for consideration in this action—when we have it an admitted fact that the required written certificate from the engineer as called for in the by-law was not obtained—that is, when it is apparent that there was legislative authority to pass a by-law of the general character which the by-law for consideration in the present case would appear to be.

The Municipal Clauses Act, B.C. Stats. 1906, Cap. 32, Sec. 50, Subsec. (32), under the authority of which the by-law was passed, makes provision for the passage by the council of every municipality for the regulation and prevention of erection of wooden buildings, and for authorizing the pulling down or removal at the expense of the owner of any building constructed in contravention of any by-law. Therefore, when the admitted fact is, as previously stated, that the required written certificate was not obtained, and its requirement would seem to be a reasonable regulatory provision, the erection of the building was distinctly an illegal act upon the part of the appellant, and it is in effect in defiance of a statutory enactment.

MCPHILLIPS, J.A.

In *Tompkins* v. *Brockville Rink Co.* (1900), 31 Ont. 124, Meredith, C.J. stated that he saw no difference between acts prohibited by direct enactment of the Legislature and those prohibited by by-law. No doubt this involves and is upon the assumption that there is legislative authority admitting of the passage of the by-law.

The learned counsel for the appellant strongly urged that, as penalties were provided in the by-law, there was no right to an injunction. In *Cooper* v. *Whittingham* (1880), 49 L.J., Ch. 752 at p. 755; 15 Ch. D. 501 at pp. 506-7, Jessel, M.R. said:

"It was said that the 17th section of the Act created a new offence of

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importation and enacted a particular penalty, and it was argued that where a new offence and a penalty for it had been created by statute, a person proceeding under the statute was confined to the recovery of the penalty, and that nothing else could be asked for. That is true as a general rule of law, but there are two exceptions. The first of the exceptions is the ancillary remedy in equity by injunction to protect a right. That is a mode of preventing that being done which, if done, would be an offence. Wherever an act is illegal, and is threatened, the Court will interfere and prevent the act being done, and as regards the mode of granting an injunction the Court will grant it either when the illegal act is threatened, but has not been actually done, or when it has been done and seemingly is intended to be repeated.

"The second exception is that created by the Judicature Act, s. 25, sub-s. 8, which enables the Court to grant an injunction in all cases in which it shall appear to the Court to be just and convenient. This section may be said to be a general supplement to all Acts of Parliament.

"I think that in this particular case an injunction can issue on both those general grounds."

This case was followed by Channell, J. in *Carlton Illustrators* v. *Coleman & Company, Limited* (1911), 1 K.B. 771; 80 L.J., K.B. 510, and we have a number of other decisions which well support the right to the injunction which was granted in the present case, notably *Mayor &c., of Devonport* v. *Plymouth, Devonport, &c., Tramways Co.* (1884), 52 L.T.N.S. 161, *per* Bowen, L.J. at p. 164; *Mackett* v. *Commissioners of Herne Bay* (1876), 24 W.R. 845; *Hamilton and Milton Road Co.* v. *Raspberry* (1887), 13 Ont. 466.

MCPHILLIPS, J.A.

The learned counsel for the appellant took the further point, although it apparently was not taken at the trial, nor in the notice of appeal, that the action was not properly brought, but should have been in the name of the Attorney-General. I am disposed to think that the objection is too late, however, it being a most important exception, as to the right in the municipality to institute this action, I have decided to deal with the question. I may say that when at the bar I at times felt that this requirement that the Attorney-General should be a party to actions or proceedings that admittedly were questions of municipal government was pressed unduly and too far, and, having filled the office of Attorney-General for this Province, it was the more impressed upon me, and I must confess that the decision in *Attorney-General and Spalding Rural Council* v. *Garner* (1907), 76 L.J., K.B. 965, comports with the view I

have long held, and that is that where the interests of a small part of the community only are involved and not those of the community at large, the Attorney-General should not be required to be the plaintiff. In the case last referred to, the action was one brought by the district council as successors to the surveyors of highways against the defendant for damages, and an injunction for wrongfully depasturing cattle on the road, the Attorney-General being joined on their relation; and it was held that as the property in the herbage was in the parish council as representing the inhabitants of the parish, who had the beneficial interest, the parish council and not the district council was held to be the proper plaintiff, and that it was not necessary that the Attorney-General should be a party. It was strongly pressed in this case that it was not a case of a public wrong, and that, therefore, the Attorney-General need not be joined—the only persons affected being the inhabitants of the parish. Now, in the present case, the inhabitants of the Municipality of Oak Bay only are interested. Further, the Legislature has delegated to the Municipality the authority for regulating the erection of buildings and preventing the erection of wooden buildings, and authorizing the pulling down of any building constructed in contravention of any by-law—and upon what grounds of public policy or necessity should the Attorney-General of the Province be required to intervene, it not being a matter of public wrong or affecting the public at large, whose interests undoubtedly the Attorney-General is to conserve and safeguard? See the judgment of Channell, J. in *Attorney-General and Spalding Rural Council* v. *Garner, supra,* at pp. 967-9.

In *London County Council* v. *South Metropolitan Gas Co.* (1904), 73 L.J., Ch. 136, the point was taken that the action was brought to enforce the performance of a public duty, and in such a case the Attorney-General was the proper plaintiff; but it was pointed out that the London County Council—as likewise the plaintiffs in the present case—were entrusted with complete control of the matters in question: see the remarks of Romer, L.J. at pp. 141-2, and Stirling, L.J. at p. 142.

In my opinion, the action was rightly constituted, and the

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Corporation of the District of Oak Bay is properly the plaintiff without the necessity of the Attorney-General of the Province being joined.

It therefore follows, in my opinion, that the judgment of the learned trial judge was right, and should be affirmed and the appeal dismissed.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Courtney & Elliott.*
Solicitors for respondent: *Bodwell & Lawson.*

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SELLS, LIMITED v. THOMSON STATIONERY COMPANY, LIMITED LIABILITY.

Sale of goods—Acceptance of first instalment—Cancellation of order for balance—Passing of property—Appropriation—Proper action for damages—Sale of Goods Act, R.S.B.C. 1911, Cap. 203, Sec. 26.

A bookseller relying on an advertisement in a newspaper of a certain book, ordered 25 copies from a publisher. Upon receipt of twelve copies (for which the bookseller paid) he immediately cabled a cancellation of the balance of the order. The publisher had not sent the 13 remaining copies, nor had he appropriated them to the bookseller prior to the receipt of the cable, but he persisted in forwarding them, and the bookseller refused to accept them. In an action to recover the price of the books, judgment was given by the trial judge in favour of the plaintiff.

Held, on appeal (reversing the decision of McINNES, Co. J.), that the cancellation operated to prevent any appropriation by the publisher effective to pass the property in the books to the bookseller.

Held, further, that an action for damages for breach of contract could not be maintained as no alternative claim to that effect had been made.

Statement

APPEAL by defendant from a decision of McINNES, Co. J. on the trial of the action at Vancouver on the 7th of

November, 1913. The action arose out of the sale by the plaintiff, an English publishing company, to the defendant of a work entitled "British Columbia: Its History, Commerce, Industries and Resources." The defence was misrepresentation. Judgment was given, allowing the claim, with costs. Defendant appealed.

The appeal was argued at Victoria on the 16th of January, 1914, before MACDONALD, C.J.A., IRVING, GALLIHER and McPHILLIPS, JJ.A.

Bodwell, K.C., for appellant: This action was brought for goods sold and delivered. The goods were not as ordered, nor were they as represented; they were never delivered, and the property never passed to the defendant. Under the Bills of Sale Act the property does not pass until the particular copies have been appropriated to the buyer: see *Ginner* v. *King* (1890), 7 T.L.R. 140.

Argument

Buchanan, for respondent: The law is clear that repudiation is of no effect unless agreed upon by the other party: Benjamin on Sales, 5th Ed., 816; *Tredegar Iron and Coal Company (Limited)* v. *Hawthorn Brothers and Co.* (1902), 18 T.L.R. 716. The advertisement in the Vancouver paper was not authorized by us. In the *Ginner* v. *King* case there was a direct withdrawal of the authority to appropriate.

Bodwell, in reply.

Cur. adv. vult.

7th April, 1914.

MACDONALD, C.J.A.: The defendant, a company of booksellers doing business in Vancouver, ordered from the plaintiff, a publishing company doing business in London, England, but licensed in this Province, 25 copies of a book having the title of "British Columbia," etc. These copies were to be taken out of stock, and would have to be appropriated to the contract in order to pass the property therein to the defendant. The contract falls within rule 5, subsection (1) of the Sale of Goods Act, R.S.B.C. 1911, Cap. 203, Sec. 26, which reads as follows:

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"Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with

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the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made."

I take it that in this case there would be an implied assent to the appropriation of the goods by the seller. Until such an appropriation the contract would be an executory one of bargain and sale.

The defendant cabled to the plaintiff cancelling the order for a balance of 13 copies which had not then been sent out. Counsel for the plaintiff admitted that no appropriation of these had been made prior to the receipt of the cablegram. The plaintiff, nevertheless, thereafter appropriated 13 copies to this contract, and, the defendant having refused to accept the books, action was brought for the price as upon a contract for goods sold and delivered. I have therefore to ask myself whether or not the implied assent of the defendant, to the future appropriation of goods, to the contract was withdrawn or destroyed by the notification that it would not accept the goods; in other words, whether or not the plaintiff, after receipt of that notification, could proceed to convert the executory agreement into an executed one by setting the goods apart as applicable to the contract and thus pass the property in them to the defendant against its will. I have not been able to find any direct authority upon this point. I am, however, of opinion that the implied assent to an appropriation of the goods was withdrawn by the notice, and that the plaintiff could not thereafter without defendant's assent convert the executory contract into an executed one. The case relied upon by Mr. *Buchanan,* counsel for the plaintiff—*Tredegar Iron and Coal Company (Limited)* v. *Hawthorn Brothers and Co.* (1902), 18 T.L.R. 716, does not, in my opinion, assist him. That was an action for damages for breach of contract, and not for the price. The repudiation there was made before the time had arrived for the delivery of the goods. The sellers declined to accept the repudiation, but waited until the time for delivery and then brought their action for damages for non-acceptance of the coals. The point in issue was this: the defendant claimed that the measure of damages was the difference between the market price and the

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sale price at the date of repudiation, whereas the plaintiffs claimed, and the Court held, that it was the difference between the market price at the date when performance was due and the sale price. In other words, that the sellers were not bound to re-sell immediately they got notice of the buyer's intention not to take the goods, but might, if they chose, wait until the time for performance had arrived and sue on the footing of the transaction at that date. In that case there was no attempt to appropriate the coals to the contract and convert what was an executory agreement into an executed one and sue for the price. The case is really of no assistance in the determination of the question now under consideration.

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The action is grounded solely upon a contract for goods sold and delivered, and no alternative claim is made for damages for breach of the executory agreement of bargain and sale. As the action is, therefore, in my opinion, not properly founded, I would allow the appeal and direct that the action be dismissed with costs here and below.

IRVING, J.A.: I would allow this appeal.

The distinction is well settled between a debt for the price of the goods, the property in which has passed, and an action of damages for breach of contract to buy and pay for the goods. In the former case the debt due is the balance of the price, the purchaser keeping the goods. In the other case the vendor retains possession of the goods, but he sues for the damages that he has sustained by the purchaser not carrying out his agreement to buy as stipulated.

IRVING, J.A.

The plaintiff has not proved his damages, if any. The trial judge proceeded on the basis that the property in the books had passed. That, I think, was a mistake. The case of *Tredegar Iron and Coal Company (Limited)* v. *Hawthorn Brothers and Co.* (1902), 18 T.L.R. 716, cited by Mr. *Buchanan* is merely an application of the principle laid down in *Hochster* v. *De La Tour* (1853), 2 El. & Bl. 678. It does not assist his case, so far as I can see. The vendors refused to allow the proposed rescission and accept the proposed purchasers, and said we shall sue you for damages if you do not accept the coal according to contract. If Mr. *Buchanan's* argument is sound

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they would have been entitled to recover the price of the coal. *Ginner* v. *King* (1890), 7 T.L.R. 140, is in the plaintiff's favour as to the appropriation. That action was in the alternative for the price of the goods or for damages for not accepting; as the defendant had cancelled the authority before the goods had been appropriated, it was held that plaintiff was entitled to damages only.

GALLIHER, J.A. agreed that the appeal should be allowed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This action was one brought to recover $600 for goods sold and delivered, being 25 copies of "British Columbia: Its History, Commerce, Industries and Resources." The plaintiff claimed $30 per copy, less discount of 20 per cent. The trial judge gave judgment for the plaintiff for $312, it being admitted at the trial that after the action was commenced the defendant Company paid the plaintiff for 12 copies of the book, that number having been shipped before cancellation of the order by the defendant Company.

The defence in effect was that the books were not as represented in an advertisement appearing in a Vancouver newspaper, and the defendant Company assumed therefrom that it was a work of small cost, not of elaborate binding, as it proved to be, that the defendant Company had fully paid the plaintiff, and that the order had been cancelled before the shipment of the remaining 13 books.

The order was given by letter in the following terms:

"Vancouver, B.C., 18th Feb., 1913.

"To Messrs. Sells. Ltd.,
"167 Fleet Street,
"London, England.

"Please enter our order as below: Ship *via* mail. Mark K Dept. 25 'British Columbia. Its History, People, Commerce, Industries, and Resources.' H. J. Boam, Ed. by Ashley G. Brown.

"Thomson Stationery Co., Ltd.
"Per J. P."

It will be seen that the price is not mentioned, and apparently no price was agreed upon or known at the time the order was given. It is clear that where no specific price is agreed upon the vendor cannot set up a price which has not been agreed upon, and if the plaintiff is entitled to recover at all it can only

be on a *quantum meruit*: *Hoadly* v. *M'Laine* (1834), 10 Bing. 482, 489; 38 R.R. 510; *Valpy* v. *Gibson* (1847), 4 C.B. 837; 16 L.J., C.P. 241.

Although it is true the defendant Company accepted and paid for 12 of the books, evidently believing there was liability therefor, the shipment not having been by mail as ordered, the remaining 13 books being shipped—by freight—and after cancellation of the order—no delivery to the defendant Company took place by delivery to the carrier, and no acceptance of the books followed—in fact, acceptance was refused.

In my opinion, upon the facts it was open to the defendant Company to cancel the order upon discovering that the books were not as ordered, and this it did at the earliest moment upon being apprised of the nature and contents of the books. The production is certainly not such as could reasonably be expected, and does not fulfill the terms of the advertisement, being largely nothing but advertising matter and material gleaned from existing publications. Section 49 of the Sale of Goods Act (R.S.B.C. 1911, Cap. 203), provides that where goods are delivered which have not been previously examined—which is the present case—the buyer is not considered to have accepted them until there is the opportunity of inspecting to ascertain whether they are in conformity with the contract. Therefore, in my opinion, upon the facts of this case, there can be no successful contention that there was any acceptance of the books. If upon the facts defendant has wrongfully refused to accept the books, the true cause of action is not properly established, and it cannot be remedied now, as no damages, such as have to be shewn, were proved. See the judgment of Lord Esher in *Ginner* v. *King* (1890), 7 T.L.R. 140 at p. 142.

MCPHILLIPS, J.A.

If I thought the action was one that might or could reasonably succeed by way of assessing the damages for not accepting the books, it would be right and proper to direct a new trial. Can this right, though, be properly extended when the facts are looked at? Apparently a discussion took place at the trial, and the learned judge allowed an amendment to the plaintiff by way of an alternative claim for damages for not accepting

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the books; but no evidence was given to establish what (if any) these damages were. The trial judge has given judgment for the plaintiff for the 13 copies of the book at $30 each, less discount of 20 per cent., *viz.*: $312—the quoted price of the books, but never agreed to by the defendant. This could not be the damages if the action was sustainable, and this Court has no evidence before it to ascertain the damages, if of opinion that damages to any amount are legally claimable. It is true that if the property in the books passed to the defendant the plaintiff was at liberty to sue, either for the price, or under the Sale of Goods Act; but if the latter course be adopted, it is an election to treat the buyer's conduct as a repudiation of the contract: Halsbury's Laws of England, Vol. 25, p. 267, note (*m*). In the present case the price was sued for; but a price never agreed to; and the books, although they may be said to have been ascertained or specific goods, there is no evidence as to whether the books were then printed or published; and, with the right of examination before acceptance, I cannot hold that the property in the books passed to the defendant at the time of the contract, or at any later date.

In determining the question of whether the property in goods sold has or has not passed, it is to be arrived at upon consideration of all the surrounding circumstances, and these, to my mind, are not sufficient for me to hold that the property therein did pass to the defendant: Sale of Goods Act, Sec. 25.

MCPHILLIPS, J.A.

If the question of the *quantum meruit* were to be gone into, and it is only upon that footing that the plaintiff could recover anything, in my opinion, the $288 already paid by the defendant is a sum amply sufficient to constitute full payment for the books, were the contract one that the defendant should be held to.

It therefore follows that, in my opinion, the judgment entered for the plaintiff by the trial judge should be set aside, the action dismissed, and the appeal allowed, with costs here and below to the defendant.

Appeal allowed.

Solicitors for appellant: *Bowser, Reid & Wallbridge.*
Solicitor for respondent: *Leo Buchanan.*

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Bills and notes—Payment of note conditional—Parol evidence to prove same—Credibility of witness.

In an action upon a promissory note, the maker raised the defence that the note was given to cover a first payment upon an agreement for sale of land and was handed over to the plaintiff on the express condition that if he failed to obtain the money for the first payment which he contemplated raising through the sale of other property, the note was to be returned or not used. The trial judge held that the condition under which the note was given having failed, the action should be dismissed.

Held, on appeal (*per* MACDONALD, C.J.A. and MCPHILLIPS, J.A.) that the appeal should be dismissed.

Per MCPHILLIPS, J.A.: No consideration such as is called for "in the sense of the law" was established.

Per IRVING and GALLIHER, JJ.A.: That on the law and on the facts the appeal should be allowed.

Per IRVING, J.A.: The essence of a promissory note is that it is an unconditional promise to pay, and oral evidence is not admissible to vary the instrument.

The Court being equally divided, the appeal was dismissed.

Statement

APPEAL from a decision of GRANT, Co. J. in an action tried by him at Vancouver on the 25th of September, 1913. The action arose through an agreement between the defendant Browning and the plaintiff, through her agent, Armishaw, for the sale to Browning of the plaintiff's property at Whonnock, B.C., consisting of three-quarters of an acre of ground with buildings, for $3,000. Browning paid $25 down, and, as set out in the receipt he received from Armishaw was to pay $450 at once, $500 in six months and the balance to be arranged. Browning, who was a grocer in Vancouver, expected to sell the property he owned there, with the proceeds of which he intended to make the first two payments. Not having been able to do so, he, three days later, at Armishaw's request, gave him two promissory notes, one for $425, payable in one month, and the other for $500, payable in six months, to be applied on the first two payments. At the end of the first month the first note was renewed by a note for

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$427.10, the note upon which this action was brought. Browning's defence was that the notes were given at Armishaw's request in order to make the transaction look better, and that it was understood between them that they were not to be paid unless he sold his Vancouver property, and that, in the event of the sale not going through, payment of the notes would not have to be made. The trial judge held that the payment of the notes was conditional upon the plaintiff's ability to raise the money for the purchase of the property, and dismissed the action. The plaintiff appealed.

Statement

The appeal was argued at Victoria on the 7th of January, 1914, before MACDONALD, C.J.A., IRVING, GALLIHER and MCPHILLIPS, JJ.A.

Joseph Martin, K.C., for appellant: The receipt for the $25 payment does not conform to the Statute of Frauds. We sued on the note, and defendants say there is no consideration to which the plaintiff answers that she is willing to carry out the agreement to sell the land, and is entitled to recover on the note.

Argument

Sears, for respondents: It was understood between Browning and Armishaw that if Browning could not sell his store in Vancouver payment on the notes was not to be enforced. The real bargain was that the defendants could enter into possession of Mrs. West's place at once and make the money whereby they could pay for the place, but Mrs. West refused to give up possession. Notes can be given in escrow: see Halsbury's Laws of England, Vol. 2, p. 483.

Martin, in reply.

Cur. adv. vult.

7th April, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: In this case there is a direct conflict of evidence. The situation of the parties, however, assists me in reviewing that evidence. Armishaw, the plaintiff's agent, in the beginning conducted the negotiations which led to the giving of the promissory note in question in this action. The defendants, husband and wife, were shopkeepers in South Vancouver.

Plaintiff owned a house in Whonnock. Armishaw suggested to the defendant, Sidney Browning, that he should purchase the house and convert it into a general store, and transfer defendants' business to Whonnock. Defendants were willing to do this, but could not make a cash payment unless they could sell their own property, which they hoped to be able to do. It was, as I read the evidence, quite well understood between the parties that in order to make the cash payment, and hence the purchase, it would be necessary that the defendants should sell their own property. That being the state of affairs, defendant, Sidney Browning, paid $25 as a deposit, and received the following receipt:

"Vancouver, B.C.,
"February 15th, '13.

"Received from Sidney Browning, the sum of $25 as deposit on Mrs. West's property situate on the Whonnock road at Whonnock, B.C., containing three-quarters of an acre of land, and all buildings on same, house, etc.

"Price $3,000, payable as follows: $450 down and note for $500 payable six months from date; balance to be arranged.

"J. E. Armishaw,
"Agent for Mrs. West."

This was, I think, regarded by both parties as an option to be converted into a sale when defendants succeeded in selling their property and thus procuring the cash necessary to enable them to make the cash payment. It was undoubtedly intended that a formal agreement of sale should be drawn up when the transaction became a sale. Three days after this, defendants were induced to give two promissory notes for the sums mentioned in said receipt, on the representation, according to the evidence of defendant Sidney Browning, of the plaintiff and her agent, that the giving of such notes would shew his good faith in endeavouring to obtain the money due to complete the transaction. Defendant states most positively that the notes were handed over on the express condition that if he failed to obtain the money for the first payment, the notes were to be returned or not used.

Now, in the circumstances above referred to there is nothing improbable in that story. The agreement for sale was not drawn up and executed, as one would have expected had these

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notes been taken as part of the purchase-money. The receipt does not satisfy the Statute of Frauds, therefore it is reasonable to suppose that defendants could not have intended to be bound by the notes, and yet have no agreement which they could enforce against the other party, and this, too, before they had assurance that they could raise the money to meet the payments. It seems to me that the plaintiff's own evidence bears this out to a certain extent. She declined to let them into possession until $250 in cash should be paid. I do not point this out as being unreasonable at all. Her position was well taken that she would not part with the possession of her property until she had got some cash. But that attitude, coupled with the absence of an enforceable agreement for sale, bears out the defendants' story that the purchase was conditional upon their raising the money by sale of their own property.

It was argued that defendant Sidney Browning's subsequent conduct indicates that the sale was concluded when the notes were given; that his conduct is consistent only with that of a purchaser, who had bound himself to pay the purchase-money. It seems to me that, while that is one inference that might fairly be drawn from his subsequent conduct, yet this other inference may be drawn from it: that he was very desirous of getting the property; he understood that he would get it whenever he could raise the money from the sale of his own property, which admittedly he was trying to sell, and which was the only way in which he could raise the money; and he was content to keep the matter in *statu quo* until it became apparent that he must fail to raise the money. I do not think that is an improbable inference to draw from his conduct. That being so, I am thrown back on the conflicting testimony of the witnesses. Without reflecting at all upon the credibility of Armishaw, I recall the evidence in which he says that a formal agreement was actually drawn up at the time the notes were given. Now, it is quite apparent that he was utterly mistaken with regard to that, so that one can hardly credit him with a clear recollection of what took place at that time. Doubtless he was trying to tell the truth, but his testimony was evidently considered by the learned trial judge to be very unreliable.

MACDONALD, C.J.A.

The learned judge saw the demeanour of all the witnesses, and appears to have been impressed with the truthfulness and sincerity of the defendant, Sidney Browning. That being so, I do not think I should be justified in interfering with his finding of fact. It does not appear that Mrs. Browning was present when the notes were given or heard any of the conversation between the parties with respect to the agreement. She was a witness, and was not asked by counsel on either side with respect to the matters in conflict, so that it is, I think, not open to me to infer that her husband's testimony is weakened because not corroborated by her. From the conduct of the case I should assume that it was common ground that she did not know of her own personal knowledge anything about the arrangement that was made when the notes were given.

Being, therefore, unable to say that the learned trial judge was clearly wrong in his conclusion, I think that conclusion should not be disturbed and that the appeal should be dismissed.

IRVING, J.A.: At the hearing we determined all the points in dispute except one—that is, the defendants' contention that the purchase by them, and the payment of the note given by them, were conditional upon his ability to raise the money to pay the notes.

The essence of a promissory note is that it is an unconditional promise to pay; even the addition of the words "as per agreement" does not make a note conditional: *Jury* v. *Barker* (1858), El. Bl. & El. 459. The delivery of a note may be conditional, but that does not permit the maker to make it conditionally. The presumption being that promissory notes are for valuable consideration, the onus is on the defendant to upset that basis. Oral evidence is not admissible to vary the instrument. That was decided over a hundred years ago in *Hoare* v. *Graham* (1811), 3 Camp. 57. A recent case is *New London Credit Syndicate* v. *Neale* (1898), 2 Q.B. 487. There, in an action by the drawers against the acceptors of a bill of exchange, evidence of a contemporaneous oral agreement to renew a bill was held inadmissible. That case is instructive. In *Henderson* v. *Arthur* (1907), 1 K.B. 10, the Court of Appeal pointed out

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that it would be contrary to the general principles of evidence to give effect to an antecedent parol agreement in order to give a different meaning to a document (a lease in that case) from that which the law would otherwise give it.

In *Heilbut, Symons & Co.* v. *Buckleton* (1913), A.C. 30 at p. 47, Lord Moulton said, speaking of a collateral contract:

"The effect of a collateral contract such as that which I have instanced would be to increase the consideration of the main contract by 100*l*, and the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing a concurrent and collateral contract. Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are, therefore, viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an *animus contrahendi* on the part of all the parties to them must be clearly shewn. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them, and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter."

It is true that there may be a delivery of a promissory note in escrow, but this is not the case suggested here, at least not by the defendant's evidence. He says:

"If we got the money, we would carry out the deal. If not they [the notes] were to be returned, and they were not to be used.

"I signed the notes on the condition that if I got through with the money . . . . I would come through with the deal, if not, there would be nothing in it.

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"When I received Mrs. West's letter of the 31st March [in which she asks $250 cash before she will let the plaintiff into possession] I considered the thing off. I couldn't do anything; but I did not say anything to anybody except my wife.

"Mr. Armishaw asked me if I would give him the notes, as he thought it would look better if he had the notes, and if we arranged the notes, and we could not come through with the money, there would be nothing in it."

This is clear. The witness wishes the Court to understand that the notes were only conditional. But if evidence of that kind were admissible his own conduct shews that the statement is untrue. If it were true, then the whole thing would have been at an end when the note became due and was unpaid. His first act in that event would be to return the agreement of sale and ask for the return of his notes, but, instead of doing that,

we find that, on the 28th of March, 1913, ten days after the first note became due, he wrote that he was packing and hoped to be in Whonnock next week. This letter does not fit in with any theory. The deal was not off, and he had not yet found the money:

"I will no doubt soon fix things up with you."

His own conduct in June, 1913, when the plaintiff's solicitor interviewed him, shews that his testimony is not to be believed. He then said he still had hopes of raising the money, but was not sure, as things were dull—"things were getting so dull and there did not seem to be any chance of getting money." This was in June. The solicitor had demanded payment in April, and threatened action on the note. His answer is not that this was a conditional arrangement, or that the note was held as an escrow, but that he still had hopes, in June, of raising the money. Mrs. Browning was not asked to corroborate this part of the defendant's story. Mrs. West and Armishaw deny the statement that there was any condition about the note. Their evidence is consistent in every way—that is to say, what each says is consistent with itself, and their testimony agree and corroborate one another. The basis of it was that the defendants should not be allowed into possession until a substantial portion of the purchase-money, *viz.*: the amount of this note plus the $25 deposited, had been paid. The defendant acknowledges this in his letter of the 28th of March, 1913. Moreover, their testimony is in conformity with law, rights, and with the teachings of experience. A vendor is not wise in letting a man of straw into possession, and, although a vendor is a trustee of the lands for the purchaser, he has a paramount right to protect his interest as vendor.

The learned judge seems to have been impressed by the defendant's evidence, but his belief in the truthfulness of the evidence is not absolutely conclusive. The rule with its exception is stated very fully in *Khoo Sit Hoh* v. *Lim Thean Tong* (1912), A.C. 323 at p. 325. This case, in my opinion, falls within the class last referred to.

On the law and on the facts I would allow this appeal and enter judgment for the plaintiff.

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

MCPHILLIPS, J.A.: I would sustain the judgment of the trial judge. It would appear clear to me that he has arrived at the correct conclusion upon the facts as well as the law.

No complete agreement of sale was ever arrived at. It is plain that the plaintiff who sues upon the promissory note refused to accept it and was always insisting upon a cash payment before any agreement would be entered into, and in that the promissory note is still held by the payee thereof (the plaintiff), all equities existing between the parties are available, and the promissory note must be held not to be enforceable; in any case, no consideration therefor has been proved. The trial judge heard the evidence, saw the witnesses, and it is essentially a case of credibility—and there is no hesitancy upon the part of the trial judge. He believed the witnesses for the defence, and I cannot see how, upon the facts of this case, there can be any disagreement with his findings. The event never happened—well known to the plaintiff—which would admit of the defendants entering upon a firm agreement with the plaintiff for the purchase of the land, and the plaintiff, upon her part, was most insistent that there would be no agreement of sale until the substantial cash payment was made. Her letter of the 31st of March, 1913, makes this perfectly clear, and also makes clear that the promissory note was not accepted, and all subsequent dealings never changed matters. The letter was in the following terms:

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"Sir:—Your letter to hand. I am sorry my brother is not at home now and is therefore unable to do the work you require, he will not be back for two weeks at least. With regard to the cash payment, I cannot think of letting you take possession without at least $250 cash. Your note is simply useless. I must have the cash."

Unquestionably the plaintiff suing upon the promissory note was entitled to have it presumed at the outset that it was given for a valuable consideration—this is the case—even as between the immediate parties thereto, but the defendants amply shewed that it was given without consideration, and, further, was not accepted by the plaintiff, and the renewal of the promissory

note—upon the facts—in no way changed matters, or rendered the promissory note valid: Halsbury's Laws of England, Vol. 2, at pp. 461-6; *Edwards* v. *Chancellor* (1888), 52 J.P. 454.

Lush, J. in delivering the judgment of the majority of the Court in *Currie* v. *Misa* (1875), 44 L.J., Ex. 94 at p. 99, states what valuable consideration is in law:

> "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other—Com. Dig., Action on the Case, Assumpsit, B. 1-15."

It is plain that no consideration, such as is called for "in the sense of the law," was established in this case. It, therefore, follows that the appellant cannot recover upon the promissory note sued upon, and the appeal fails and must be dismissed.

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

Solicitor for appellant: *F. C. Saunders.*
Solicitors for respondents: *Alexander & Sears.*

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HEDICAN v. THE CROW'S NEST PASS LUMBER COMPANY, LIMITED.

Company law—Logging operations—Authority of officers to make contracts—Managing director—Logging superintendent.

The general manager of a lumber company gave written instructions to a logging superintendent to make contracts and hire assistants for cutting and delivering a certain quantity of logs at their mill for the season of 1912. The logging superintendent then contracted with the plaintiff for the cutting and taking out of all lumber in a certain area at a certain daily output, which would involve continuous operations for about three years. The plaintiff worked under the contract for three and one-half months, when the Company shut down their mill and discharged the plaintiff. In an action for damages for being denied the right to complete his contract:—

Held, on appeal, reversing the decision of MURPHY, J. (MCPHILLIPS, J.A. dissenting), that the instructions received by the logging superintendent from the general manager did not authorize the contract made with the plaintiff, and the logging superintendent as such had no power to make the contract.

Per GALLIHER, J.A.: Had the plaintiff been dealing with the managing director, in the absence of proof of direct authority, implied authority could be assumed, but to carry the doctrine further and to say that implied authority could be assumed in the case of a subordinate officer is unsound.

Doctor v. *People's Trust Co.* (1913), 18 B.C. 382, distinguished.

APPEAL from a decision of MURPHY, J. in an action tried by him at Cranbrook on the 26th of May, 1913.

Statement

The facts are that the defendant Company's managing director, Peter Lund, gave written instructions in November, 1911, to one Walter Magoon, their logging superintendent, to enter into contracts for the cutting and supplying of logs for the logging season of 1912, for their sawmill at Wardner, B.C. On May 1st, 1912, Magoon entered into a written agreement with the plaintiff whereby the plaintiff was to cut into saw-logs all timber of certain dimensions that was owned by the defendant Company adjacent to their logging camp No. 8. He was to furnish at best 30,000 feet a day at $1.20 a thousand, the work to be under the supervision of a

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foreman, and if unsatisfactory, it could be terminated by the Company by giving 15 days' notice. By cutting at the above rate it would have taken the plaintiff about three years to finish his contract. He commenced work on the 14th of May, 1912, and worked continuously until the 1st of September, when the mill closed down and logging operations were suspended by Lund, no complaint having been made as to the plaintiff's work and no notice having been given as required under the contract. The plaintiff brought action for damages for breach of contract. It was held by the trial judge that the plaintiff was entitled to damages, and he directed an inquiry before the registrar as to the *quantum* of damages the plaintiff had sustained. The defendant Company appealed on the ground that the alleged contract with the plaintiff was entered into without the knowledge or authority of the directors of the defendant Company and was not binding on the Company, and even in the event of the plaintiff being entitled to damages, the learned judge erred in his direction as to the principle upon which the *quantum* of damages should be ascertained.

Statement

J. W. de B. Farris, and *P. E. Wilson,* for plaintiff.

A. B. Macdonald, for defendant Company.

13th July, 1913.

MURPHY, J.

MURPHY, J.: On the questions of fact I hold that the contention that plaintiff abandoned the contract is not proven. The onus of establishing this is on the defendant. I do not think that is satisfied by the qualified evidence of Wentworth. I further hold that the contract was not terminated because plaintiff's work was not satisfactory. This is, I think, clearly an afterthought, for Mr. Lund did not know the terms of the contract when he closed down the work and could not, therefore, invoke the provisions it contained for cancellation if indeed it does contain such stipulations. Further, assuming their existence, the contract requires 15 days' notice to be given. No such notice was given, and without it I hold the contract could not be terminated. The real defence is that Magoon had no authority to make the bargain sued on. The memorandum and articles were not put in, but evidence was

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given without objection that defendant Company is in the lumber business and amongst other things done by it was the cutting of logs on its own limits. Mr. Lund was the managing director, and could, as such, I think, delegate the power to make such a contract as the one in question, and on the true legal construction of his letter of the 15th of November, 1911, I hold he did make such delegation. The insistent note in that letter is that Magoon is to provide between 25 and 30 million feet of logs within twelve months, and he is urged to get in contractors. True, that refers to the Wasa limits only, but it clearly, I think, contemplates his making contracts of even wider scope than the one here discussed. The letter conclues, "I am giving you a general outline of these matters as they occur to me, and I shall expect you to do the rest," shewing the wide scope his activities were expected to take in the matter of supplying logs to the mill. It is to be noted also that a like quantity of logs would be required each year, and the letter, I think, indicates that provision for continuous supply must be made by Magoon. But, if I am in error in this, I think on the evidence the plaintiff is entitled to succeed in this Court at all events on the principle cited by IRVING, J.A. in the recent case of *Doctor* v. *People's Trust Co.* (1913), 18 B.C. 382, that a company is bound by the acts of persons who take upon themselves with the knowledge of the directors to act for the company, provided such persons act within the limits of their apparent authority, and that strangers dealing *bona fide* with such persons have a right to assume that they have been duly appointed. This means, I think, that in such circumstances strangers may assume that persons so acting have the powers they purport to exercise. There is no question here that plaintiff dealt *bona fide* with Magoon and that Lund and the Company knew of such dealing. Magoon, under the evidence, had full charge of getting logs for the mill. Lund only occasionally visited the scene of operations, and, so far as the evidence shews, took no part therein except by giving directions to Magoon. The plaintiff is entitled to judgment, but I direct a reference before the registrar to ascertain the *quantum* of damages, as the matter is not fully entered into on

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the record. The measure of damages to be the amount of profit plaintiff would have made if allowed to complete the contract in due course.

The appeal was argued at Victoria on the 29th and 30th of January, 1914, before MACDONALD, C.J.A., IRVING, GALLIHER and MCPHILLIPS, JJ.A.

Bodwell, K.C., for appellant (defendant): The trial judge relied on a letter from Lund to Magoon, but there is no authority in this letter to give a contract that extends beyond a year, and the contract Magoon gave the plaintiff would take three years to complete. As to the duties and powers of a logging superintendent, he cannot bind the Company to such a contract as this: see *In re Cunningham & Co., Limited* (1887), 36 Ch. D. 532 at p. 539; *Elk Lumber Co.* v. *Crow's Nest Pass Coal Co.* (1907), 39 S.C.R. 169. Even if the Court agrees that the contract was not terminated, damages were assessed on a wrong principle. If the Company were not satisfied with the work, they could terminate it on giving 15 days' notice, and the evidence shews Lund was not satisfied, and, as a matter of fact, Hedican acquiesced in the termination of the contract. As to proper measure of damages see *Beatty* v. *Bauer* (1913), 18 B.C. 161.

Argument

J. W. de B. Farris, for respondent (plaintiff): The duties of the logging superintendent are set out in the letter from the managing director to Magoon: see *Hochster* v. *De La Tour* (1853), 2 El. & Bl. 678; 22 L.J., Q.B. 455. There was an implied authority in Magoon to make the contract. He contemplated that a substantial portion of the contract would be completed in 1912. On the question of damages the case of *Beatty* v. *Bauer* cited by the appellant is distinguishable. See also *Lowe* v. *The Robb Engineering Co.* (1905), 37 N.S. 326.

Bodwell, in reply, referred to *Baker* v. *Atkins* (1910), 15 B.C. 177.

Cur. adv. vult.

7th April, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would allow the appeal for the reasons given by my brother GALLIHER.

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IRVING, J.A.: The judgment appealed from finds certain facts, *viz.*: (1) that the plaintiff did not abandon the contract; (2) that the contract was not terminated by reason of the unsatisfactory way in which it was being performed. With these I do not think we need interfere. But on what is referred to as the real defence, I have, with every respect for the learned trial judge, reached the conclusion that the appeal must be allowed.

The Company is in the lumber business, having a sawmill, which is supplied with logs, some cut on the Company's lands, and some bought. Those cut on the Company's lands are either cut by contract at so much per thousand, or by the Company's men. The general manager was P. Lund; the logging superintendent was Magoon, who was first employed by the Company in November, 1911. His designation as "logging superintendent" amounts to nothing.

In *Elk Lumber Co.* v. *Crow's Nest Pass Coal Co.* (1907), 12 B.C. 433, it was argued that the words "land commissioner" were sufficient in themselves, having regard to their association with great companies such as the Hudson's Bay Company, to indicate the authority to bind the principal. But in the Supreme Court of Canada (39 S.C.R. 169 at p. 172) Davies, J. said:

> "In itself and apart from other evidence the title has no legal significance and that at any rate it does not *per se* imply an authority to sell lands."

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Magoon's duties required him to provide between 25 and 30 thousand feet of logs for the Company's mill, and to have them at the mill ready at all times during the sawing season, which lasts from 1st April to some day in November. Definite instructions were given him with reference to the season of 1912, in a letter dated 15th November, 1911, and that letter the trial judge thought amounted to an authority to Magoon to make the agreement upon which the plaintiff bases his action. The letter in question, in my opinion, was looking to the operations for 1912 only. The first letter Magoon wrote the plaintiff was with reference to the plans for 1912 only, but when Magoon and plaintiff met they proceeded to deal with the cutting of 25 to 30 million feet—something which could not be done having regard to the fact that the plaintiff had no

equipment, in one season—and something which could only be done to the Company's advantage if the Company could and would maintain a force of men to complete the delivery of the logs after the plaintiff had sawn and limbed them. In short, the agreement that Magoon made with the plaintiff involved the tying up of the Company for more than one season. Magoon says it is not a usual thing for a logging superintendent to do unless he has direct authority from the Company or general manager to make such a contract. It is quite clear that Magoon had no such authority, as he never stated to Lund the nature of the contract he had given the plaintiff. The judge so finds.

That Lund knew the plaintiff was getting out logs and was being paid for so doing is admitted, but the unusual terms were withheld from Lund—whether deliberately or by mere mischance it is not necessary to determine. At any rate, until Magoon was discharged and the plaintiff's work was stopped, the managing director was not aware that the plaintiff claimed a right to cut all the logs on the Company's land adjacent to camp 8, even though it should run into three or four seasons. The apparent acknowledgment by Lund of the existence of the contract sued on was not made on full information, and, therefore, cannot bind the Company: *De Bussche* v. *Alt* (1878), 8 Ch. D. 286. I am by no means certain that the letter of the 1st of May, 1912, ever contemplated cutting beyond the winter of 1912-13: see the terms of payment, but I shall accept for the purposes of this judgment the construction placed upon it by plaintiff's counsel.

The letter of the 15th of November, 1911, is not authority for making the contract, nor, if it is regarded as evidence of the nature of the logging superintendent's duties, does it go far enough to shew that a logging superintendent has power to make contracts of so large a character as the one now under consideration.

Wright v. *Glyn* (1902), 1 K.B. 745, is a useful case on the authority of a servant to bind his master.

I would allow the appeal.

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GALLIHER, J.A.: I agree entirely with the findings of fact of the learned trial judge, but I cannot agree with his interpretation of the letter of authority from Lund to Magoon, dated the 15th of November, 1911, nor with his application of the principle laid down in *Doctor* v. *People's Trust Co.* (1913), 18 B.C. 382. Had the plaintiff been dealing with the managing director, as in the *People's Trust* case, it may very well be that, in the absence of proof of direct authority, implied authority could be assumed (see also remarks of North, J. in *In re Cunningham & Co., Limited* (1887), 36 Ch. D. 532 at p. 539), but to carry the doctrine further and to say that implied authority could be assumed in the case of a subordinate officer (such as Magoon) is, I think, unsound. Assuming that Lund could clothe Magoon with authority to make the contract, has he done so? The oral testimony is against that conclusion, and we have then only to look at the letter and construe it.

I agree with the trial judge that that letter is wide in its scope, and, considering the nature of the business carried on, might be deemed to give quite extended powers to Magoon, but, with the exception of one paragraph, which I will presently refer to, must, I think, be limited to the sawing season of 1912, and it is, I think, clear on the evidence that the contract entered into extends beyond that season. The paragraph I refer to is as follows:

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"It is also possible that a contract can be let to log off the two limits near Wasa. I think you should endeavour to get in touch with some reliable logger who possesses sufficient equipment and means to handle this contract. There is other timber in that vicinity that could be added, so that the right man could have permanent work for some time to come, and I think it is highly desirable that we endeavour to get one or more strong logging contractors into the district, who are in a position to carry on both winter and summer logging. These should be men of ample experience who can be relied upon to do the work satisfactorily and profitably both for the company and themselves.

"In any event you should endeavour to provide between 25 and 30 million feet of logs for the Wardner Mill during the next 12 months, and take the responsibility of having logs at the jack ladder on April 1st next and a continuous supply at the mill for the entire sawing season, which usually closes some time during the month of November.

"I am giving you a general outline on these matters as they occur to me, and I shall expect you to do the rest."

It is to be noted that reference is there made to a contract to

log off. Magoon is requested to get in touch with a strong logging outfit with means and equipment to log both summer and winter, an entirely different contract, as I view it, to the one under which the plaintiff was engaged. Moreover, there is no authority given Magoon to enter into such a contract, in fact the very wording of the clause assumes a reference to Lund before any contract is made. "To get in touch" does not imply authority to enter into the contract, nor does the reading of the other part of the letter, restricted as it is to a particular season, advance matters in plaintiff's favour.

I think the appeal must be allowed and the action dismissed with costs.

MCPHILLIPS, J.A.

McPhillips, J.A.: This is an appeal from a decision of Murphy, J.—judgment having been entered for the plaintiff against the defendant Company for the breach of a contract entered into with the plaintiff in writing as contained in a letter of May 1st, 1912, addressed to the plaintiff, and signed by Walter Magoon, logging superintendent of the defendant Company, who was acting under a letter of instructions from P. Lund, managing director of the defendant Company, dated the 15th of November, 1911, whereby the plaintiff was to cut for the defendant all timber owned by the defendant adjacent to its camp No. 8, the defendant agreeing to pay therefor at the rate of $1.20 per thousand feet—Doyle's scale—the plaintiff to furnish at least 30,000 feet per day. If at any time too many logs were cut in the woods, the defendant could place the plaintiff's men at other work—the work to be done to the satisfaction of the camp foreman and logging superintendent, and if at any time the work was not being done satisfactorily, the contract would become null and void after 15 days' notice, the contract to continue as long as the work was satisfactorily carried on. Apparently there was a memorandum of the contract as contained in the letter of the 1st of May, 1912, in triplicate, forwarded with the letter to the plaintiff for signature, he to return two of them to the office of the defendant, the plaintiff to retain one of them. It is not shewn in the evidence that this memorandum in triplicate was signed or

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returned, nor was it put in evidence, but it was not contended that it was not—rather that it was assumed to have been done. The terms of the contract were accepted by the plaintiff, and he entered upon the work until the defendant refused, on or about the 15th of September, 1912—but without giving the 15 days' notice—to further continue plaintiff in the work.

The trial judge held against the defence set up—that the plaintiff abandoned the contract, and it was further held by the trial judge that the contract was not put at an end because of the plaintiff's work being unsatisfactory; that the 15 days' notice required for its termination was not given; that Magoon, the logging superintendent, had authority to make the contract under express instructions in writing from Lund, the managing director of the defendant Company, as contained in the letter of the 15th of November, 1911, and that there was a proper delegation of authority from the managing director to the logging superintendent to enter into the contract, especially wherein it was insisted upon that the logging superintendent was to provide 25 or 30 million feet of logs within twelve months. The trial judge admits that the managing director was referring only to the Wasa timber limits, but that the authority conferred even extended to entering into contracts of a wider scope than that sued upon. The learned judge in his judgment quotes an excerpt from the letter of the managing director to the logging superintendent as follows:

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> "I am giving you a general outline of these matters as they occur to me, and I shall expect you to do the rest."

The judgment as entered directed that it be referred to the district registrar of the Supreme Court at Cranbrook to enquire into and state the *quantum* of damages the plaintiff sustained by the breach of the contract by the defendant; the measure of damages to be the amount of profit the plaintiff would have made if he had been allowed to complete the contract.

It would not appear that any evidence was given as to the memorandum or articles of incorporation of the defendant Company and as to the corporate powers of the Company, its directors or officers, other than that the Company was carrying on active operations in the cutting of timber and the manufacture of the same in a large way.

The appellant, the defendant Company, set up by way of defence that the contract was entered into without their knowledge, and was entered into without authority, and that it was not binding; that the work was unsatisfactorily done; that the plaintiff abandoned the contract; that the plaintiff, on the 10th of September, 1912, accepted $383 in full satisfaction of anything due under the contract; that the contract was then terminated, and that the plaintiff, in any event, sustained no damages in respect thereof. It will be seen that the trial judge in his findings held against all of these contentions of the defendant, except that no reference is made to the contention which is upon the pleadings, but evidently not pressed at the trial, that the receipt by the plaintiff of the $383 was in any way a satisfaction of the plaintiff's claim.

The able argument of counsel for the appellant was made with much ingenuity—that the extent of the authority conferred upon the logging superintendent was exceeded, and at best could not be held to extend beyond the right to enter into a contract for one season's work—and not more—relying greatly upon *In re Cunningham & Co., Limited* (1887), 57 L.J., Ch. 169. This is a decision of North, J. and in effect held that in the circumstances, it not being shewn that the giving of the note was necessary or that the giving of it was within the ordinary business of the company, the note was not binding on the company. North, J. at p. 172, said:

"What is necessary for carrying on the business of the firm under ordinary circumstances and in the usual way is the test. . . . . Had Hunter authority to do what he did? In the first place, was it necessary for the carrying on of the business of the company that this contract with Liberos should be entered into?"

In my opinion, applying the test put by North, J., the letter of the managing director Lund to the logging superintendent previously herein referred to, amply satisfies the requirements of the law as stated by North, J. to authorize the contract being entered into, and to establish liability thereunder upon the defendant.

It is manifest that the contract was in relation to essentials in the business of the defendant—the cutting of timber to provide the necessary logs for manufacture into lumber in the

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ordinary course of the business of the Company. It is trite law that a company is liable for the acts of its agents, undertaken by them for and on behalf of the company, and in the course of the business of the company; it is true perhaps that this proposition may be stated too broadly at times—no doubt the surrounding circumstances must be looked at, and in some cases the scope of authority may be exceeded. Lord Cranworth, in dealing with the liability of a company in *Ranger* v. *The Great Western Railway Co.* (1854), 5 H.L. Cas. 72 at p. 86, said:

"But where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accomplished through the agency of individuals."

It is not the law that persons dealing with companies must enquire into what Lord Hatherley called "the indoor management." There is the right to presume that that which is being done is done with all due regularity: *Royal British Bank* v. *Turquand* (1856), 6 El. & Bl. 327; *Mahony* v. *East Holyford 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 at p. 469; *In re County Life Assurance Company* (1870), 5 Chy. App. 288.

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In the present case, whilst there is no evidence that the plaintiff enquired into the authority of the logging superintendent—the fact that the logging superintendent presumed to act for the Company in regard to the ordinary business of the Company, and with the precision of having the contract in triplicate, to be of record with the Company—in my opinion, the *onus probandi,* if at any time upon the plaintiff, was shifted, and it rested with the Company to displace the right in the plaintiff to insist that the logging superintendent was clothed with the necessary authority to make the contract, and one binding upon the Company. Maule, J. in *Smith* v. *Hull Glass Co.* (1852), 21 L.J., C.P. 106 at p. 110 said:

"This is a case of persons or a body corporate carrying on business at a certain place by persons authorized by them and acting with their apparent knowledge."

In the present case, we have a managing director acting and deputing to the logging superintendent the entry into contracts in the ordinary course of the business of the Company—and

upon all the facts—the part performance and payments by the Company, which reasonably could only have been made as referable to some contract made with the plaintiff—is it now open to the Company to successfully contend as a matter of law that no sufficient power was delegated to the logging superintendent to enter into the contract? I would say it is not open. Unquestionably the contract under consideration in the present case is one within the objects of the Company. Lord Cairns in *Ferguson* v. *Wilson* (1866), 2 Chy. App. 77 at p. 89 said:

"The company itself cannot act in its own person, for it has no person; it can only act through directors, and the case is as regards those directors, merely the ordinary case of principal and agent."

Blackburn, J. in *McGowan & Co. (Limited)* v. *Dyer* (1873), 21 W.R. 560 at p. 561 said:

"Christie, as managing director, had a most extensive authority to act for the company, and we do not at all question that the company must be bound by every act of his when acting for them within the scope of that extensive authority."

In the present case it cannot, upon the evidence, be contended that Lund did not have extensive authority; in fact, he admitted this, and when it is considered that in the particular operations of the Company it was—it may be said as of necessity that extensive powers should be exercisable by the managing director, and when the managing director expressly imposes upon the logging superintendent the responsibility to have a continuous supply of logs at the mill, it seems to me that it is impossible to contend that the contract was not within the scope of the logging superintendent's authority, being one in the ordinary course of the business of the Company.

Upon the question of damages, I do not think that there should be any difficulty in assessing them, nor can they be said to be merely speculative or too remote: *Simpson* v. *London & North Western Railway Co.* (1876), 45 L.J., Q.B. 182.

It therefore follows that, in my opinion, the decision of the learned trial judge was right, and the appeal should be dismissed.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellant: *A. B. Macdonald.*
Solicitor for respondent: *P. E. Wilson.*

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BURGESS v. ZIMMERLI

BURGESS v. ZIMMERLI.

Dentistry—Unlawful practising—Work by unqualified assistant—Action by employer for services so rendered—Dentistry Act, R.S.B.C. 1911, Cap. 64, Secs. 59, 60, 63, 64, 70 and 71.

In an action by a qualified dental surgeon for a balance due for professional services, when in fact, the work was performed by an unqualified assistant, whose remuneration under arrangement with his principal was a percentage of the price of the work he did:—

Held (MARTIN, J.A. dissenting), that there was a violation of the Dentistry Act, and the plaintiff was not entitled to recover.

Held, further, on the defendant's counterclaim for the return of moneys paid on account of the services so rendered, that as the defendant was not, at the time of payment, aware that the plaintiff was violating the law, he should recover the amount so paid.

Decision of LAMPMAN, Co. J. reversed.

Statement

APPEAL from a decision of LAMPMAN, Co. J. in an action tried by him at Victoria on the 26th of June, 1913. The plaintiff, a duly-qualified dental practitioner, brought action for $122, balance due for professional services. The whole account was $243.50, but $121.50 had been paid. The defendant set up that the work done was actually performed by one Hammond, an unregistered dental practitioner working in the plaintiff's office, and that under the Dentistry Act the plaintiff was not entitled to recover for services so rendered. It appeared from the evidence that Hammond was a graduate of a dental college in Philadelphia, but was not qualified to practise in British Columbia. On coming to Victoria he arranged with the plaintiff to work in his office on a 50 per cent. basis until such time as he passed the Dental Board. The defendant counterclaimed for re-payment of the $121.50 paid on account of the services rendered, on the ground that it was paid through mistake and in the belief that Hammond was a duly-qualified dental practitioner and through the misrepresentation and fraud of the plaintiff in holding out the said Hammond as a qualified practitioner. The trial judge gave

judgment for the plaintiff for the full amount claimed and dismissed the counterclaim. The defendant appealed.

The appeal was argued at Victoria on the 27th of January, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

D. S. Tait, for appellant: An unqualified person did practically all the work for which the remuneration is claimed and the defendant did not know he was being treated by an unqualified person. He relied on sections 60, 63, 64 and 70 of the Dentistry Act. Section 70 provides for a penalty in case of an unqualified person practising, and from the Act as a whole it can be inferred that it was intended to protect the public. Where an act is prohibited under a penalty, the person who commits that act acquires no right of action: see *Brown* v. *Moore* (1902), 32 S.C.R. 93; *North-Western Construction Co.* v. *Young* (1908), 13 B.C. 297; *Komnick Brick Co.* v. *B.C. Pressed Brick Co.* (1912), 17 B.C. 454; *Wright* v. *Elliott* (1911), 21 Man. L.R. 337. To shew that the penalty under section 70 of the Act involves a prohibition to practise as a dentist see *Taylor* v. *The Crowland Gas and Coke Company* (1854), 23 L.J., Ex. 254; *Barton* v. *Piggott* (1874), 44 L.J., M.C. 5; *Cope* v. *Rowlands* (1836), 2 M. & W. 149; *Victorian Daylesford Syndicate, Limited* v. *Dott* (1905), 2 Ch. 624; Halsbury's Laws of England, Vol. 7, p. 402, par. 833. If the work so performed is prohibited and the contract cannot be enforced, then the money already paid to the plaintiff must be refunded: see Halsbury's Laws of England, Vol. 7, pp. 409-10; *Browning* v. *Morris* (1778), 2 Cowp. 790 at p. 792; *Barclay* v. *Pearson* (1893), 2 Ch. 154; *Chapman* v. *Michaelson* (1909), 1 Ch. 238.

Argument

F. C. Elliott, for respondent: Hammond was working under the personal supervision of Burgess, of which there is the evidence of Burgess himself, and he does not come within the prohibitive sections of the Act: see *Brown* v. *Robinson* (1824), 1 Car. & P. 264. On the question of an assistant see *Howarth* v. *Brearley* (1887), 19 Q.B.D. 303 at p. 305; *De la Rosa* v. *Prieto* (1864), 16 C.B.N.S. 578 at p. 581; *Turner* v. *Reynalt*

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(1863), 14 C.B.N.S. 329 at p. 334; Poley on Solicitors, p. 78. Section 70 of the Act applies to a case where an unlicensed person enters into a contract with a licensed person and then works absolutely alone; in such a case they are both liable to the penalty imposed under the section. Unless a person holds himself out to the public as practising the profession for hope of reward or gain he is not liable: see Maxwell on Statutes, 5th Ed., p. 644.

Tait, in reply, referred to section 71 of the Act as to one holding himself out to practise.

Cur. adv. vult.

7th April, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think there was a clear violation of the Dentistry Act, and, therefore, the plaintiff in the action (respondent in this appeal) was not entitled to recover for fees charged the defendant for dentistry work done in such violation.

As regards the counterclaim for moneys already paid by the defendant to plaintiff on account of the bill, in view of the fact that defendant was not at the time aware that the plaintiff was violating the law, I think he is entitled to judgment for the sum for which he has counterclaimed.

The appellant should have the costs here and below.

IRVING, J.A.

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

In my opinion, Hammond was practising as a dentist under cover of Burgess's professional licence.

MARTIN, J.A.

MARTIN, J.A.: It is admitted that the defendant had the benefit of the dentist's work that was done for him and his family, but he seeks to avoid paying for it on the ground that Hammond, the employee who did the work in the plaintiff's office, was not a registered dentist, and was, therefore, not entitled to practise as such under the Dentistry Act. We were referred to sections 59, 60, 63-4 and 70-1 of that Act in support of this contention, but, in my opinion, after a careful consideration of them in the light of the authorities, they fail to do so,

because, as a matter of fact, on the undisputed testimony, Hammond was not "practising" in the true sense of that term, but was an assistant to the plaintiff and employed as such in his office, and was there subject to his supervision. This is not the case of a registered practitioner putting an unregistered one in charge of a branch office, or in charge of his chief office during his absence, but that of an assistant being employed by a registered practitioner. It is impossible for a dentist in large practice to carry on his occupation without assistants of various kinds and more or less highly skilled and correspondingly paid. As Mr. Justice Byles said in *De la Rosa* v. *Prieto* (1864), 16 C.B.N.S. 578 at p. 581:

> "A great many attendances, in the case of a medical man in large practice, must be given by assistants,"

and the higher the class of his practice the higher the skill of his assistants. Nor does anything turn upon the manner of payment, and I see no good reason why the remuneration should not depend upon the amount of work done; that method of payment is often an incentive to industry. There is nothing at all inconsistent with this view in the statement in section 63 that "the right . . . . to practise" is "a personal right": like many other personal rights, it involves the employment of others to exercise it to the full extent. There is nothing in the Act which requires assistants to be indentured or to be certificated. Section 64 permits dental students to practise, *i.e.*, do dental work and surgery, "under the personal supervision of a member of the college," but section 64 prohibits them from being "placed in charge of any dental office." It is not contended that Hammond was placed in charge of the plaintiff's office. Section 70 does not touch this case, and to apply it simply, in my opinion, with all due respect to that of others, evades the real point, because Hammond did not, in fact, "practise or profess to practise" dentistry, unless it can be said that to act as a skilled assistant is to do so.

It must be remembered that in cases of this kind the prohibition and the offence must be undoubted, because, as was said in *Turner* v. *Reynall* (1863), 14 C.B.N.S. 328 at p. 335, on a similar Act, "This is a disqualifying statute, and, there-

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fore, to be construed strictly." If the statute were intended to prohibit the employment of a skilled uncertificated assistant why does it not say so in plain terms? As was said in *Haffield* v. *Mackenzie* (1860), 10 Ir. C.L.R. 289 at p. 296, "Nothing could have been easier than for the Legislature, if they had so designed," where the reason is also given for refraining from doing so, *viz.*: "The framers of the Act were probably conscious that, if they had proposed more stringent provisions, the measure would not have received the sanction of the Legislature." The point is really put in a nutshell by Chief Justice Abbott in *Brown* v. *Robinson* (1824), 1 Car. & P. 264, thus:

"No practice, while in the service of another, can be a practising under this Act."

GALLIHER, J.A.

GALLIHER, J.A. concurred in allowing the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This is an appeal from a decision of LAMPMAN, Co. J. in favour of the plaintiff for $122, being a balance claimed to be due for professional services as a dentist. The account in the whole was for $243.50, upon which $121.50 had been paid. The services rendered would appear to have been for work done upon the mouth and teeth of the defendant and to the extent of $3.50 for Miss Elizabeth Zimmerli. It would not appear that any of the work done was simply mechanical, *i.e.*, the supply of false teeth, but was all work done in the mouths of the patients, being treatment, extractions, building up and the placing of crowns, and the supply of the materials therefor.

The defence was that the services were rendered by one Hammond, not a duly qualified or registered dental practitioner, although so held out by the plaintiff, and that under the provisions of the Dentistry Act the plaintiff, although himself qualified, was not entitled to recover for any of the services rendered.

Mr. *Tait*, in a very careful argument, on behalf of the appellant, urged most forcibly that not only should the action be dismissed, but that the counterclaim for the return of the $121.50 paid should be allowed, upon the ground that the pro-

fessional services rendered and the materials supplied were rendered and supplied illegally and contrary to the provisions of the Dentistry Act. It would appear that Hammond was a graduate from the Philadelphia Dental College, but not qualified under the Dentistry Act, and he was not a duly-indentured student of dentistry under the Dentistry Act. It would also appear that the Dentistry Act is an Act passed for public protection, and may also be said to be in the way of protecting duly-qualified dental practitioners, although I cannot say that this latter protection can be said to be spread in terms upon the statute book.

The plaintiff in his evidence dealing with the position and terms of engagement he had with Hammond said:

"When he came with me our arrangement was there was no written agreement simply verbal, of course he was not a registered man therefore I did not think it was the right thing to do to enter into a written agreement, so I told Mr. Hammond that I would allow him on the 50 per cent. basis until such time as he had passed the Board."

The arrangement made, in my opinion, was clearly against the intention of the Legislature in the enactment of the Dentistry Act: see sections 59, 60, 63, 64, 65, 70, 71, 72, and, in my opinion, the intention of the Legislature is clearly indicated in the language of the Act. Sections 63 to 68, inclusive, follow under the heading "Provisions for Public Protection," and these words are to be found in section 63:

"And every such member so practising shall at his office or place of practice, by a proper sign, conspicuously placed, set forth his proper name, so that all persons applying to him for professional aid and treatment may have certainty of his identity and means of availing themselves of the protective provisions of this Act."

Section 63 (*a*) admits of partnership only between registered members of the College of Dental Surgeons, and, therefore, prohibits any partnership with any person not a member of the College.

Upon the argument I was to a considerable extent impressed by *Hennan and Co. (Limited)* v. *Duckworth* (1904), 20 T.L.R. 436, and *Seymour* v. *Pickett* (1905), 74 L.J., K.B. 413, it being held by the Court of Appeal in England in the latter case that:

"The Dentists Act, 1878, s. 5, prevents an unqualified person from

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recovering any fee or charge for dental operations or dental attendance or advice, but there is nothing in the Act which renders the contract to do such work illegal, and notwithstanding section 5 an unqualified person can recover in respect of mechanical work done or materials supplied in the course of such dental operations or attendance."

It is to be, however, noted that this is not an action by an unqualified person, but by a member of the College of Dental Surgeons, and whose right to practise arises only by reason of the Act and under its protection, and he permits an unqualified and unregistered person to do the work he is suing for. Further, the Acts differ—the English Act is aimed at the prevention of the practice of dentistry and dental surgery, and the prevention of recovery of any fee or charge for any dental operation, dental attendance or advice, unless registered; the British Columbia Act provides against all this—but further provides (sec. 60) against "the performance of any operation or for any medicine or materials that he may have prescribed or supplied as a dentist or dental surgeon unless he be registered."

Now, it is apparent if one, not a member of the College, were to sue in this Province, he could not recover—even to the extent it was held there was the right of recovery in *Hennan and Co. (Limited)* v. *Duckworth* and *Seymour* v. *Pickett, supra.*

MCPHILLIPS, J.A.

Then upon the facts the materials supplied in the present case were worked in materials upon the teeth, not merely materials of a mechanical nature supplied, such as false teeth. Wills, J. in *Hennan and Co. (Limited)* v. *Duckworth, supra,* said at p. 437:

"Dental operation must mean an operation in the surgical sense upon a living patient, and not work in making false teeth."

Now, the question that presents itself for consideration is this: If the unqualified or unregistered person could not recover for that which is sued for, can the qualified and registered person, which the plaintiff is, recover? I am of the opinion that what occurred was the doing of that which was illegal, and, that being so, no part of the contract can be enforced. In arriving at this conclusion I have considered and relied upon the following authorities: *Brown* v. *Moore*

(1903), 32 S.C.R. 93, 97; *Wright* v. *Elliott* (1911), 21 Man. L.R. 337; *Taylor* v. *The Crowland Gas and Coke Company* (1854), 23 L.J., Ex. 254; and *Cope* v. *Rowlands* (1836), 2 M. & W. 149.

I am of the opinion that the money paid and covered by the counterclaim may be recovered back, and in arriving at this conclusion I have considered and relied upon the following authorities: *Browning* v. *Morris* (1778), 2 Cowp. 790; *Kearley* v. *Thomson* (1890), 24 Q.B.D. 742; *Barclay* v. *Pearson* (1893), 2 Ch. 154; *Lodge* v. *National Union Investment Company, Limited* (1907), 1 Ch. 300; *Victorian Daylesford Syndicate, Limited* v. *Dott* (1905), 2 Ch. 624.

It therefore follows that, in my opinion, the judgment of the trial judge should be set aside, the action dismissed with costs, the counterclaim allowed with costs and the appeal allowed.

Appeal allowed, Martin, J.A. dissenting.

Solicitors for appellant: *Tait, Brandon & Hall.*
Solicitors for respondent: *Courtney & Elliott.*

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SEIPPEL LUMBER CO. v. HERCHMER

SEIPPEL LUMBER COMPANY v. HERCHMER *ET AL.*

Crown grant—Error in survey—Establishment of true line—Powers of officials of Crown lands department—Chief commissioner of lands—Jurisdiction—Official Surveys Act, R.S.B.C. 1911, Cap. 220, Sec. 2—Land Act, R.S.B.C. 1911, Cap. 129.

Where the description of land in a Crown grant gives a point of commencement, the position of which is not disputed, and from which the true boundaries of the land granted can be ascertained by a proper survey according to the description in the Crown grant, it is not within the power of the officials of the Crown lands department to establish as the true line one erroneously run by a negligent or incompetent surveyor.

Section 2 of the Official Surveys Act deals only with boundaries that are surveyed and run under the authority of the Government, and does not apply to a survey run at the instance of the land owner, the notes of which are received by the proper officials in the Crown lands department.

The chief commissioner of lands has no jurisdiction under the Land Act to determine a dispute concerning lands already Crown granted.

Statement

ACTION tried by HUNTER, C.J.B.C. at Vancouver on the 15th of February, 1914, for trespass by the defendants on sub-lot (4) of lot 4590, group 1, Kootenay District, the property of the plaintiff Company. A Crown grant was issued for lot 4590 to the British Columbia Southern Railway on the 3rd of October, 1901, subject to a survey on the ground. The land was described in the Crown grant by metes and bounds commencing at a fixed point on the adjoining lot, the position of which was not questioned. The railway company had the lot surveyed in 1903, under directions of the land department, by Mr. Swannell, P.L.S., whose plans and field notes were filed in the lands department, and approved. Owing to the necessity of making a further survey of the eastern boundary of said lot the railway company employed John McLatchie, P.L.S., who in 1906 re-surveyed said eastern boundary, and found an error in the Swannell survey, namely, that the Swannell line was 34.23 chains west of the true eastern boundary. In 1902, the defend-

ants obtained three timber licences adjoining the eastern boundary of lot 4590, which were later surveyed by Alfred Cummings as lots 9472, 9473 and 9474; they being surveyed as adjoining the eastern boundary of lot 4590 as surveyed by Swannell, he declining to accept the line as defined by McLatchie. Sub-lot (4) of lot 4590, which was the eastern portion of said lot and adjoined the timber licences in question, was sold by the railway company to the North American Land and Lumber Company, Limited, in 1906, who in turn sold to the plaintiff in February, 1910. Cummings's survey of the timber berths was filed and approved by the lands department, and by letter of the 22nd of March, 1911, the chief commissioner of lands advised the railway company of the approval of said plans and that the eastern boundary of lot 4590 as surveyed by Swannell was established as the true eastern boundary of said lot. The survey was gazetted in April, 1911. A protest was lodged by the railway company against this gazetting and an appeal was taken from the chief commissioner's decision dismissing the protest to a judge of the Supreme Court (CLEMENT, J.), who dismissed the appeal. The plaintiff commenced this action on the 10th of September, 1913.

Statement

Davis, K.C., and *D. B. Kerr*, for plaintiff.
Harvey, K.C., and *Stockton*, for defendants.
W. S. Deacon, for the Attorney-General.

HUNTER, C.J.B.C.: The plaintiff in this case is bringing an action for trespass against the defendants, resting upon its Crown grant. By the terms of the Crown grant, its line is described as "commencing at the intersection of the westerly limit of lot 4589, group 1, Kootenay District, with the centre line of the British Columbia Southern Railway, said point being station zero of a traverse of a portion of the said railway made by W. B. Gauvreau, P.L.S., and recorded in the department of lands and works in Victoria on the 15th of December, 1900."

Judgment

It is beyond dispute that this station zero is a fixed point, as to the situation of which there is no controversy. It is

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therefore apparent that a competent surveyor could at once, having located point zero, run a line due north as required by the terms of the Crown grant and in that way determine the plaintiff's boundary. It has, however, been strenuously argued that although such a line as that can be accurately located, and although according to all known scientific laws there can be only one line which would satisfy the conditions, at all events until the earth's axis is changed, yet it is within the power of different officials, such as surveyors-general and chief commissioners, to say that a line as established by some negligent or incompetent surveyor, though it is not the true line, shall be deemed to be the true line. It seems to me to be a very startling proposition indeed, that a man who has got a Crown grant and whose boundary can be definitely ascertained beyond any reasonable doubt or controversy may wake up some morning to find his property swept away by the decisions of such officials, which decisions may apparently be given behind closed doors, without any reason, without any notice and without any appeal to a responsible civil tribunal.

Judgment

There is no controversy in this action, at all events, if there is, then I find that the so-called Swannell survey was absolutely erroneous, with the result that it lops off over 400 acres covered by the plaintiff's grant. On Mr. *Harvey* being pressed by the Court to say whether or not he would support the accuracy of that survey, he did not see fit to give the Court a definite answer, but, notwithstanding that, I think I can safely say that a casual inspection of Mr. Swannell's notes, even to the mind of a layman, reveals the fact that they are absolutely and startlingly erroneous. Referring to station 19, the easting is given as 4.49, subtending an angle of 7 degrees and 44 minutes, the side of which is three chains 34 links. Now, any school boy can at once see that it is impossible for the line subtending an angle of 7 degrees and 44 minutes in a right-angle triangle to be 4.49 chains when one side bounding the angle is only 3.34, so that any official in the land office, if he had taken the trouble to glance at these notes, even in a casual way, could have seen that they were absolutely wrong, and, as a matter of fact, the line should have been .449 instead of 4.49.

Now, this survey of Swannell's was found as early as 1906 to be absolutely wrong by Mr. McLatchie. In the meantime there had been a communication, in 1904, to Mr. Ross representing the defendants, to the effect that the chief commissioner had decided that the boundary line as established by Mr. Swannell under the authority of the Government was "the true and unalterable boundary," notwithstanding the fact that only certain points on that boundary had been fixed by Mr. Swannell and that the boundary had not been completely run and surveyed by him. That ruling was reversed in October, 1907, as appears by a letter signed by the deputy minister of lands to the effect that he was directed by the chief commissioner to state that the line established by Mr. McLatchie had been accepted by the department as being correct, and the effect of it was to shew that the timber licences were overlapping the boundaries of lot 4590. So far as that ruling being final and unalterable, as one would expect to find it, we find that again in 1910 that ruling is reversed and the original ruling restored, in a letter from the same official, and the admittedly erroneous line declared to be "the final and unalterable boundary." He says he is directed by the chief commissioner to advise that the surveys of those lots, being the defendants' licences, will be gazetted, and, so far from finding the commissioner's rulings final and unalterable, I find that about the only matter that was not final and unalterable were the commissioner's rulings themselves, and it is not beyond the bounds of possibility that on further consideration by some future commissioner the old decision of 1907 will be restored and so on *ad infinitum*.

Judgment

It is alleged, however, by the defendants that the fact that the Canadian Pacific Railway or the British Columbia Southern took an appeal from the last decision, in some way or other had a binding effect and that the matter had become closed. All I need say about that is, that that was a proceeding taken by their predecessors in title, subsequent to the conveyance to the plaintiffs. The plaintiffs themselves, not being parties to the proceedings, cannot in any way be bound, as Mr. *Harvey* suggests, by the fact that they were privies of the Canadian Pacific Railway. How privies can be bound by the

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action of their predecessors subsequent to their grants under which they claim is a matter that passes my comprehension. Then it is sought to support the ruling by reference to section 2 of the Official Surveys Act, in which it is enacted that all boundary lines surveyed and run under the authority of the Government heretofore or hereafter shall be the true and unalterable boundaries, etc. A casual glance at that section shews that it is dealing with boundaries that are surveyed and run under the authority of the Government. Now, I am unable to accept the proposition that because a land owner selects his own surveyor and his notes are received by the proper officials at the Government buildings, that constitutes a survey carried on under the authority of the Government within the meaning of the Act. Not only that, but the language, when carefully looked at, certainly refers only to boundaries which are "surveyed and run" and not to boundaries as in this instance, portions only of which are marked out and on which only certain points are located.

Then, referring to the proceedings that were taken before the commissioner, I am clearly of the opinion that there was no jurisdiction for the commissioner to entertain a dispute of this character. The very heading of the Act, I think, shews that. It is an Act purporting to deal with Crown lands, and the chief commissioner is the official empowered and required by the Act to administer those lands. How a dispute concerning lands already Crown granted can in any way come under the purview of that Act in the absence of the most positive legislation I am unable to perceive. As I have said, the effect of such a ruling as that, if upheld, would be that people who had land Crown granted to them could have their property swept away by decisions of bureaucratic officials without even the safeguard of publicity or recourse to Courts of law.

Judgment

In regard to the Act cited by Mr. *Davis,* I do not think there is much to be gathered from that, because that was a private Act and in the nature of a private bargain between the Government and the railway, and if they had recognized the other boundary I think Mr. *Davis* would have been the first

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to argue that that in no way would be binding on his clients, and I think he would have been right.

The plaintiff is entitled to the relief prayed. As to the costs, the defendants other than the Attorney-General will have to pay costs, and, were it not for the Crown Costs Act, the Attorney-General would also have had to pay costs, as no sufficient reason appears for his intervention in the litigation, nor was there any explanation as to why his counsel undertook to argue the defendants' case on the merits, although represented by their own counsel.

Judgment for plaintiff.

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Negligence—Contractor erecting fire-escape—Foreman in charge of construction—Fall of floor—Negligence of foreman—Employers' Liability Act, R.S.B.C. 1911, Cap. 74, Sec. 3, Subsec. (3).

The defendant had under construction the erection of a fire-escape on the wall of a theatre, his foreman superintending the construction. The plaintiff and a fellow-workman, F., were working on one of the floors or landings of the fire-escape, which consisted of an iron grating in two parts, supported at the ends by two bars of angle iron, the ends of which were imbedded in and supported by the east and west walls of the enclosure in which the fire-escape was constructed, one two inches wide touching the wall to the north for its full length, and the other three inches wide supporting the grating at its outside edge. Riveted to the outside of the latter were upright posts of angle iron of smaller size supporting and forming part of the railing guarding the outside edge of the platform. While these upright posts remained in place the grating was held secure. The foreman ordered the plaintiff and F. to drive out two rivets that held the upright post to the outside of the three-inch bar on the fifth floor, and put in their place two stove bolts. Upon F. driving out the rivets, the upright post being loose and no longer holding the grat-

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ing in place, the grating slipped off the bar along the wall and fell with the two men to the floor below, injuring the plaintiff. In an action for damages under the Employers' Liability Act the jury brought in a verdict for the plaintiff.

Held, on appeal (GALLIHER, J.A. dissenting), that the jury might reasonably conclude that the release of the upright post brought about the fall of the grating, and that there was, therefore, evidence upon which to find the defendant negligent through his foreman not seeing that the platform was properly secured.

Per IRVING, J.A.: Buildings in the course of erection are "the works" of the person erecting them within the meaning of the Employers' Liability Act.

Statement

APPEAL by defendant from a decision of MORRISON, J. and the verdict of a jury at Vancouver on the 31st of October, 1913, in a damage action for personal injuries sustained by the plaintiff while in the employment of the defendant, owing to alleged negligence and defective arrangements in connection with the work of constructing a fire-escape on a theatre.

The appeal was argued at Victoria on the 23rd of January, 1914, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Argument

H. S. Wood, for appellant: The action is under the Employers' Liability Act. This was a case where a contractor was building the fire-escape who was someone other than the owner of the building. As to whether the construction of a fire-escape comes within the word "works" within the meaning of the Act, see Beven on Negligence, 3rd Ed., 695; *Howe* v. *Finch* (1886), 17 Q.B.D. 187; *Conway* v. *Clemence* (1885), 2 T.L.R. 80; *Brannigan* v. *Robinson* (1892), 1 Q.B. 344; *Everett* v. *Schaake Machine Works* (1912), 17 B.C. 271. The cases referred to in Ruegg's Employers' Liability and Workmen's Compensation, 8th Ed., p. 110 *et seq.*, all refer to "ways," and are thus distinguishable. The verdict was not justified by the evidence. There is no evidence to support the finding that the grating was not properly secured. If there was any defect, it was the very defect he was sent to remedy: see *Davidson* v. *Stuart* (1903), 34 S.C.R. 215; *Booker* v. *Higgs* (1887), 3 T.L.R. 618; *McArthur* v. *Dominion Cartridge Company* (1905), A.C. 72; *Pegram* v. *Dixon* (1886), 55 L.J., Q.B. 447.

The result of the statement by the judge to the jury is that the dictum *res ipsa loquitur* applies. Even if there was a defect, there is nothing to shew that there was any negligence or carelessness by the defendant or his employees. On the question of misdirection see *Pickering* v. *G.T.P. Ry. Co.* (1913), 5 W.W.R. 666.

Argument

J. W. de B. Farris, for respondent: This is a "way" because it is used as a scaffold: *Carter* v. *Clarke and others* (1898), 78 L.T.N.S. 76. The heads of the rivets having been cut off is evidence of a defect: see *Farmer* v. *B.C. Electric Ry. Co.* (1911), 16 B.C. 423; *Wilkinson* v. *B.C. Electric Ry. Co., ib.* 113. We cannot point out any negligent act of the defendant, but the employee who was sent to repair the defect was in the position of an employee under the Employers' Liability Act.

Wood, in reply.

Cur. adv. vult.

7th April, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The jury found the defendant negligent "through his foreman not seeing that the platform was properly secured." The defendant was contractor for the erection of fire-escapes on the walls of the new Orpheum Theatre in the City of Vancouver. The plaintiff and one Fleck, both helpers—that is to say, men who were learning their trade, not journeymen in that class of work, were working on one of the landings of the fire-escape, which consisted of an iron grating supported at one end by a bar of angle iron with a two-inch face, and at the other by a similar bar with a three-inch face. Rivetted to the latter were upright posts of similar iron supporting and forming part of the railing guarding that end of the platform. While these upright posts remained in place the grating was secure, but if they were removed the grating might slip forward and lose its hold of the two-inch rest at the other end and fall.

Johnson, defendant's foreman, ordered the plaintiff and Fleck to go upon the said grating and drive out the rivets which fastened one of the upright posts, and while Fleck was doing this the grating fell and precipitated both men to the platform at the storey below, injuring the plaintiff.

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On cross-examination, Fleck testified:

"This is your theory then, see if I am right that on the instant you gave the last blow to the rivet which knocked it through this upright sprang away, and the other thing (the grating) came with it?" I believe it did."

This theory, I think, is borne out by the evidence. No other explanation of the fall of the grating except by other interference with it by these two men, which they deny, was offered, and I think the jury might reasonably conclude that the release of the upright post brought about the fall of the grating.

The action is brought under the Employers' Liability Act, and the finding of the jury above set out must, I think, be referable to section 3, subsection (3) of that Act.

What, then, was the negligence, if any, of Johnson? Two inexperienced men, paid apprentices I should call them, were ordered to go upon a grating, using it as a platform or scaffold from which to work on a railing which, while safe in its then position, would become unsafe when the rivets were driven through and the upright released. They were not warned of the danger, and had no knowledge that the driving out of the rivets would render the platform unsafe. The skilled foreman knew, or must be presumed to have known, of the danger he was subjecting them to. He neither warned them of it nor took precautions to otherwise secure the platform as he might easily have done, and which the jury have found he ought to have done. I think it cannot, therefore, be said that the jury had no legal evidence upon which to found their verdict. These men were not erecting the grating, they had had nothing to do with its erection, they were using it as a scaffold from which to work upon the railing, which was their business there, and which, so far as they knew, had nothing to do with the stability of the platform.

MACDONALD, C.J.A.

Defendant also complains of misdirection on the part of the learned judge in that he directed the jury as follows:

"Now, where the thing or the appliance or the erection or whatever you may call it—in this case the fire-escape—is shewn to be under the management of the defendant or his servant, and the accident is such as in the ordinary course of things does not happen if those who have the management take care—take reasonable care—it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of care."

Assuming that to be an erroneous direction on the facts and in the circumstances of this case, the jury's verdict is not *res ipsa loquitur*. The negligence is definitely assigned, so that this direction apparently did not influence them in coming to their conclusion.

I think, therefore, the appeal should be dismissed.

IRVING, J.A.: *Brannigan* v. *Robinson* (1892), 1 Q.B. 344, cited by Mr. Ruegg in Part IX. of Master and Servant in Halsbury's Laws of England, Vol. 20, at p. 140, as an authority for the proposition that buildings in the course of erection are the works of the person erecting them, and so within the Employers' Liability Act, puts an end to one contention of the appellants' counsel. There we have the verdict finding it was fault of the plaintiff's foreman. *Reynolds* v. *Holloway* (1898), 14 T.L.R. 551, seems to cover that aspect of the case.

Dealing with the ground that the verdict was against evidence.

In *Paterson, Widow and Children* v. *Wallace & Company* (1854), 1 Macq. H.L. 748, it was said *res ipsa loquitur* has no application to a question between master and servant. That, of course, was at common law, and was inapplicable by reason of the doctrine of common employment, but under the Employers' Liability Act, where servant is in same position as an outsider, there is no longer the same wide exemption under the fellow servant doctrine, and, therefore, there is no reason for the complete restriction of the maxim. It, after all, is a mode of proving negligence, and where warranted by the facts it will apply: see *Huxam* v. *Thoms* (1882), 72 L.T. Jo. 227.

IRVING, J.A.

In *Smith* v. *Baker & Sons* (1891), A.C. 325, Lord Halsbury, L.C. at p. 335, pointed out that the unexplained and unaccounted for fact, that the stone was being lifted over a workman and that it fell and did him damage, would be evidence for a jury to consider of negligence in the person responsible for the operation. See also *Walker* v. *Olsen* (1882), 19 S.L.R. 708 (Ct. Sess.), cited in Minton-Senhouse on Accidents to Workmen, 2nd Ed. at p. 6, where tackle for hoisting buckets became loose for some unexplained cause, it was held *prima-facie* evidence that the tackle was defective.

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The learned judge in his charge did not say more than Lord Halsbury said in *Smith* v. *Baker & Sons, supra,* and he immediately added, "but if you think the accident was caused by a fellow-workman, *viz.*: Fleck, the defendant would not be liable."

I do not think, with deference to the learned trial judge, that he put the instruction as to drawing an inference of *volens* quite fairly to the jury, but later on, at the instance of defendant's counsel, he modified his instruction to meet the views of defendant's counsel.

I would dismiss the appeal.

GALLIHER, J.A.

GALLIHER, J.A.: I would allow the appeal and dismiss the action with costs. I can find no evidence of negligence on the part of the defendant or the foreman Johnson.

In this view I express no opinion on the other points raised by the appellant.

Appeal dismissed, Galliher, J.A. dissenting.

Solicitors for appellant: *McPhillips & Wood.*

Solicitors for respondent: *Farris & Emerson.*

IN RE G. O. TAYLOR, DECEASED.

CLEMENT, J.

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May 28.

IN RE G.O.TAYLOR, DECEASED

Conditional limitations—Executory interests—Supplying omitted words.

The testator by his last will provided, *inter alia*, as follows: "I devise and bequeath all my real and personal property to my wife, Jane Taylor, as long as she remains unmarried. In the event of my said wife marrying at any time after my death, I devise and bequeath all my said real and personal property unto my daughter."

Held, that as to the real estate these provisions constituted a conditional limitation, conferring on the wife a fee determinable on her marrying again, and as to the personal estate, these provisions conferred an absolute interest subject to an executory bequest in favour of the daughter, contingent on the wife's re-marriage.

Statement

PETITION under the Trustee Act heard by CLEMENT, J. at Victoria on the 27th of May, 1914, for the construction of the will of G. O. Taylor, deceased.

Maunsell, for the petitioner, the executor, stated the facts and submitted to the judgment of the Court.

Argument

Mayers, for the wife, submitted that as to the real estate the provisions constituted a conditional limitation, giving the wife a determinable fee, which, upon her death unmarried, would swell into a fee simple absolute. If the wife should marry, her interest would be divested and would immediately vest in the daughter. During the lifetime of the wife unmarried she could dispose of such interest as she possesses in the realty: *In re Moore* (1888), 39 Ch. D. 116, *per* Bowen, L.J. at p. 132; Challis's Real Property, 3rd Ed., 254-62. As to the personal property, the wife takes an absolute interest, but subject to her daughter's executory interest, which would arise if the widow remarried; this applies only to such articles as are not of the class *quæ ipso usu consumuntur*: Jarman on Wills, 6th Ed., Vol. 2, 1453-55. There may be a suggestion that the intention of the testator was that his wife should take her interest merely until death or remarriage, but there is not sufficient indication on the face of the will to enable the Court

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to supply the omission: *Hope* v. *Potter* (1857), 3 K. & J. 206; *Eastwood* v. *Lockwood* (1867), L.R. 3 Eq. 487.

Mann, for the daughter, adopted the same argument.

IN RE G.O.TAYLOR, DECEASED

28th May, 1914.

CLEMENT, J.: I am of opinion that the petitioner Company must upon demand deliver to the testator's widow, Jane Taylor, all the personal estate remaining in its hands after payment of the debts, funeral and testamentary expenses and the costs of administration; that as to such part of the personal estate as consists of things which are consumed in the user the widow takes absolutely; that, subject to the last preceding paragraph, the widow may use and enjoy unless and until she remarries, upon which event happening the personal property of the deceased G. O. Taylor becomes the absolute property of the child, Mary Campbell Taylor; that any dealing with or disposal of such personal estate by the widow can take effect, but subject always to the happening of the contingency of her remarriage, in which event any interest in the personal estate created by the widow will cease and such personal estate will become the absolute property of Mary Campbell Taylor; that if the widow dies the testator's widow —that is to say, if she does not again marry, the personal estate will pass by her will (if any) or upon intestacy, to her next of kin; that the real estate is in effect in the same position; the widow takes the fee simple determinable upon remarriage, upon which event happening the devise over in favour of Mary Campbell Taylor will take effect and any estate or interest which the widow may have created will thereupon cease and determine; that if the widow dies without marrying again, the real estate will pass under her will or upon intestacy to her heir or heirs-at-law; that what has been said as to the real estate of the deceased G. O. Taylor must be taken subject to the law of the place where the said real estate is situate; in other words, this opinion is based upon the assumption that the real estate in question is situate within the Province.

Judgment

Costs to all parties out of the estate as part of the administration.

Order accordingly.

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Fire insurance—Variations of statutory conditions—Forest fires—Unoccupied buildings—"Just and reasonable"—R.S.B.C. 1911, Cap. 114, Secs. 5, 6 and 7.

Practice—Raising new point on appeal—Printing of variations—Conspicuous type—Different coloured ink.

The defendant Company insured the plaintiffs' buildings situated about the entrance to a mine in heavily-wooded country. The policy contained two conditions varying the statutory conditions, whereby they would not be responsible, first, for loss occurring through forest fires and, secondly, for loss if the insured premises should become vacant or unoccupied. The property was partially destroyed by a forest fire. In an action for the recovery of amount of the loss it was held by the trial judge that the variations from the statutory conditions inserted in the policy were just and reasonable, but that upon the evidence there was no justification for an allegation by the defendant Company that the policy was cancelled under the authority of an employee of the plaintiffs prior to the fire. The action was dismissed without costs.

Held, on appeal (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the plaintiffs' appeal should be dismissed.

Held, further (IRVING and GALLIHER, JJ.A. dissenting), that the defendant Company's cross-appeal be dismissed.

Per MACDONALD, C.J.A.: A condition as to vacancy must be judged with reference to the facts of the particular cases under consideration. In the circumstances here the variation was a just and reasonable one, and the defendant Company was entitled to succeed upon the defence that the buildings insured were vacant when destroyed.

Per IRVING, J.A.: The defendant Company is entitled to succeed on the defence that the loss was caused by a forest fire, which, by one of the varied conditions, was excepted from the risk, and it was just and reasonable that it should be.

Upon an application by the plaintiffs to amend the pleadings in order to raise the objection that the variations of statutory conditions were not printed in the policy in conspicuous type or with a different coloured ink, as required by the Fire-insurance Policy Act:—

Held (MCPHILLIPS, J.A. dissenting), that the application must be refused as the objection had not been raised at the trial and was a question of fact which might be elucidated by oral evidence.

Statement

APPEAL by the plaintiffs and cross-appeal by the defendant Company from a decision of CLEMENT, J. in an action tried

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by him at Vancouver on the 13th of May, 1913. The plaintiffs were the holders of a fire-insurance policy from the defendant Company on a number of buildings at the mouth of the Silver King mine, on Toad mountain, near Nelson, B.C. The buildings were partially destroyed by a forest fire on the 31st of July, 1910, the damages being assessed at $2,200. In an action for the recovery of the loss, the defendant Company set up in their defence two conditions inserted in the policy that varied from the statutory conditions, namely, that the defendant Company would not be answerable for the loss occurring through forest fires, or for loss if the premises insured should become vacant or unoccupied. The defendant further alleged that the insurance was terminated by the plaintiffs' written notice to the defendant's agent in Nelson, B. C., terminating the policy. The plaintiffs, in reply, denied having terminated the policy, and claimed that the two conditions inserted in the policy varying the statutory conditions, namely, as to forest fires and as to the vacancy of the buildings insured, were unjust and unreasonable. It was held by CLEMENT, J. at the trial that the facts brought the case within these two conditions and that they were not unjust and unreasonable, but on the defendant's allegation that the policy had been cancelled, which was the main issue at the trial, he found in favour of the plaintiffs, and dismissed the action without costs. The plaintiffs appealed on the ground that the trial judge erred in holding that the variations in the statutory conditions in the policy in respect to "forest fires" and "vacancy" were just and reasonable, and that the onus was upon the plaintiffs to establish that said variations were unjust and unreasonable, and on other grounds. The defendant cross-appealed on the ground that it should have recovered the costs of the action.

Statement

J. A. Clark, for plaintiffs.
Mayers, for defendant Company.

18th June, 1913.

CLEMENT, J.

CLEMENT, J.: At the conclusion of the trial I gave judgment in the plaintiffs' favour on the issue as to cancellation of the policy sued on; but reserved judgment upon the two other

questions remaining for determination, namely, as to the operation and effect of two conditions contained in the policy in variation of the statutory conditions as set out in the Fire-insurance Policy Act, R.S.B.C. 1911, Cap. 114. It was not disputed that the facts in evidence brought the case within the conditions; but Mr. *Clark* urged that they were unjust and unreasonable conditions to be enacted by the Company. At the hearing no evidence was adduced by the plaintiffs directed specially to the question of the reasonableness of the conditions, and it was contended that all variations from the statutory conditions are *prima facie* unjust and unreasonable and that consequently the burden should be upon the Company in that regard. I reserved judgment to consider the point more carefully, intimating that if I should continue of opinion that the burden—except in the case of a variation manifestly unjust and unreasonable upon its very face—is upon the plaintiffs in a case of this kind, I should allow the plaintiffs to adduce evidence along that line. In *Eckhardt v. The Lancashire Insurance Company* (1900), 31 S.C.R. 72 at p. 74, the Supreme Court unqualifiedly approved of the judgment of Meredith, C.J. at the trial (1898), 29 Ont. 695 at p. 699), and as I read that judgment, the question is one to be determined on the circumstances of and surrounding the particular contract, and there is no such presumption as is here contended for. Having so concluded, the case was again called, but no further testimony was adduced. It was, however, admitted that the property insured formed part of a group of structures situate around the mouth of the Silver King mine, upon the wooded mountain side, some miles away from any neighbours; and the "survey" was put in shewing the position of the various structures.

The facts, then, as they are before the Court are that the date of the contract the mine was being operated, the different buildings insured were insured as buildings occupied by various members of the operating staff, and that the *locus* was as above set out. The conditions set up are that the Company should not be answerable, first, for loss occurring through forest fires and, secondly, for loss if the premises insured should become vacant or unoccupied; and, as already intimated, the

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facts bring the case within these conditions. The fire which destroyed the buildings was a forest fire and at the time the mine was not being worked and the various buildings were unoccupied.

After careful consideration I am unable to say that it was unjust and unreasonable for the Company at the date of the contract to stipulate for immunity in the circumstances indicated. I am free to say that, in view of the fact that the Company's refusal to recognize liability was at first (and, indeed, until an amended defence was filed in this action), based solely upon the contention that the policy had been cancelled, their reliance now upon these variations hardly calls for commendation; but legally they are entitled to stand upon their contract unless I can find affirmatively that these variations are unjust and unreasonable. I have tried in vain to propound some good reason for so holding, and must, therefore, dismiss the action. I do so, however, without costs, as the Company failed in the issue upon which most of the time of the trial was taken up.

CLEMENT, J.

The appeal was argued at Vancouver on the 24th and 25th of November, 1913, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Ritchie, K.C., for appellants (plaintiffs): The question is whether two variations from the statutory conditions inserted by the defendant in the policy are valid under the Fire-insurance Policy Act. We contend that they are not just and reasonable, and, further, that the variations are bad, because (1) they are not in a conspicuous type and (2) they are not in ink of a different colour from the body of the document. The variations are very important and should be inserted in accordance with the Act. It is conceded the question as to type and colour of ink was not raised in the Court below, but we have the right to bring it up on an application to amend, which we now do.

[*Per curiam*: This is a question of fact, not one of law, and should have been brought up in the Court below, when all necessary evidence might have been taken on the question. The application to amend is refused.]

As to the variation that the moment the houses were vacant the policy was void, we say this is unreasonable. If a company makes a further addition *prima facie* they are doing something unreasonable: see *Parsons* v. *Queen's Ins. Co.* (1882), 2 Ont. 45. The question is that when the variation cuts down or limits the circumstances under which the insured receives protection, it is *prima facie* unreasonable: see *Eckhardt* v. *The Lancashire Insurance Company* (1900), 31 S.C.R. 72. The variation as to not being liable in case of forest fire is also unreasonable: see *City of London Fire Ins. Co.* v. *Smith* (1888), 15 S.C.R. 69; *Canada Landed Credit Co.* v. *Canada Agricultural Ins. Co.* (1870), 17 Gr. 418; *Abrahams* v. *Agricultural Mutual Ins. Co.* (1876), 40 U.C.Q.B. 175. We submit they are estopped from setting up vacancy as they had given an extension of the policy during vacancy, so there could be no cancellation. On the question of estoppel, see *People's Iife Ins. Co.* v. *Tattersall* (1906), 37 S.C.R. 690; Cameron on Fire Insurance, 236. If an agent says (on threat to insure in other companies): "Do not insure anywhere else, the policy is 'all right,'" the company is estopped from cancelling the policy: see Joyce on Insurance, par. 2231; *Cole* v. *London Mutual Fire Ins. Co.* (1907), 15 O.L.R. 619.

Argument

Mayers, for respondent (defendant): There are three questions: First, as to the burden of proof; second, the test as to what is just and reasonable in the way of variations from the statute and what is not; and, third, the question of waiver and estoppel. Section 7 of the Fire-insurance Policy Act is the governing section. The trial judge held that the question of reasonableness was an affirmative and not a negative proposition; the burden of proof was, therefore, on the plaintiffs. Section 7 puts the matter in such form as to cast the burden on the assured: see *City of London Fire Ins. Co.* v. *Smith* (1888), 15 S.C.R. 69; *Eckhardt* v. *The Lancashire Insurance Company* (1900), 31 S.C.R. 72. If the variation is in the nature of a snare to delude the insurer, that is unreasonable: *The Commercial Union Ass. Co.* v. *The Canada Iron-Mining and Manufacturing Co.* (1873), 18 L.C.J. 80; *McKay* v. *Norwich Union Insurance Co.* (1895), 27 Ont. 251; *Spahr* v. *North Waterloo*

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Ins. Co. (1899), 31 Ont. 525; *Bishop* v. *Norwich Union Insurance Society* (1893), 25 N.S. 492. It was held in the case last cited that non-occupancy voided the policy. On the question of estoppel, what was said could only have been a representation of intention. As to waiver, see *Western Assurance Co.* v. *Doull* (1886), 12 S.C.R. 446; *Hendrickson* v. *The Queen Insurance Co.* (1871), 31 U.C.Q.B. 547; *McGeachie* v. *North American Life Ass. Co.* (1893), 20 A.R. 187; (1894), 23 S.C.R. 148; *Logan* v. *Commercial Union Ins. Co.* (1886), 13 S.C.R. 270. As to the cross-appeal, if the assured wants the policy cancelled he may cancel it by notice at once; this the evidence shews was done by Rudd, who was the assured's agent; if this is correct, it does away with the question of estoppel, as estoppel must be plain and unambiguous: see *Low* v. *Bouverie* (1891), 3 Ch. 82.

Argument

Ritchie, in reply: It cannot be assumed from the fact that a building is vacant that the risk is increased: see *Gould* v. *British America Assurance Co.* (1868), 27 U.C.Q.B. 473; *Peck* v. *Agricultural Ins. Co.* (1890), 19 Ont. 494; *Foy* v. *The Ætna Insurance Co.* (1854), 8 N.B. 29. On the question of estoppel, see *McIntyre* v. *East Williams Mutual Fire Ins. Co.* (1889), 18 Ont. 79 at p. 92.

Cur. adv. vult.

23rd February, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: It may be useful to state briefly the situation of the parties involved in, or connected with, this litigation. The Hall Mining and Smelting Company were the owners of mines and mine buildings in the vicinity of Nelson. They had issued debentures which were held by the plaintiffs Flint Ramsay and Ernest Prier Ashley, as trustees for the owners thereof.

The plaintiffs, the Kootenay Development Syndicate, were the lessees of the mines and buildings aforesaid, and were represented in the Province by a local board and by Mr. R. S. Lennie, a barrister and solicitor, who held the syndicate's power of attorney. Mr. Lennie says that under the terms of the lease the syndicate had agreed with the lessors to maintain insurance against fire on the premises. Mr. Davys was manager

for the syndicate. Henry V. Rudd was an accountant and foreman of the syndicate and had much to do with the survey of the insurance, which was effected after the syndicate took possession of the mines. Mr. Lennie represented the other plaintiffs, as well in the matter of the insurance, and had sole authority in that regard according to his own uncontradicted testimony. The policy in question, being policy numbered 9077, was issued by the defendant on the 5th of February, 1909, to plaintiff Louis Pratt as receiver for the said mining company, and covers certain mine buildings in a mountainous district, at some distance from other buildings. Pratt, with the consent of the defendant, subsequently, *viz.*: on the 18th of May, 1910, assigned the policy to the plaintiffs Ramsay and Ashley. The fire occurred on the 31st of July, 1910. The amount recoverable under the policy, if plaintiffs can succeed at all, is not in dispute.

Several questions of law and fact were raised for our consideration. Defendant's first point was that the policy had been cancelled at the request of Rudd in June, 1910. I think it is clear that Rudd had no actual authority to bring about a cancellation of the policy, and this even apart from the fact that Rudd had left the syndicate's employ before his attempt to cancel the insurance. Lennie had charge of the insurance to the knowledge of Brydges, defendant's local agent. It was Lennie who secured the contract of insurance from the defendant through Brydges. Before effecting the insurance Lennie referred Brydges to Rudd, for data on which the contract was based, and afterwards Rudd, as the syndicate's accountant, paid, or arranged payment of the premiums and looked to the keeping of the policy in good standing by applying for a vacancy permit in May. It does not appear that Rudd ever effected a contract of insurance with the defendants, or any other company on behalf of the plaintiffs, or any of them, nor that he ever was allowed to effect the cancellation of a policy for them. How, then, was he held out as having authority to effect a cancellation of this policy? The only foundation for suggesting such holding-out is based on this: that Lennie asked Brydges, with whom he was negotiating insurance, to make a survey of

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the insurance, and in doing so to consult with Rudd, the foreman and accountant, and obtain information and data from him; and that after Lennie had entered into the contract based on that survey, Rudd issued the syndicate's cheques and notes in payment of the premiums and saw to keeping the policy in good standing by obtaining a vacancy permit in May, 1910. In my opinion, the evidence wholly fails to shew facts upon which it could be held that the plaintiffs are estopped from denying that Rudd had the authority claimed for him. Had Rudd the power to effect cancellation, I should feel much doubt as to the correctness of the conclusion arrived at by the learned judge that there had been no effective cancellation.

Before coming to the defence which, in my opinion, relieves the defendant of liability, I will refer, in order to clear the ground, to two other points raised in the appeal. The appellants attempted, on the argument before us, to raise for the first time a matter which had not been pleaded nor referred to at trial, nor in the notice of appeal, *viz.*: that the variation of the statutory conditions, upon which the defendant relies, were not printed "in conspicuous type," as required by sections 5 and 7 of the Fire-insurance Policy Act, R.S.B.C. 1911, Cap. 114. The Court, by a majority, then decided that it was too late to raise the point.

MACDONALD, C.J.A.

My own opinion was that whether or not the type was conspicuous was a question of fact which might, to some extent at least, be elucidated by oral evidence, and that we could not by merely looking at the print decide that fact for ourselves. Had there been a jury, that question could not, I think, have been withdrawn from them, nor could oral evidence relative to it have been ruled out, and hence the question should, if intended to be relied upon, have been made an issue at the trial. If I were now called upon to express my own opinion of the type, I should say that it is more conspicuous than that in question in *Lount* v. *London Mutual Fire Ins. Co.* (1905), 9 O.L.R. 549 at p. 553, which was held to comply with the Act. There the variations were printed in type of the same size and character as that used for printing the body of the policy. Here the variations are printed in type much smaller than that used in

printing the rest of the contract, including the statutory conditions. It might not be unreasonably held that the type was conspicuous by reason of the contrast, but that is a matter I am not now called upon to decide.

Another question raised in the defence was that, by one of the varied conditions, loss, if occasioned by forest fire, which was the case here, was not insured against, and this was combatted on the ground that such condition was not just and reasonable. As to this I desire to express no opinion, it being unnecessary to do so in view of the decision to which I have come on the next and last question which need be discussed, and upon which I rest my judgment.

The policy contains a condition, added to the statutory conditions, reading as follows:

> "This policy will not cover vacant or unoccupied buildings unless insured as such, and if the premises insured shall become vacant or unoccupied, or if the insurance shall be on a manufacturing establishment, or mill, and the same shall cease to be worked, this policy shall cease and be void unless the Company shall by endorsement on the policy allow the insurance to be continued."

That the buildings were vacant at the time of their destruction, and for a considerable time prior thereto, is not disputed. The plaintiffs, in pursuance of this condition, applied for and obtained from said agent an endorsement on the policy permitting vacancy from the 18th of May, 1910, to the 18th of July of the same year. When that period expired, no further action was taken to procure continued permission. As already stated, the fire occurred on the 31st of July. The case is thus narrowed down to the question: Was this condition one "not just and reasonable" to be exacted by the Company? This condition would clearly fall within the authority of *Spahr* v. *North Waterloo Ins. Co.* (1899), 31 Ont. 525, and the American cases collected at p. 726 of Cyc., Vol. 19, were it not for the omission of the ten days of grace after vacancy allowed, by standard conditions of this kind, for obtaining the insurer's permission. But, as pointed out by Meredith, C.J. in *Eckhardt* v. *The Lancashire Insurance Company* (1898), 29 Ont. 695 at p. 699; affirmed (1900), 31 S.C.R. 72 at p. 74, a condition of this character is to be judged with reference to the facts of the

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particular case under consideration. The question is not, would such a condition inserted in every contract of insurance be just and reasonable, but, on the facts and in the circumstances of this case, can it be said to be not just and reasonable to exact it. The defendant might reasonably say: We do not insure vacant buildings except at a higher rate of premium than this contract calls for. Yours are buildings remote from other habitations. Without your occupancy we would have no protection against itinerant or criminal persons loitering about the premises and lighting fires there for their own purposes or with criminal intent, nor would there be persons there to put out incipient fires. It is practicable for you and impracticable for us to guard against vacancy; you must either, therefore, keep the premises occupied or obtain our permission to let them become vacant, even for a few days.

There is no suggestion that the plaintiffs were ignorant of this condition. It is some evidence of the reasonableness of it that they acted under it, and obtained sixty days' permission to leave the building unoccupied. The ten days are allowed in standard conditions to meet all cases. The absence of days of grace in a particular case should not be fatal to the condition if, on the facts of the particular case, it was not to be apprehended that the condition would become a trap. It is of the same character as Statutory Condition No. 3, which requires the insured to notify the insurer of changes, in the surroundings of the premises, material to the risk. In a case like the present the vacancy condition is less onerous because default in observing it cannot happen except from gross carelessness in connection with an event, the result of deliberate action on the insurer's part and entirely within his control, and one which is not the subject of uncertainty as to what is or is not material to the risk.

MACDONALD, C.J.A.

I am in entire accord with those who think that variations of statutory conditions should be jealously scrutinized by the Court, in order to guard against a reversion to the conditions which brought about the intervention of legislators and the enactment of laws for the protection of insurers against unjust contracts. But, on the other hand, it must not be forgotten that insurance is a lawful business highly beneficial to mankind,

and that stipulations which would pass without criticism in ordinary commercial contracts are not necessarily to be condemned because they appear in an insurance contract. While the Legislature intended to fetter insurance companies to some extent in the making of contracts of insurance, it left them the right to protect their own interests by reasonable restrictions on their liability.

Mr. *Ritchie* further contended that because Brydges said, at a time subsequent to the expiry of the vacancy permit, that "the cancellation had not been put through and the policy *is in force,*" that the Company is estopped from setting up the breach of the vacancy condition. Had Brydges been a principal that might be so, but I doubt even that, because it is quite manifest that neither Lennie nor Brydges had the vacancy in mind on that occasion. But apart from that, the policy contains stipulations that

"No officer, agent or other representative of this Company shall have power to waive any provisions or conditions of this Policy except such as, by the terms of this Policy may be the subject of agreement endorsed thereon or added hereto; and, as to such provisions and conditions, no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

And again, the vacancy permit is required to be endorsed on the policy, and failure to comply with that condition where the Company, as distinguished from its local agent, has not contributed to the failure to do so, or otherwise acquiesced in it, is fatal to the plaintiffs' claim: the *Western Assurance Co.* v. *Doull* (1886), 12 S.C.R. 446.

The appeal and cross-appeal should be dismissed.

IRVING, J.A.: This is a claim made against the defendant in respect of a building destroyed by a forest fire.

The policy contained the following variations from the statutory conditions:

"4. Condition No. 10 has the following clause added to subsections (b), (f) and (g), respectively:—

"(b) Also by earthquake or hurricane, or by *forest fires.*

"This policy will not cover vacant or unoccupied buildings unless insured

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as such, and if the premises insured shall become vacant or unoccupied, or if the insurance be on a manufacturing establishment, or mill, and the same shall cease to be worked, this policy shall cease and be void unless the Company shall by endorsement on the policy allow the insurance to be continued."

Upon this defence being raised, the plaintiffs set up the contention that the exemption from forest fires was "unreasonable and unjust" within the meaning of the Act.

No evidence was given touching the justness or unreasonableness except this: The building in question was insured by two companies; both contained the same exemption; both charged the same rate—a rate struck by the board of underwriters in Vancouver. In these circumstances, the proper inference to draw is that this was the ordinary rate for policies not covering forest fire risks. Dealing with the forest fire risks only, I can see no substantial reason why we should decide in favour of the plaintiffs. The judgment of Meredith, C.J. in *Eckhardt* v. *The Lancashire Insurance Company* (1898), 29 Ont. 695 at p. 699, which has been adopted by the Supreme Court of Canada (1900), 31 S.C.R. 72 at p. 74, seems to me altogether in favour of the defendant.

IRVING, J.A.

The question of just and reasonable has been discussed recently by the Appellate Division in Ontario: see *Strong* v. *Crown Fire Ins. Co.* (1913), 29 O.L.R. 33 at p. 51 *et seq.*

I would allow the cross-appeal, both as to the cancellation of the policy and as to costs. The judge might have imposed terms on making the amendment, or divided the costs according to the issues, but I can see no reason for depriving the defendant of the costs of the action in which it succeeded.

MARTIN, J.A.

MARTIN, J.A.: In my opinion the variations in the statutory conditions, as to forest fires and vacancy, cannot, in the circumstances of this case at least, "be held to be just and reasonable to be exacted by the Company," under section 5, and therefore, by virtue of section 7, they are "null and void." With respect to forest fires they are, in the wooded portions of this Province, wherein this insurance was effected, an ordinary risk, and I think it should no more be justly avoided than any other of that nature. It would be very little more unreason-

able to bargain that the risk would not cover fires which did not originate upon the premises insured, which would be most unjust and unreasonable.

With respect to the condition that "if the premises insured shall become vacant or unoccupied . . . . this policy shall cease and be void unless the Company shall by endorsement on the policy allow the insurance to be continued," I entertain a strong view that it is far too drastic because it comes into operation immediately and gives the insured no time at all to inform himself, or to protect himself from any of the ordinary occurrences which might cause the premises to become "vacant or unoccupied" without his notice, and with no opportunity to discover the fact or protect himself by the exercise of all due diligence. The term "vacant or unoccupied" is very far-reaching and would, *e.g.,* cover the case of the tenant of a furnished house absconding at night, whereby the premises would immediately become vacant, and a fire might destroy them at once before the landlord knew of the vacancy, or, much less, had time to go to the company's office to apply to continue the policy, which would be too late and he would be met with a refusal. And not only this, but if the premises are "unoccupied," the result is or may be the same, because "unoccupied" is a very wide term and there is no limitation upon the period, and *e.g.,* a policy holder who had shut up his house in the morning and taken his family for a day's outing on the water and been unexpectedly detained all night, might return to his home to find not only that it had been burnt down in his absence, but that he could recover no insurance because it had been in fact "unoccupied." Numerous other examples might be cited, all going to shew that some period of vacancy or unoccupancy should be fixed, with the reasonable intention of giving the insured some time at least to turn round and take steps to protect himself. The vice of the present clause is that no matter how careful or diligent a policy holder may be, his rights are instantly and automatically determined, and he finds himself at the mercy of some company which insists upon what it calls its strict contractual rights, which is precisely what the Legislature is seeking to guard against by said section 5. No

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authority has been cited to us justifying a condition of this harsh and peremptory nature.

So far as the cancellation of the policy is concerned, I think the proper view of it was taken in the Court below: the estoppel relied on here comes within Lord Justice Bowen's definition in *Low* v. *Bouverie* (1891), 3 Ch. 82 at p. 106.

In my opinion the appeal should be allowed.

GALLIHER, J.A.

GALLIHER, J.A.: I would dismiss the appeal and allow the cross-appeal. Assuming for the moment that Rudd had authority to apply for cancellation of the policy, the evidence is shortly this: He came into Brydges's office on the 13th of June, 1910, asking for the cancellation of the Connecticut policy among others. He was told it was irregular to do so without production of policies. He left, saying he would look them up, and returned next day with the policy in question, and requested its cancellation. He was asked to put his request in writing, which he did on the 14th. On receipt of the policy and this letter, Brydges cancelled same, credited the assured with the return premium in his books instead of sending them a cheque, as the assured were then indebted to him for premiums, wrote a letter advising his Company of what had been done on the 16th of June, with a memo. at bottom to "hold until policies come in," meaning other policies which Rudd informed him he would get from London, and also wrote a letter to Rudd, June 17th, advising him of the amount of return premium calculated from the 13th of June, as had been requested by Rudd in his letter of the 14th of June. Still assuming that Rudd had authority, what took place as above set out, to my mind constitutes cancellation, and once cancelled, Brydges, while he had authority to cancel, had no authority or power to revive the policy, and his only course would have been to issue a new policy. But the plaintiffs say the Company are estopped from saying the policy was not in force by reason of something that took place between Lennie, agent of the assured, and Brydges, agent of the Company, about a month later. I have weighed the evidence upon this very carefully, and while I will not refer to it in detail I point out a piece of evidence which Mr. *Ritchie*

relied on before us, and which strikes me as significantly against the assured.

This evidence was brought out by Mr. *Clark,* counsel for the assured, in cross-examination of Brydges, and is as follows:

"Mr. *Clark*: Isn't this a true position, that Mr. Lennie having questioned and written this letter, you said now we will put this up to the insurance Company and pending their reply everything will be in force? That is it exactly, yes, that is what I wanted to put before."

I interpret that evidence to mean that while Lennie was questioning the cancellation, owing to the fact that Rudd had no authority, the matter was to be put up to the Company as to whether the policy was to be considered cancelled, and in the meantime, so far as Brydges could, he assented to the policy being considered in force. But as soon as the policy was cancelled it was dead, and Brydges had no power to declare it revived for any period, or awaiting any decision. The facts were all before Lennie as well as Brydges (except perhaps the fact that the policy was in Brydges's hands, having been surrendered by Rudd, which I do not think sufficient to alter the case), and if Lennie and Brydges made a mistake in law as to the position in which matters were, that does not create an estoppel as against the Company.

Now as to Rudd's authority. The evidence is clear that he had no express authority and that at the time he made the application for cancellation his employment with the assured had ceased, although he appears to have consulted with Mr. Davys, managing director of the Kootenay Development Syndicate, as to reduction of expenses and restricting insurance.

At the time the policy was issued Mr. Lennie gave instructions for a resurvey and readjustment of the insurance, and referred Mr. Brydges to Rudd, who was then in their employ, to take up the details, in fact, left it entirely to Rudd and Brydges to do all this work. Subsequently Brydges swears that Rudd arranged for credit regarding premiums payable, procured the notes for same, attended to their renewals from time to time, and generally attended to this insurance business. When Rudd came in about cancellation, it does not appear that Brydges knew he was not still in the employ of the assured, and when he was requested to bring in the policies before cancellation

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could be made, produced from the custody of the assured the policy in question, wrote a letter on behalf of the assured requesting cancellation, and in every way acted so as to justify Brydges in believing he had full authority. We must, however, look further to see how Rudd became possessed of the policy, for I think there can be no doubt, from the evidence of Miss Copper, that he handed it in to Brydges's office. Rudd is very hazy on this point, and the only explanation as to how he became possessed of it is to be found in the evidence of Lennie himself, which is to the effect that if Rudd came in wanting any papers of the assured, and Lennie was busy, he would give him the key of a box in the safe where these papers were kept, so that he could get what he wanted. This seems the probable explanation of how he got this policy. It is also to be noted that the power of attorney from the Hall Mining and Smelting Company to the Kootenay Development Syndicate, which was recorded, contained a provision expressly authorizing the Development Company to appoint a substitute or substitutes. Now, considering that Rudd was put forward by Lennie as the man to deal with this insurance, in the first place, his arranging for a line of credit, his procuring of notes and the renewal of same, and the production upon request of the document necessary to obtain cancellation, with no notice to Brydges of any change in his position, and the manner in which the document was procured by Rudd, it seems to me the assured are, in the circumstances, bound by his act.

GALLIHER, J.A.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: The learned trial judge has found that there was no cancellation of the policy of fire insurance sued upon in this action, which was really the defence that the trial proceeded upon throughout the major portion of the hearing of the action.

The appeal is from the whole judgment, and the respondent Company cross-appeals against the finding of the learned trial judge that there had been no cancellation of the policy and for the costs of the action.

The policy of fire insurance issued in favour of Louis Pratt (the appellant) as receiver for the Hall Mining and Smelting

Company, Limited, and was placed upon certain buildings situate on the Silver King mineral claim, on Toad Mountain, close to Nelson, B.C.

Upon a perusal of the policy it will be seen that it has conditions set out in three ways: (a) Conditions immediately following the description of the property insured; (b) statutory conditions; and (c) variations in conditions and additions thereto.

The condition first to be noticed reads as follows (which is in very small type and in red):

"It is understood and agreed that this policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or wind storm) not exceeding the sum insured nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. . . . ."

(The following in larger type—eight point and leaded, and in black):

"And the said Connecticut Fire Insurance Company hereby agrees to indemnify and make good unto the said assured . . . . heirs or assigns all such direct loss or damage (not exceeding in amount the sum or sums insured as above specified, nor the interest of the assured in the property herein described), the amount of loss or damage to be estimated according to the actual cash value of the property, with proper deduction for depreciation however caused."

Turning to the statutory conditions, these would appear to be as contained in the statute (Fire-insurance Policy Act, R.S.B.C. 1911, Cap. 114), and are in black type and the same as the last clause above quoted.

The statutory condition that requires to be noticed is 10 (*b.*), which reads as follows:

"10. The company is not liable for the losses following, that is to say:—

(*b.*) For loss caused by invasion, insurrection, riot, civil commotion, military or usurped power."

The above statutory condition is added to (in very small type, six point, in red, set solid) in the variations in conditions in the following manner:

"Condition No. 10 has the following clause added to subsection (*b.*) . . . . :

"(*b.*) Also loss by earthquake or hurricane, or by forest fires."

Then we find an entirely new condition:

"7. The following clause is added as a new condition:

"This policy will not cover vacant or unoccupied buildings unless insured

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as such, and if the premises insured shall become vacant or unoccupied, or if the insurance be on a manufacturing establishment, or mill, and the same shall cease to be worked, this policy shall cease and be void unless the Company shall by endorsement on the policy allow the insurance to be continued."

Before dealing with any of the facts as brought out at the trial, I purpose to deal with the policy itself, scanning it and applying the law to it, and in particular the Fire-insurance Policy Act.

Looking at the policy it will be seen that three colours appear thereon, black, purple and red, and before the statutory conditions are reached we have all of these colours. Later we have them all again, the statutory conditions being in black and the variations of conditions in red. This does not comply, in my opinion, with the mandatory provision of the statute. To illustrate and punctuate the view I take, I will quote section 5 of the Act, which is as follows:

"5. If an insurance company or other insurer desires to vary the said conditions, or to omit any of them or to add new conditions, there shall be added to the said conditions on the policy in conspicuous type, and in ink of different colour, words to the following effect:—

"VARIATIONS IN CONDITIONS.

"This policy is issued on the above statutory conditions, with the following variations and additions:—

"These variations [*or* as the case may be] are, by virtue of the British Columbia Statute in that behalf, in force so far as, by the Court or Judge before whom a question is tried relating thereto, they shall be held to be just and reasonable to be exacted by the Company. Provided, however, that the provisions of this section shall not authorize a company or other insurer to vary, omit, or add to the statutory condition Number 16."

MCPHILLIPS, J.A.

It will be seen that where variations or additions are to be made, the words set forth in the statute, or words to the same effect, "shall be added to the said conditions *on the policy* in conspicuous type, and in ink of different colour."

Now, two things must be present: First, "in conspicuous type"—it is very small and less conspicuous than the rest of the type; further, the spacing of the lines is closer and is not leaded, and it is palpable to everyone that it is designed, whether intentionally or unintentionally, not to make clear, but to obscure, and calculated to admit of not being noticed, when the object of Parliament is well enunciated by the language, that

any such variations or additions shall be visually and prominently brought to the notice of the assured.

In *Greet* v. *Citizens' Ins. Company* (1879), 27 Gr. 121, a somewhat similar matter came up for consideration: see the judgment of Spragge, C. at pp. 128-9.

In England a case arose relative to conditions printed on a passenger's ticket, in which it was held that conditions printed on a passenger's ticket are not binding on the passenger unless he has received notice of them. I am not relying on this case as being particularly in point, but as it was a case that went to the House of Lords it is instructive on the question—here up for consideration. The case is that of *Richardson, Spence & Co.* v. *Rowntree* (1894), 63 L.J., Q.B. 283. Lord Ashbourne at p. 285 said:

> "I think, having regard to the facts here—the smallness of the type in which the alleged conditions were printed; the absence of any calling attention to the alleged conditions; and the stamping in red ink across them—there was quite sufficient evidence to justify the learned judge in letting the case go to the jury."

And see the judgment of Bain, J. in *Green* v. *Manitoba Assurance Co.* (1901), 13 Man. L.R. 395 at p. 401.

Second, "in ink of different colour." What does this mean? Ink of a different colour to that in the statutory conditions, or ink of different colour to that of any other ink on the policy? Bearing in mind the plain intent of Parliament, the protection of the assured from conditions that might practically render the policy an illusory one, the words of a statute of this class are to be read *strictum jus,* and my reading of the words "in ink of different colour"—bearing in mind the plain intention actuating the enactment and considering the context—that what is meant, as well as enacted, is that the ink must be different in colour to any other ink on the policy. In short, I read that portion of the section (5) now under consideration—dropping the words regarding the type—in the language as in the section contained, that is, "there shall be added to the said conditions on the policy . . . . in ink of different colour."

It will be seen that it is "on the policy" the ink of different colour must be. Now, on the policy in this case is to be found

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black, purple and red ink, and conditions precede the variations in conditions in black, purple and red ink.

Applying one's mind to the policy alone—looking at it as it lies before us—we see black, purple and red ink therein, and conditions appear on the policy in both black and red ink before we reach the statutory conditions or the variations in conditions. It is patent that in using red ink in the variations in conditions and additions thereto, the statute has not been complied with, if I am right in my construction that the difference in colour must be difference in colour on the policy, not merely difference in colour from that in the statutory conditions.

In construing statutes it is well to keep in mind the view of Cresswell, J. in *Biffin* v. *Yorke* (1843), 6 Sco. N.R. 222 at p. 235 (referred to in Broom's Legal Maxims, 8th Ed., at p. 439), where he said:

> "It is a good rule in the construction of Acts of Parliament, that the judges are not to make the law what they may think reasonable, but to expound it according to the common sense of its words."

The assured, seeing black, purple and red ink on the face of the policy, to my mind would not have called to his special attention the variations in conditions appearing in red ink on the policy, and Parliament, in my opinion, in legislating, was legislating arrestively, if I may so express it. The assured was to have the fact of variations and new conditions focused upon him by the utilization of a colour different from all other colours upon the policy.

MCPHILLIPS, J.A.

Turning to section 6 of the Act, further light is shed upon the points immediately under consideration. "No such variation, addition or omission shall unless the same is distinctly indicated and set forth in the manner and to the effect aforesaid be legal and binding on the assured." In my opinion it is not only open to this Court, but it is the duty of this Court to see that due compliance is had with a public Act, such as the Fire-insurance Policy Act, when it becomes necessary to consider varied or added conditions, as public policy is well demonstrated in the language of the statute, and unless the variations in the statutory conditions—the omission of any of them or the additions thereto—are made as is by statute provided, they are

not legal and binding on the assured, and if properly made, they must be further found to be just and reasonable, otherwise the policy shall, as against the assured, be subject to the statutory conditions only, and this duty is cast by the Act upon the Court or judge before whom a question is tried relating thereto: sections 5, 6 and 7, Fire-insurance Policy Act.

It is not apparent upon the appeal book whether the point was raised at the trial that the variations and additions were not made in compliance with the provisions of the Act, unquestionably though the point was raised and urged that the variation in the conditions and addition thereto were not just and reasonable, and the learned trial judge held that they were just and reasonable.

In a case which came before the Court of Appeal in Ontario, *Reddick* v. *Saugeen Mutual Fire Ins. Co.* (1888), 15 A.R. 363 at p. 368, Osler, J.A. said:

"The defendants say it should have been raised at the trial and decided by the trial judge, but it was, within the plain words of the statute, a matter to be determined by the Court to which it was presented, and there was no remaining question of fact connected with it which made it necessary to direct a new trial in order to dispose of it."

Therefore, it is my opinion that the variations in conditions and additions thereto do not comply with the statute, that is, the variation to condition No. 10, exempting the Company for losses caused by forest fires, and No. 7, the added condition that "this policy will not cover vacant or unoccupied buildings . . . .," and are not legal and binding on the assured, and therefore, to the extent that the Company relies upon these conditions in resisting payment of loss, my opinion is that the Company fails in its contention, and the policy must be read as if those provisions were absent therefrom. It is not necessary for me to consider whether the conditions which now, in my opinion, fall to the ground, could be held to be just and reasonable.

However, as I have a very pronounced opinion that even were the variation and addition to the policy upon which the Company relies carried out in conformity with the provisions of the statute, nevertheless, same are unavailing to the Company to resist payment of loss, in that they are not, in the circumstances of this case, just and reasonable. Whether or no they

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would under any other state of circumstances be held to be just and reasonable, I do not presume to say.

Upon the facts before us the insurance was placed under Lennie's instructions, who was the registered attorney under the Companies Act for the Kootenay Development Syndicate, a survey of the premises and the property to be insured first being made, and the insurance was distributed among four companies, the Northern, Guardian, Ætna, the Connecticut, it being left with one Brydges, the agent for the respective companies, to distribute the insurance, that is to say, the different proportions of the risk. The Kootenay Development Syndicate had a lease of the premises which were insured, the owners of same being the Hall Mining and Smelting Company, and there was an issue of debentures to Flint Ramsay and Ernest Prier Ashley as trustees for the debenture holders. It is apparent on the face of the policy that notice was brought home to the Company that the mining premises were in the hands of a receiver, as the receiver is the assured under the policy.

At the time when the fire occurred men were upon the premises, at Mr. Lennie's direction, on account of the forest fires prevailing in the immediate vicinity, and it is evident that the agent for the Company, Brydges, knew that the mine was not being operated before the fire occurred, and he also knew of the fact that the premises were vacant and unoccupied, as a vacancy permit had issued for 60 days from the 18th of May, 1910 (the fire taking place on the 31st of July, 1910). Mr. Lennie was acting as solicitor for all patries, that is to say, for the owners of the mine, the lessees thereof, and for the receiver, acting on behalf of the debenture holders, and the survey made preparatory to the placing of the insurance was made by Brydges, the agent for the Company. It is clear upon the evidence that Brydges was aware throughout of the state of the insured premises—that the mine was shut down and that the buildings were vacant and unoccupied, and it can be well found upon the evidence that Brydges was to protect the insurance by vacancy permits—if it can be successfully contended that under the policy such were necessary.

MCPHILLIPS, J.A.

With regard to the alleged cancellation of the policy, the

evidence makes it absolutely clear that the learned trial judge is right in holding that there was no cancellation, and in this holding I unhesitatingly agree. Brydges personally assured Mr. Lennie that the policy was in full force—after the question of cancellation came up owing to Rudd's unauthorized interference in the matter. In some strange way Brydges got possession of the policy sued upon in this action. Upon the evidence it may fairly be assumed through Rudd, who apparently from time to time came to Mr. Lennie's office, and when Mr. Lennie was busy he would give him the key to a box containing documents and he would get what he wanted thereout. Further, it is clear that Rudd had no authority to possess himself of the policy. His official connection with the Kootenay Development Syndicate ceased with the closing down of the mine, which was sometime in May, 1910. It is evident that Brydges did not consider that Rudd was referring to the policy sued upon when he asked for cancellation, as note Brydges, Blakemore & Cameron's letter of the 17th of June, 1910, to Rudd, which advised that "policy 90775 was cancelled *pro rata* and a new policy was issued on February 5th, 1909, to take its place, No. 90777." Therefore, we can dismiss any question of this application on the part of Rudd for cancellation, as the Company plainly did not consider it had reference to the policy sued upon—No. 90777. Further, it is an idle contention of the defendant Company to set up cancellation founded upon any action of Rudd; he had no authority—was out of the employ of the Kootenay Development Syndicate when he presumed to act in the way of bringing about cancellation, and the Syndicate itself was under covenant to keep the insurance existent; then what power, right or authority would even the Syndicate have to obtain cancellation of insurance of which it was not the beneficiary? The policy is payable to Pratt, the receiver, and he alone could, with the Company, bring about cancellation. Unquestionably, no effective cancellation took place. All that was done was done with no authority whatever. On the 18th of July, 1910, Mr. Lennie wrote to Brydges, Blakemore & Cameron, Ltd., advising that Rudd was without authority in asking for any cancellation, and the reply of

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Brydges, Blakemore & Cameron, Ltd., under date July 25th, 1910, makes it clear that the Company did not act upon Rudd's request, and makes it manifest that no cancellation can be contended for. Then, on the 1st of August, 1910, Mr. Lennie advised Brydges, Blakemore & Cameron, Ltd., that "the portion of the property insured with you in the Guardian Fire Insurance Company and the Connecticut Fire Insurance Company under policies numbered respectively 3599894 and 90777 was destroyed by a forest fire yesterday morning." Following this, Brydges, Blakemore & Cameron, Ltd., wrote a letter under date August 2nd, 1910, advising that copies of Mr. Lennie's letter had been forwarded to each of the companies. Now, it is to be noted that not until October 12th, 1910, although the origin of the fire was stated to be a "forest fire" was there repudiation of liability, and that appears by the letter of A. A. Richardson, adjuster for the defendant Company, and it is to be noted that the denial of liability under the policy proceeding from the manager of the Company is postulated upon the following premise:

"that no liability exists thereunder and that it is neither morally nor legally bound to allow a claim in any sum under the policy, the receipt of which by the Connecticut from the same source which it was originally ordered following a written request for cancellation would seem to be *prima-facie* evidence of the right and authority of the persons who occasioned the cancellation to act."

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Here we have most peculiar, and, I cannot but remark, most extraordinary conduct; before the loss takes place the Company, through its agent, advises Rudd that it cannot recognize his request, that it is irregular, and, in any case, does not refer to the existing insurance, and the same agents assure Mr. Lennie that no cancellation had been effected. Yet it is attempted to deny liability on this ground, and upon the fact that the Company had obtained possession of the policy by the known unauthorized act of Rudd, as, after the whole matter was well understood, and a claim made under the policy, a Mr. Reed, the inspector of the Company, took possession of the policy.

The explanation of how the policy got into the hands of the Company is contained in the following letter from Brydges,

Blakemore & Cameron, Ltd., to R. S. Lennie, of the 26th of November, 1912:

"We have yours of the 22nd inst. noted. You are correctly informed. Mr. Reed, Inspector for the Connecticut, was here a short time ago, inspecting their business here, he found this policy in the 'Silver King' file and took it."

It is evident that the Company was none too sure of its position, as we find in the adjuster's letter conveying to Mr. Lennie the decision of the Company (in part hereinbefore recited) he stated that "the receipt of which [this, no doubt, refers to the policy] by the Connecticut from the same source which it was originally ordered, following a written request for cancellation, would seem to be *prima-facie* evidence of the right and authority of the persons who occasioned the cancellation, to act."

It is manifest that the "*prima-facie* evidence" has vanished when the evidence at the trial is perused and considered, and nothing remains upon which the Company can, in my opinion, escape liability for the loss, which unquestionably is one for which the Company is legally answerable. I do not feel at all incommoded by the terms of the provisions against liability, even were the provisions as to forest fires and vacancy capable of being invoked, as my opinion is that these conditions were waived upon the facts. It is evident that the only defence first set up was that of cancellation—later the variation in condition No. 10 and the additional condition No. 7 were invoked; this is well indicated by the trial judge, and, for the first time, appeared upon the pleadings—that is to say, in the amended statement of defence, stated to be amended under orders made on the 9th of October, 1911, and 5th of November, 1912. When this delay is considered it is interesting to note what Idington, J. said in *Prairie City Oil Co.* v. *Standard Mutual Fire Insurance Co.* (1910), 44 S.C.R. 40 at p. 56:

"No such objection as now relied upon was ever made until the statement of defence shewed it amongst a great many other random shots."

It is to be remarked that Mr. Lennie promptly and frankly advised the agents for the Company, under date the 1st of August, 1910, that the property insured had been destroyed by a forest fire, but not until this very late date do we see any

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defence founded upon the exemption from liability because of forest fires or vacancy or non-occupation of buildings.

It is plainly evident that there was no thought on the part of Mr. Lennie, who effected the insurance, that there was exemption from liability caused by forest fires, as apparently that was a well-understood danger—I might almost say notorious in the neighbourhood, possibly such as might be taken judicial notice of. We have on the policy before us some evidence that losses occasioned by forest fires were insured against; there is to be noticed a flamboyant printed declaration pasted upon the policy which refers to the then recent Fernie fire—a fact of open and general knowledge throughout the Province—a most disastrous fire, occasioned by forest fires. Why is it there if it was not intended to be read by the assured? And it calls attention to the fact that companies had failed to pay losses through instability.

I am not placing special reliance upon this factor in the case, save to say that, finding this affixed to the policy, was it not calculated to lull the assured into a false state of security? And at no time, although the evidence shews that forest fires were raging on the mountainside in the immediate neighbourhood before and at the time Mr. Lennie satisfied himself that the insurance was existent, was there ever a hint given that the insurance was not effective when loss was occasioned by forest fires; and it is inconceivable that Brydges was not also aware of the forest fires and Mr. Lennie's natural anxiety in the circumstances to be sure that the policy was in force.

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That the appellants are rightly entitled to rely upon what took place between Mr. Lennie and the agent of the Company, Mr. Brydges, I would refer to *Prairie City Oil Co.* v. *Standard Mutual Fire Insurance Co., supra,* at p. 58, where Idington, J. said:

> "Again, can the appellants not be taken to have adopted the act of the agents and that adoption to relate back to the time the agents gave the written notice? I merely suggest that as a possibly fair inference from the facts knowing as matter of common knowledge how much the agents for insurance companies daily constitute themselves the agents of both parties for many things relative to the transaction of the business in hand."

With respect to the position of affairs before and at the time of the loss, the subject-matter of this action, I would refer to the evidence of John Scholey:

"Who was there at the time the fire took place on these particular premises? At the time of the fire two men, one named Field, the other—I forget his name.

"Two besides yourself? Yes, we knew the fire was coming, that it was dangerous, and I 'phoned for more help.

"How long were you there before the fire? There was another fire on the other side of the mountain two or three weeks before, we got that out.

"You had been at these buildings two or three weeks before the fire? Yes, had to be; the whole country was afire all round."

With respect to the actual facts existent relative to the buildings as to vacancy at the time of the fire, we have also the further evidence of John Scholey:

"When you went up nobody was in occupation? No, I took charge. Mr. Davys sent me up after they came down.

"Where did you live? I was down at the smelter; they all belong to the Company.

"Where did you sleep and eat? In the boarding house below.

"How far from these houses? Perhaps 500 feet or 1000 feet."

In my opinion, even were the condition operative as to vacancy or non-occupation, there was such occupation here upon the evidence, coupled with all the surrounding circumstances, which would not entitle the Company to be given the benefit of any such condition; as the facts in my opinion work an estoppel against the Company, and there is also ample evidence of waiver, and the further fact that Brydges knew all along the condition of matters, and was to continue the vacancy permit throughout the time of vacancy.

It is my opinion that if the added condition No. 7 as to vacancy is to be considered, it is unjust and unreasonable, and, therefore, not legal or binding on the assured. An authority which well demonstrates the unreasonableness of any such condition is to be found in the decision of the Queen's Bench Division of Ontario, *McKay* v. *Norwich Union Insurance Co.* (1895), 27 Ont. 251, judgment of Street, J. at p. 261.

The result in this case was that the actual facts as to occupancy being before the Company at the time of the application, the Company was liable, nor were they relieved by their varia-

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tion of the statutory conditions that the policy would not cover vacant or unoccupied houses; also that the variations as to the premises becoming vacant or unoccupied were in that case unreasonable, as the houses were of a class likely to be occupied by tenants for short periods (here the mine might be shut down for short or long periods, and, as a matter of fact, that which imported such happenings was present, in that the assured was a receiver), and the reasonableness of the variation was to be tested with relation to the circumstances at the time the policy was issued. It was held in the *McKay* case, *supra,* that, owing to the fact that several of the houses were vacant to the plaintiff's knowledge for some months before the fire, that was, under the third statutory condition, a change material to the risk, which was thereby increased, and the failure to notify the defendants avoided the policy "as to the part affected." But the case we have here to consider is easily differentiated. Here we have complete knowledge in the Company of vacancy, the issuance of a vacancy permit, and continued knowledge up to the time of such vacancy, and no exercise of the Company's right to return the premium for the unexpired period and cancellation of the policy, or any demand in writing for an additional premium.

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Reverting again to the variation of the statutory conditions relative to exemption of liability if caused by forest fires. I am of opinion, after a close study of the cases, and a careful consideration of all the facts, that it cannot be at all supported that any such variation of the statutory conditions can be held in the circumstances as we have them before us, to be just and reasonable; to hold otherwise would be in effect to hold that the policy was an illusory contract, as the risk the assured considered he had insured against (that which was the chief local menace) was undoubtedly forest fires, amongst other risks; therefore, the variation provision for exemption from liability caused by forest fires—which occasioned the loss in this case—is not legal or binding on the assured.

By way of analogy, cases may be looked at in England dealing with carrier contracts, and the question of just and reasonable comes up for consideration in relation to such contracts, and I

would call attention to the decision in the House of Lords of *Peek* v. *North Staffordshire Railway Company* (1863), 32 L.J., Q.B. 241, and particularly the judgments of Lord Wensleydale at pp. 273 and 275, and Lord Chelmsford at p. 277. It will be observed, though, that Lord Chelmsford dissented from the conclusion that the condition insisted upon by the company was neither just nor reasonable.

In Halsbury's Laws of England, Vol. 4, at pp. 30-31, when considering special conditions as imposed by common carriers, we find this statement:

"These conditions must be just and reasonable and the onus is on the company to shew that they are just and reasonable,"

citing *Peek* v. *North Staffordshire Railway Company* (1863), 10 H.L. Cas. 473, and other cases.

I cannot agree with the learned trial judge if it is, as it would appear to have been, his decision that the onus was on the plaintiff to establish that the variation in conditions and addition thereto were unjust and unreasonable, nor do I think that the decision of *Eckhardt* v. *The Lancashire Insurance Co.* (1900), 31 S.C.R. 72 at p. 74, supports him in that view, as of course if it did, it would be binding upon this Court. Gwynne, J. who delivered the judgment of the Court, merely said:

"There is no foundation for the contention that every variation from a statutory condition or addition thereto should be *prima facie* held to be unjust and unreasonable."

And my view on the facts of the case before us is that upon those facts, and under all the surrounding circumstances, it is manifest that the variations in conditions and addition thereto are not just and reasonable, and the onus which was upon the Company was not satisfactorily discharged to admit of their being held legal and binding on the assured. Upon the whole, therefore, my opinion is that the variations and addition to the statutory conditions are not legal and binding on the assured. Firstly, because of non-compliance with the Act in not being distinctly indicated and set forth in the manner required. (It becomes necessary for me to observe that, although this point was held by the majority of the Court at the hearing not to be open to the appellant—not being taken below—my view is that it is a

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point that devolved upon the learned trial judge to take, and it is one that a judge of this Court must take—whether taken below or not—when there has been plain and manifest non-compliance with the Act.) Secondly, if, contrary to my opinion, there has been sufficient compliance with the requirements of the Act to effectuate a change and addition to the conditions, variations and addition are not just and reasonable. Thirdly, if, contrary to my view, there has been sufficient compliance with the requirements of the Act to effectuate a change and addition to the conditions, and also, contrary to my view, the change and addition to the conditions may be deemed just and reasonable, and then there is upon the facts ample evidence to establish estoppel and waiver against the Company such as to disentitle the Company from successfully asserting that there was a change material to the risk owing to vacancy or non-occupation, and that likewise no cancellation of the policy can be established.

In coming to the conclusion which I have in this case, I have not overlooked section 2 of the Fire-insurance Policy Act. It is to be observed that the section reads:

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"Where, by reason of necessity, accident, or mistake, the conditions of any contract of fire insurance on property in this Province, as to the proof to be given to the insurance company after the occurrence of fire, have not been strictly complied with, or where, after a statement or proof of loss has been given in good faith by or on behalf of the assured in pursuance of any proviso or condition of such contract, the company, through its agent or otherwise, objects to the loss upon other grounds than for imperfect compliance with such conditions, or does not, within a reasonable time after receiving such statement or proof, notify the assured in writing that such statement or proof is objected to, and what are the particulars in which the same is alleged to be defective, and so from time to time, or where for any other reason the Court or judge before whom a question relating to such insurance is tried or inquired into considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions, no objection to the sufficiency of such statement or proof, or amended or supplemental statement or proof (as the case may be), shall, in any of such cases, be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into."

It would appear clear to me that the Legislature indicated in the strongest way that it is the province and the duty of the Courts to closely examine into all the facts relative to liability under policies of fire insurance, and to impose liability there-

under upon companies where it considers it inequitable that the insurance should be deemed void or forfeited.

See also remarks of Davies, J. at p. 53, and Idington, J. at pp. 59-60 in the *Prairie City Oil Co.* case, *supra.*

Certainly, in my opinion, it is inequitable in the case before us that the insurance should be deemed void or forfeited for any reason; on the contrary, in my opinion, it is legal and binding on the Company.

In the result, in my opinion, the appeal should be allowed, and the cross-appeal dismissed, and the plaintiffs (appellants) do have judgment for the sum of $2,200 and the costs of the Court below.

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

Cross-appeal dismissed, Irving and Galliher, JJ.A. dissenting.

Solicitor for appellants: *J. A. Clark.*

Solicitor for respondent: *James H. Lawson.*

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Master and servant—Workman—Injury to—Liability at common law only—Defective system—Common employment.

The plaintiff was injured by falling from false work on a wall in course of construction owing to the tipping up of a loose plank on which he stood. The defendant was in the course of constructing a concrete refuse burner in connection with its mill, which was to be about 20 feet in diameter, with a concrete wall six feet thick. Skeleton walls made of planks were erected six feet apart for the reception of the cement, and false work was erected outside with an inclined runway up which the cement was carried in wheelbarrows. At the top of the inclined runway 2 x 4 scantling was placed across the top of the skeleton walls, upon which rested two two-inch planks close together, forming a runway on which the wheelbarrows were run from the inclined runway and from which the cement was dumped into the centre. These planks were moved from time to time as the wall grew in height. At first the planks were nailed to the scantling, but on their last removal, when about six feet from the ground, they were not nailed. At the time of the accident the plaintiff was standing on the planks, tamping the cement and cleaning out the wheelbarrows.

Held, on appeal (IRVING and MCPHILLIPS, JJ.A. dissenting), that the employer was not liable at common law, as the runway did not form part of a system, being something which the employer must of necessity have left to the care of the foreman.

Wilson v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326, followed.

Decision of MACDONALD, J. reversed.

Statement

APPEAL by defendant from a decision of MACDONALD, J. at Vancouver on the 2nd of December, 1913, in an action for damages ($20,000) for injuries sustained by the plaintiff through the negligence of the defendant. The allegation was failure to select competent foremen, and also defective system of carrying on the work on which the plaintiff was employed. A verdict of $2,500 was given for plaintiff, and defendant appealed.

E. A. Lucas, for plaintiff.

Stockton, for defendant.

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MACDONALD, J.: In my opinion, the defendant is liable on the ground of negligence. The defendant seeks to evade liability on the ground that if there is any negligence shewn it was the negligence of fellow employees of plaintiff. I find on the facts that there was a grossly negligent condition at the place where the plaintiff was called upon to do his work and where the accident occurred, and he suffered serious injury. The excuse by the defence is that a number of men were being employed and such condition likely arose through the neglect of some one of these men, perchance one of the foremen, in not having taken the precaution to have the planks upon the scaffold nailed and thus rendered secure. I consider that the defendant cannot on this score escape liability. They had provided a veritable trap for not only this plaintiff, but any other workmen who might be engaged in work of a like nature; and the facts remain undisputed before me that the planks not only were not nailed or so constructed as to meet one another on the level, but overlapped and rendered them still more dangerous. From day to day the workmen engaged were in a perilous and dangerous position, and the only wonder is that before the occurrence when this plaintiff was injured some other person had not also suffered an injury. Now, as to the defence that the defendant is an incorporated company and thus not responsible, the neglect being through one of its employees, I do not think such defence is applicable to the facts in this case. It is (see Davies, J. in *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420 at p. 424),

> "The duty of a master as essential on his part in the first instance at least, to provide fit and proper places for the workmen to work in, and a fit and proper system and suitable materials under and with which to work."

The learned judge further adds that such a duty cannot be got rid of by delegating it to others and that an incorporated company is responsible. Were the argument advanced by the defence correct, there would, in many cases in which verdicts have been rendered in favour of the workman, be a contrary result.

Then the other ground of defence is that the plaintiff was *volens* and thus should not be entitled to succeed. I take it

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that a plaintiff must be shewn, by evidence to satisfy the Court, not only that he was *volens,* but also *sciens.* I do not consider that under the facts in this case and the authorities, that such a defence has been made out on the part of the defendant.

As to the amount of damage to be assessed, having in mind that the action is one at common law and also that the plaintiff must have suffered, not only in loss of time, but in pain and suffering, to a very great extent, the damages should be placed in some such way as to form some compensation for his injury. It is a difficult matter to fix with any degree of mathematical accuracy a certain amount. I understand that for all time to come, during the balance of his life, this workman will be handicapped in his work, and his evidence supports that position. The extent to which that will occur is difficult to arrive at. However, I think that, having given due consideration to the matter of damages, that a fair amount of compensation to be allowed to the plaintiff would be the sum of $2,500. There will be a verdict for the plaintiff for $2,500 and costs.

The appeal was argued at Victoria on the 20th of January, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

S. S. Taylor, K.C., for appellant (defendant): It is admitted there is no action under the Employers' Liability Act or under the Workmen's Compensation Act, as they are too late in bringing their action; their whole case is at common law. It is claimed that we did not provide a safe place for the plaintiff to work. The question of incompetence is eliminated. The planks on which the plaintiff worked were moved every two or three days, and on this occasion they were not nailed, but that was only after the shifting of the planks and could not be called a system; it was the negligence of a fellow servant: see *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326 at p. 332. We discharged every duty to this man that the law requires: see *Grant* v. *Acadia Coal Co.* (1902), 32 S.C.R. 407 at p. 435; *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685; *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420; *Canada Woollen Mills* v. *Traplin* (1904), 35 S.C.R. 424 at p.

431. The facts in *Wilson* v. *Merry, supra,* are precisely the same as in this case: see also *Fralick* v. *Grand Trunk Ry. Co.* (1910), 43 S.C.R. 521; *Brooks, Scanlon, O'Brien Co.* v. *Fakkema* (1911), 44 S.C.R. 421. The scaffolding was always nailed previously, and that was the system we provided, but here the fellow servant departed from that system and neglected to nail the planks: see *McPhee* v. *Esquimalt and Nanaimo Railway Co.* (1913), 49 S.C.R. 43. The plaintiff saw the planks were loose the day he was hurt and what he did makes him guilty either of *volens* or contributory negligence: see *Smith* v. *Baker & Sons* (1891), A.C. 325.

Argument

E. A. Lucas, for respondent (plaintiff): The cross-pieces on which the planks rested and on which the plaintiff stood were loose, and the man in charge of this false work was the general superintendent of the Company. This cannot be distinguished from *Ainslie Mining and Ry. Co.* v. *McDougall, supra;* see also *Waugh-Milburn Construction Co.* v. *Slater* (1913), 48 S.C.R. 609; *Weppler* v. *Canadian Northern Railway Co.* (1913), 5 W.W.R. 472; *Lindsay* v. *Davidson* (1911), 1 W.W.R. 125.

Taylor, in reply: It is not a question of a system at all; it is a question of a violation of a system: *Hosking* v. *Le Roi No. 2* (1903), 34 S.C.R. 244.

Cur. adv. vult.

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MACDONALD, C.J.A.: There is no dispute concerning the facts of this case, and it is conceded that it cannot be decided by reference either to the Employers' Liability Act or to the Workmen's Compensation Act, for the reason that it is out of time in respect to these Acts. The defendant's common-law liability only is in question now.

The defendant was erecting a mill including a circular refuse burner, the walls of which were being constructed of concrete. The burner had a diameter of 25 feet and the walls a thickness of six feet. Forms or skeleton walls of planks were erected and between these the concrete was dumped so that on removal of the planks the solid concrete wall would remain. These forms had to be heightened from time to time as the work

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progressed. Across the forms or skeleton walls were placed 2 x 4 scantling, and on these planks were laid making a gangway of about two feet in width in the centre between the skeleton walls. The concrete was wheeled in barrows up an incline bridge and along this gangway, and dumped into the cavity beneath. At the time of the injuries for which the plaintiff claims damages, the skeleton walls had reached a height of six feet from the ground. They had been raised at least once or twice before the day in question. The work on the burner had been in progress for about three days at that time. The plaintiff was employed on this gangway cleaning out the wheelbarrows and adjusting the concrete in the form with a pole or tamping stick.

The negligence complained of was in not nailing the planks to the cross-pieces; one of the planks had been forced out of position by the wheelbarrows, and had lost its hold upon the cross-piece, and the plaintiff, inadvertently stepping upon it, was thrown down and injured. In the construction of similar concrete work in other parts of the mill the scaffolding which corresponded to the gangway in question had been properly nailed. The construction and raising of the forms from time to time was entrusted to a competent foreman and competent workmen. This, I think, is the result of the admissions of plaintiff's counsel at the conclusion of the evidence at the trial. I think it may also be inferred from the whole case that these men were supplied by defendant with suitable materials and appliances with which to do the work properly. The gangway was a temporary structure which, I take it, had to be removed each time the walls were raised in height and then replaced. This apparently would occur within short intervals, if not from day to day.

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Unless the employer (an incorporated company) was in duty bound to do more than put the work in competent hands and supply the necessary materials and resources to do it, so that if carefully done the gangway should be a safe place for the plaintiff and other employees to work upon, then the judgment for the plaintiff cannot be sustained. The contention of respondent's counsel is that the gangway was part of a system.

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In fact he grounded his case entirely upon that. In my opinion, it was not part of a system. It was something that appellant must of necessity have left to the care of its foreman and workmen. I think it was even less a part of a system than was the platform in *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326. The case, I think, is distinguishable from *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420; *Brooks, Scanlon, O'Brien Co.* v. *Fakkema* (1911), 44 S.C.R. 412; and other cases of that character. It is more akin to *Hosking* v. *Le Roi No. 2* (1903), 34 S.C.R. 244. In any case it seems to be so completely covered by *Wilson* v. *Merry, supra,* that I am impelled to the conclusion that the appeal must be allowed and the action dismissed with costs.

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In the result it becomes unnecessary to deal with the question of plaintiff's voluntary assumption of the risk, which also was raised in the appeal.

IRVING, J.A.

IRVING, J.A.: I would dismiss this appeal on the authority of the *Fakkema* case. There is evidence here from which it may be inferred that there was neglect of duty to properly adjust the boards along which the plaintiff was expected to wheel his wheelbarrow. This is neglect which, to my mind, would be the fault of a fellow servant, and, therefore, a defence in a common-law action (as this is), and can, according to the *Fakkema* case, be regarded as a faulty system.

As to the contention that the plaintiff was *volens,* I certainly would have drawn the inference that he was, but the judge thought he was not, and it is not advisable for a judge in appeal to upset an inference drawn by a trial judge, when there is evidence to support his finding. Besides, the doctrine of *volens* has almost reached the vanishing point.

MARTIN, J.A.

MARTIN, J.A.: This appeal, I think, should be allowed; the judgment on the facts can only be supported on the ground that the defendant had not provided a safe place for the plaintiff to work in. It is not a case of system. But the authorities cited in favour of the respondent, ending with

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Waugh-Milburn Construction Co. v. *Slater* (1913), 48 S.C.R. 609, do not apply to the facts of this case, which is one of the alteration in a runway or staging at frequent intervals; as the wall rose day by day, it might be safe to-day and unsafe to-morrow. As a matter of fact, when the work of constructing the wall was begun it was reasonably safe, for the runway was upon, or close to the ground, but as the wall rose and the staging with it, it gradually became so high that the precaution of nailing the planks should have been taken by the foreman in charge, and an action could have been maintained under the Employers' Liability Act if it had been brought in time.

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GALLIHER, J.A.: The work in which the plaintiff was engaged at the time of the accident was in connection with the erection of a cement burner some 20 feet in diameter and which at that time had reached a height of about 14 feet from the ground. His duty on the day in question was levelling the cement after it was poured into the forms from wheelbarrows, and, in order to do this, was obliged to stand on planks laid on 2 x 4 pieces on top of the forms. The burner was circular in shape, and the planks, instead of being cut on the bias so as to come together and conform to this shape, were crossed one on top of the other and were not nailed, and one of these planks upon which the plaintiff stepped, having been shifted by the wheeling of the heavy barrows full of cement, tipped and the plaintiff fell and was injured. No testimony was given one way or the other as to the competence of the foreman in charge of the work or the erection of these runways, but counsel for the plaintiff said he did not question the competence of the foreman except in so far as the nature of the structure shewed. The method adopted was, in my view, grossly negligent, so much so that, had the general competence of the foreman been questioned, I would have been inclined to hold that it argued incompetence; however, the admissions of plaintiff's counsel do not warrant me in going beyond classing it as negligence.

In this view, with some reluctance, I am unable to dis-

tinguish it from *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326.

The appeal must be allowed.

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McPHILLIPS, J.A.: This appeal is one brought by the defendant Company from a decision of MACDONALD, J. in a common-law action for negligence, tried by him without a jury, judgment being entered for $2,500 in favour of the plaintiff.

The plaintiff was seriously and permanently injured by falling from a staging consisting of loose planks placed upon the top of the form or false work used in the construction of a large burner at the sawmills of the defendant Company. The burner was being constructed of concrete, and the plaintiff was at times wheeling barrows of the concrete up the runway, and along the planks, to the top, and dumping it between the false work where required, and at other times emptying or scraping out the barrows and smoothing or levelling the concrete down, after it was dumped by other employees. At the time of the accident the plaintiff was, pursuant to instructions given him, scraping out the barrows and smoothing and levelling down the concrete, and about the last of the concrete had been deposited to complete the final course which could go on with the false work already constructed. It would appear that up the slanting runway the planks were nailed, but those upon the top of the false work were not, and the planks were overlapped over which the barrows had to be wheeled, and the workmen were standing and working on these planks, which, not being nailed, under the influence of the weight brought upon them by the wheeling and other strain from time to time, were liable to get out of position, which event did happen, precipitating the plaintiff to the ground below. The form or false work, the slanting runway and the loose planks on top were built to a height of about six feet from the ground about a week before the accident, and the plaintiff had been working about a week before the accident took place. A superintendent and foreman were in charge and were about the place and saw the work going on and were

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at times upon the staging during the progress of the work. An excavation had been made inside the form or false work, *i.e.*, the interior of the circular form or false work and the depth to the inside from the top was 14 feet to the outside six feet. Previous to the form or false work being constructed for the burner a machine house had been constructed of concrete at the same place, and the planks were during the construction nailed down. The planks in the form or false work were, of course, nailed, and the planks upon the runway slanting up to the top of the form or false work for the burner were nailed, but the others which circled round were not nailed. The plaintiff in doing the work he was engaged upon had to stand upon and pass over these planks which were left unnailed, and, stepping upon one of the planks, it tipped up, as he explains it, and he fell to the ground.

It is perhaps somewhat explanatory of matters to quote some of the questions put to the plaintiff by counsel for the defendant Company and the answers made thereto by the plaintiff. It is to be noted that the plaintiff is a Scandinavian and was examined through an interpreter.

"*Stockton*: You knew that the planks would tip, they would be apt to tip if you stepped on them? No, he says if he had known that he would have watched himself better; but it happened sometimes that the fellow-workers would fall down with the wheelbarrow.

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"*Stockton*: We will see what he says on discovery on that as well.

"You knew you had to be careful when you were on those planks, didn't you? Yes, he was always careful, he says.

"You knew that if you were not careful you were apt to tip the planks and you were apt to go over, isn't that right? Yes, he says, one had to watch them and see that they laid in their original positions or else they would be liable to tip or slip off.

"And you knew that you had to watch them and had to be careful, isn't that right? It was not his job, he says, to watch these planks.

"Did you know that you had to be careful when you were walking on those planks? Yes, he knew he had to be careful.

"You knew that it was dangerous work, working up there with those planks that way, didn't you, Mr. Liset? What does he say? Yes, he says, but he was very busy emptying out, scrapping out the wheelbarrows as they came along with him, and it was not his job, so he would forget it; it was not his job to do it.

"You knew it was dangerous working up there on the scaffold though? Yes, I saw it was not very safe and I tried to look out for it.

"You knew it was not—

"Court: Finish your answer. You saw it was not very safe and what? He saw it was not very safe and tried to look out for himself as best he could.

"*Stockton*: You recognized it was a dangerous place to work when you started to work on that, didn't you? He thought it was not very dangerous, because it was not very high.

"But you knew there was a chance of those boards tipping, isn't that right? He says he didn't think anything about that. He thought it was the foreman's business to watch out for the scaffold and none of his."

The learned judge, in his findings of fact, held that the defendant Company was guilty of negligence, and that the negligence was not that of a fellow servant, but negligence imputable to the defendant Company, being a case of defective installation and construction without proper precautions to provide a fit and proper place for the plaintiff to work, that the plaintiff had not consented to undertake the risk and a defective system. I suppose it may well be said that negligence in law receives more careful attention and is oftener up for consideration by the Courts than perhaps any other branch of the law, yet, with all the investigation we have had, great uncertainty exists, and, it must be said, always will exist, consequent upon the varying conditions and situations in which persons may be placed, and in the relationship of masters and servants, the relative duties and responsibilities which the law imposes are sometimes most difficult of ascertainment.

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For a short and terse statement, and an accepted one, of what constitutes "negligence," Willes, J. said in *Vaughan* v. *The Taff Vale Railway Company* (1860), 29 L.J., Ex. 247 at p. 248:

"The definition of 'negligence' is the absence of care, more or less, according to the circumstances."

In the present case no doubt the plaintiff was aware that the planks were loose, and that there was danger, but does that preclude his right of recovery? I think not: see the remarks of Lord Watson in *Smith* v. *Baker & Sons* (1891), A.C. 325 at p. 344.

In *Waugh-Milburn Construction Co.* v. *Slater* (1913), 48 S.C.R. 609, it was held by the defence that the accident occurred through the fault of a fellow servant was not available, and the default to take measures to ensure the safety of

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the employee was personal negligence on the part of the company: *per* Fitzpatrick, C.J. at p. 615. In the present case, at the inception of things, when the first work on the construction of the burner is entered upon, the planks are laid and left unnailed; it is not a case of the staging being at first properly constructed with materials at hand and competent servants charged with the duty to see to its being kept in proper condition.

In *Brooks, Scanlon, O'Brien Co.* v. *Fakkema* (1911), 44 S.C.R. 412 at p. 417, Duff, J. said:

"As to the first point, the employer is responsible according to the view of the majority of the judges in *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420, for the installation of a system of work which needlessly exposes his workmen to risk of injury."

In the present case, in my opinion, there is the clearest evidence that there was a defective system, which renders the defendant Company liable.

In *Webster* v. *Foley* (1892), 21 S.C.R. 580, it was held that a master is responsible to his workmen for personal injuries occasioned by a defective system of using machinery as well as for injuries caused by a defect in the machinery itself, and that at common law a workman was not precluded from obtaining compensation for injuries received by reason of defective machinery or a defective system of using the same by reason of his failure to give notice to the employer of such defect. Strong, J. said at p. 586, referring to the judgment of Lord Watson in *Smith* v. *Baker & Sons, supra*:

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"And at page 355 Lord Watson pointed out that at common law notice to the employer of the unsafe state or the unsafe working of appliances or apparatus was not required, and that he was bound at his peril to make proper provision in these respects, but that the Employers' Liability Act had, in this respect, altered the law in favour of the employer by requiring that the workman should give information of the dangerous or defective state of the appliances."

The learned judge has relied upon *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420, and rightly, it was in that case held that an employer is under an obligation to provide safe and proper places in which his employees can do their work, and cannot relieve himself of such obligation by delegating the duty to another, and that if an employee is

injured through failure of the employer to fulfil such obligation the employer cannot in an action against him for damages invoke the doctrine of common employment.

In *Weppler* v. *Canadian Northern Ry. Co.* (1913), 23 Man. L.R. 665; 5 W.W.R. 472, it was held that to support the defence of *volenti non fit injuria* the defendant must set up and prove affirmatively first that the plaintiff well knew the danger and the risk; second, that the plaintiff contracted or consented to run the risk. Mere proof that the plaintiff knew the danger and continued in his employment is not conclusive evidence to prove the second point.

It is plain in the present case that the defendant Company had carpenters to put up the form or false work, and there was a superintendent and foreman about, and the construction of the burner was a new work and of different shape, no doubt, to the machine house, being circular, and the duty of the defendant Company was to see to it that in the carrying on of the work a safe system was adopted, and, in my opinion, a most unsafe system, as it was proved, was adopted, resulting in this very serious and permanent injury to the plaintiff.

I cannot accede to the very forceful argument of Mr. *Taylor,* counsel for the defence, that this is not a case of liability because of the fact that the defendant Company had competent servants, and that in the construction of the machine house, carried out shortly before work on the burner was undertaken, the planks upon the top of the form or false work were nailed, to the plaintiff's knowledge, and that the negligence was the negligence of fellow servants, *i.e.,* the carpenters. At first sight this would seem to be very convincing, but when analyzed it is far from convincing, as it really fails to establish compliance with that duty which at common law is imposed on the master, and that is to at all times provide the workmen with a reasonably safe place to work. The building of the burner was a new work, and the form and false work no doubt greatly differed in construction, and was it incumbent upon the plaintiff to point out to the employer that in this new work the system was a different one and to apprehend danger and point out the danger to the employer and at his peril continue

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the work? I cannot think that this can be the situation in law.

Now, upon the facts of the present case it is clearly demonstrated that there has been negligence and negligence imputable to the defendant Company. Lord Watson in *Smith* v. *Baker & Sons, supra,* at p. 353, said:

"The judgment of Lord Wensleydale in *Weems* v. *Mathieson* (1861), 4 Macq. H.L. 215 at p. 226, clearly shews that the noble and learned Lord was also of opinion that a master is responsible in point of law not only for a defect on his part in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used."

In the present case there was failure to see that the supplied materials were properly placed, and properly secured, *i.e.,* an absence of proper precautions—a defective system is proved, and, in my opinion, it is impossible for the defendant Company to shelter themselves behind other servants to whom they delegated a duty which is inseparably fastened upon themselves, in the language of Davies, J. in *Ainslie Mining and Ry. Co.* v. *McDougall, supra,* at p. 428:

"Their duty to their workmen in this situation was to provide them with a reasonably safe place in which to work."

MCPHILLIPS, J.A.

Upon the facts of the present case was it a reasonably safe place to work? The obvious and only answer, in my opinion, is, that it was not, and that happened which proper precautions and a proper system would have prevented.

It therefore follows that, in my opinion, the decision of the learned trial judge is right and the appeal should be dismissed.

Appeal allowed, Irving and McPhillips, JJ.A. dissenting.

Solicitors for appellant: *Taylor, Harvey, Grant, Stockton & Smith.*

Solicitors for respondent: *Lucas & Lucas.*

REX v. ALLERTON.

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March 3.

REX v. ALLERTON

Criminal law—Proceeding before police magistrate—Attorney-General as witness—Subpoena—Discretion of magistrate as to issue of—Criminal Code, Secs. 671 and 711.

A minister of the Crown may be summoned as a witness.

The power of compelling attendance given by sections 671 and 711 of the Criminal Code should be exercised only when the magistrate has reason to believe that any person can give relevant and material evidence in a matter pending before him.

Statement

APPLICATION for a writ of *mandamus* heard by MACDONALD, J. at Victoria on the 3rd of March, 1914.

Aikman, for applicant.
Maclean, K.C., for the Attorney-General.
C. L. Harrison, for the Police Magistrate.

Judgment

MACDONALD, J.: This is an application for a writ of *mandamus* to compel the police magistrate of the City of Victoria to issue a subpœna to the Honourable the Attorney-General of the Province to compel his attendance as a witness at a summary trial before such police magistrate. The applicant relies upon the provisions of section 671 of the Criminal Code, coupled with section 711 of the Code. During the course of the able argument presented by counsel for the applicant, he took the ground that the word "may" in section 671 should be construed as "shall," or to make the verbiage more applicable, "must." It is not contended by counsel for the Attorney-General or counsel for the magistrate that the section could not bear this construction. I do not find it necessary to express a decided opinion on that point. It will suffice for me to say that a power of this kind, in the interests of justice should not depend upon the whim or feeling of the magistrate at the time. In my opinion, speaking generally, the magistrate is called upon under that section to issue a subpœna or summons, as it is termed, to any

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of His Majesty's subjects whom he has reason to believe will be a material witness, and give relevant evidence in a matter then pending before him. The wording, however, seems to place some responsibility upon the magistrate, and vest him with some discretion, because it speaks of the person to be subpœnaed as likely to give material evidence respecting the charge. If the affidavit on the part of the applicant had not been met by the affidavit of the magistrate, I would have thought it advisable, in my present opinion of the matter, to grant the writ. But that affidavit is met by one on the part of the magistrate, in which he sets forth the reasons which were suggested by the solicitor for the applicant for obtaining such subpœna for the Attorney-General. To my mind the statement of the magistrate, uncontradicted, shews that the witness so sought to be examined under the subpœna, could not give material evidence in the matter then pending. In other words, he was not the witness that is contemplated by section 671. And the authority of *Rex* v. *Baines* (1909), 1 K.B. 258, seems to completely cover the situation. In that case ministers of the Crown were sought to be examined as witnesses at a criminal trial, and a subpœna actually issued and was served. An application was successfully made to the Court to set aside such subpœna, as being an abuse of the process of the Court, on the ground that such witnesses could not give any relevant evidence. It was mentioned in that case, that a minister of the Crown had no special privilege from being summoned as a witness. They have no privilege or precedence over other subjects of the Crown. But if a subpœna is issued in a way that would be harassing, and not to aid in the administration of justice, but for an ulterior purpose, then the interference of a Superior Court is, upon application, amply justified.

Judgment

It has been suggested by counsel for the applicant in his reply, that the material might in some way be amended so as to meet the objections that have been taken; but I do not feel called upon to express any opinion in that connection. So far as this application is concerned, it is refused.

Application refused.

BREITENSTEIN v. MUNSON *ET AL.*

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March 14.

BREITENSTEIN v. MUNSON

Trusts and trustees—Husband and wife—Oral agreement to become jointly interested in land with right of survivorship—Carried out by conveyance to wife, who makes will in favour of husband—New will revoking former and leaving half estate to daughter—Will inoperative as to trust estate—Statute of Frauds—Cannot be set up as a cloak to a fraud.

The plaintiff, having acquired an interest in land, entered into an oral agreement with his wife whereby they were to become jointly interested in the land, with the right of survivorship. The arrangement was carried out by a conveyance to the wife, and a will made by her in the plaintiff's favour. Later the wife made a new will revoking the former will, and leaving half her property to the plaintiff and half to a daughter by a former marriage.

Held, that the property was received by the wife subject to a trust in favour of the plaintiff, which continued up to the time of her death, whereupon the plaintiff became the sole owner.

Held, further, that the interest of the wife having been acquired subject to a trust in favour of the plaintiff, the Statute of Frauds cannot be set up as a cloak to a fraud.

Statement

ACTION for a declaration that the defendant, Lilian Munson, took no benefit under the will of the plaintiff's deceased wife in respect of a parcel of land which stood in the name of the deceased wife, but was the property of the plaintiff. Tried by MACDONALD, J. at Vancouver on the 13th of February, 1914. The facts are set out fully in the reasons for judgment.

Scott, and *Goodstone,* for plaintiff.

R. R. Maitland, and *Hunter,* for defendants.

14th March, 1914.

Judgment

MACDONALD, J.: In 1907 the plaintiff became possessed of a beneficial interest in lot 7, block 105, district lot 264A, City of Vancouver, and this was the only asset of any importance possessed at the time by the plaintiff.

Plaintiff is over 75 years of age, and was considerably older than his wife, Mattie Breitenstein, to whom he was married in 1903. It was agreed between them in 1903 that they should

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become jointly interested in this lot, with the right of survivorship. I am quite satisfied that this was the intention of the parties at the time, and to effect such object a solicitor was employed. He recollects the preparation and execution of the documents which he considered would answer the purpose. Plaintiff assigned to his wife his entire interest in the property, and she in turn made a will in his favour. A simpler and safer mode of conveyancing might have been adopted. While the husband was bound by his absolute assignment under seal, the wife might revoke her will and defeat the object of the family arrangement, or even without revocation, further assign the property to a *bona-fide* purchaser. The property thus assigned to the wife was at the time received by her subject to a charge or trust in favour of the plaintiff. They became in equity, irrespective of the form of the documents, jointly interested in the property, with right of survivorship. The plaintiff, who was in receipt of good wages as a stonemason, managed the property, and made the further payments that were required to completely vest the title in the wife and comply with the terms of the agreement under which the property had been originally purchased. This situation continued until a sale subsequently took place to one Flowers.

Judgment

It was sought at the trial to amend the statement of defence by setting up the Statute of Frauds, it being contended that the *North-Western Salt Co.* v. *Electrolytic Alkali Co.* (1912), 107 L.T.N.S. 439 applied, and gave such right, even at such a late stage of the proceedings. I doubted the application of this decision, as the facts were not similar to the present case, but, following the practice of IRVING, J. in *McNerhanie* v. *Archibald* (1898), 6 B.C. 260 at p. 262, I allowed the amendment, reserving the question of costs. I do not think, however, that the Statute of Frauds affords any defence in view of the finding already referred to.

The interest of the wife having been acquired subject to the trust in favour of the plaintiff, it would be a fraud to now set up the Statute of Frauds as a cloak: see *Rochfoucauld* v. *Boustead* (1897), 1 Ch. 196; *Gordon* v. *Handford* (1906), 16 Man. L.R. 292.

In 1909, the wife, in company with her daughter, Lilian Munson, one of the defendants, instructed the same solicitor who had acted in 1907, to draw a new will, by which the wife devised half her property to the plaintiff and half to such daughter. The solicitor states that he would not have drawn such a will, had he recollected the previous arrangement, but forgetting what had taken place, the will was prepared and duly executed, and remained in his possession. At the same time the previous will was destroyed. The plaintiff contends that this second will was a fraud upon him, and in breach of the arrangement under which he assigned the property to his wife. Upon the death of the wife, Lilian Munson claimed half the interest in the estate, including an interest in what is known as lot 19, block 113, district lot 301, City of Vancouver, which had been acquired in the name of the plaintiff out of the proceeds of the sale to Flowers of lot 7. If the property remained subject to the trust, or the right of survivorship in favour of plaintiff, then no interest in lot 7 or lot 19 passed under the will.

The only point, in my opinion, left for consideration is whether, either before the execution of the second will or at any time thereafter, up to the death of the wife, the situation between the husband and wife had changed, or the arrangement had become so modified that she became entitled to devise half the property standing in her name to the defendant Munson.

It appears Lilian Munson, shortly after a second marriage, was invited to come from Alaska to visit her mother, who was practically an invalid. Her evidence tends to shew an arrangement by which her mother was to give her half the property at her death, and in the meantime she was to remain with her mother and assist in the general housework and usual domestic arrangements. Now, if this arrangement was acceded to by the plaintiff, her step-father, in such a way as to amount to an agreement, the second will might become operative so as to confer an interest upon the daughter.

The plaintiff denies any such arrangement, and says that even the execution of the will was concealed from him, until about six weeks before the death of his wife. The solicitor, who acted for all parties at the time, thought that the plaintiff was

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incorrect in this, and that he had not become aware of the will until after the death of the wife. A close perusal of the evidence given by the daughter, Lilian Munson, does not shew any clear-cut bargain as to her services being recompensed by any disposition of the property. It should, however, be considered whether by an application of the principle of estoppel, it might be successfully contended that the wife was entitled to deal with a half interest in the property and dispose of it to her daughter. Independent witnesses were called, and it is difficult to determine as between conflicting statements where the truth of the matter lies. The principal witness on behalf of the plaintiff was John Graham, a real-estate broker, and he says that the wife, in 1911, stated that she was "simply holding the property for Breitenstein," and that they "had an understanding that the one that lived the longest should inherit the property." Mrs. Muir gave evidence to the contrary, which supported the contention of the defence, and says that on one occasion the wife, in the presence of her husband, stated that she "owned the property and was going to give Lily [defendant Munson] half of it to take care of her, and that she had to have somebody to do it and she wanted Lily to do this." Defendant Munson shewed by her evidence that the making of the second will was not disclosed to the plaintiff at the time, and states that it was not until the spring of 1910 that her mother mentioned the new will. In reply to a question as to whether the plaintiff was present at the time she answered in the affirmative, and voluntarily added the words, "and, of course, he was angry." He further added that she (meaning the wife) "was a cheat."

Judgment

Now, if the contention made by this defendant were correct, there would be no reason for the plaintiff becoming angry or accusing his wife of fraud. So that, even upon the statements of the defendant Munson, there was not an arrangement by which she was to receive half the property standing in the name of her mother in return for any services rendered or otherwise.

I think that the probabilities are in favour of there being no abandonment by the plaintiff of his right of survivorship. Instead of approving of the second will, he protested. Considering the relationship of the parties, and the disparity in

age, even if I gave full effect to this portion of the evidence, I do not think it was to be expected that the husband would take active steps to establish his interest in the lifetime of the wife. Unless defendant Munson can shew that her position was thereby altered, she cannot complain. I feel quite satisfied that she would in any event have made her home with her mother. I am further impressed with the danger of supporting a change of situation between the husband and the wife dependent upon chance conversations recounted years after. In the circumstances, I find that the trust which existed continued up to the time of the death of the wife, and that the plaintiff thereupon became the sole owner of any interest possessed by the late Mattie Breitenstein in lot 7, and entitled to any purchase-money still payable in connection with the sale of such property. Plaintiff retains the entire ownership of lot 19. There will be judgment accordingly for plaintiff, with costs against defendant Munson.

Judgment

A suit brought by defendant Munson against the plaintiff herein was, by order of the Court, directed to be tried at the same time as this action. The actual contest in such action was as to the ownership of the real property. It was admitted that there was no personal property to pass under the will. It may, however, be proved if parties interested so desire. As defendant was dilatory, if not negligent, in producing the will for probate, and invited litigation by his actions, I consider a proper disposition of the costs of such action would be not to allow them to either party.

Judgment for plaintiff.

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DELL v. SAUNDERS

DELL v. SAUNDERS.

Vendor and purchaser—Agreement for sale of land—Subsequent sale of land subject to agreement—Parol assignment of agreement for sale—Right of assignor to sue—Assignment of legal chose in action—Laws Declaratory Act, R.S.B.C. 1911, Cap. 133, Sec. 2, Subsec. 25.

By instrument in writing B. agreed to sell land to S., who paid some cash and agreed to pay the balance in four equal instalments at intervals of six months. B. then sold the property to D., subject to the agreement. There was no written assignment to D. of the agreement, or of the moneys payable by S. under it; but there was evidence of a parol assignment of it; and in a conveyance of another lot from B. to D. it was recited that the agreement had been assigned to D. Upon the first instalment coming due under the agreement S. failed to pay, and D. sued S. for the amount so due in his own name.

Held, on appeal (MCPHILLIPS, J.A. dissenting), that the assignment of the benefit of the covenant for payment in an agreement of sale must be in writing to enable the assignee to sue upon the covenant in his own name.

Per MACDONALD, C.J.A.: Legal choses in action could and have been recovered by suit in the name of the assignor. It is here that that law has been changed. The Laws Declaratory Act, R.S.B.C. 1911, Cap. 133, Sec. 2, Subsec. (25), gives the assignee of a legal chose in action who complies with its provisions the right to sue in his own name, but when a legal chose in action is assigned otherwise than in conformity to the Act, he must still sue in the name of his assignor.

Decision of MCINNES, Co. J. reversed.

Statement

APPEAL from a decision of MCINNES, Co. J. in an action for the recovery of an instalment of purchase-money under an agreement for sale tried by him at Vancouver on the 27th of October, 1913. The facts are that one Ruby Blackwell, who was the owner, subject to a mortgage, of lot 16, block 70, of district lot 540, group 1, New Westminster district, entered into a written agreement on the 23rd of November, 1912, to sell the lot to the defendant, Mary E. Saunders. Mrs. Saunders paid $1,100 cash, assumed the mortgage of $2,300, and agreed to pay four instalments of $525 each, one every six months, with interest at 7 per cent., the first instalment being due and pay-

able on the 23rd of June, 1913. In February, 1913, Mrs. Blackwell conveyed the lot to the plaintiff, subject to the mortgage and the Saunders agreement. There was no written assignment by Mrs. Blackwell to the plaintiff of the Saunders agreement or of the moneys payable under it, but there was a recital of the assignment in a document to which Mrs. Blackwell and the plaintiff were parties, bearing even date with the transfer of the lot to the plaintiff and other evidence of a parol assignment of the agreement. Default having been made by the defendant in payment of the first instalment of $525, the plaintiff brought action in his own name without making the assignor a party to the action either as a plaintiff or defendant. Upon the trial judgment was given in favour of the plaintiff for the amount claimed. The defendant appealed.

Statement

The appeal was argued at Victoria on the 9th of January, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Bray, for appellant (defendant): The judgment was for the amount of the first instalment under an agreement for sale. The defence is that there was no written assignment of the agreement nor of the moneys payable under it to the plaintiff, and no notice of the assignment was given to the defendant. The plaintiff claims there was a parol assignment, and the question is whether there was such an assignment as enabled the assignee to sue in his own name: see *Durham Brothers* v. *Robertson* (1898), 1 Q.B. 765; 67 L.J., Q.B. 484. The assignment must be brought within section 2, subsection (25) of the Laws Declaratory Act in order to give the assignee the right to sue in his own name: see *Reynolds* v. *McPhalen* (1908), 7 W.L.R. 380. We may have some equities we could plead if the assignor were a party; this we cannot do when he is not: *Bateman* v. *Hunt* (1904), 2 K.B. 530; *King* v. *Victoria Insurance Company* (1896), A.C. 250; *Torkington* v. *Magee* (1902), 2 K.B. 427 at pp. 430-32. The most it can be is an equitable assignment, and there is not even any evidence of that: see Phipson on Evidence, 4th Ed., p. 630.

Argument

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Argument

Sir C. H. Tupper, K.C., for respondent (plaintiff): We were about to discount the agreement in the usual way when we saw the defendant as to a building which was being erected on the property. As to the right of the plaintiff to sue in his own name, see Halsbury's Laws of England, Vol. 4, p. 391, par. 829, and p. 375, par. 796; *Israel* v. *Douglas* (1789), 1 H. Bl. 239 at p. 241; *Surtees* v. *Hubbard* (1803), 4 Esp. 203; 6 R.R. 853; *Baron* v. *Husband* (1853), 4 B. & Ad. 611. This was an equitable chose in action, as it was a right arising in the future when the assignment took place.

Bray, in reply, referred to *Walker* v. *Bradford Old Bank* (1884), 12 Q.B.D. 511; and *Brice* v. *Bannister* (1878), 3 Q.B.D. 569.

Cur. adv. vult.

7th April, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The facts of this case, briefly stated, are that one Ruby Blackwell, being the owner, subject to a mortgage, of lot 16, more particularly described in the pleadings, entered into a written agreement, dated the 23rd of November, 1912, to sell it to the defendant Mary E. Saunders. Some cash was paid down, Mrs. Saunders assumed the mortgage and agreed to pay it off, and the balance of the purchase-money was made payable in four equal instalments of $525 each, the first payable in June, 1913. In February, 1913, Mrs. Blackwell conveyed the lot to the plaintiff, subject to the mortgage and to the Saunders agreement. There was no written assignment to the plaintiff of that agreement, or of the moneys payable by the defendant under it, but I think there is sufficient evidence of a parol assignment of it. In a document bearing even date with the above-mentioned conveyance it is recited that the Saunders agreement had been assigned to the plaintiff.

I do not think that the recital can be regarded as an assignment in writing conforming to subsection (25) of section 2 of the Laws Declaratory Act, R.S.B.C. 1911, Cap. 133, which is practically, if not identically, the same as subsection (6) of section 25 of the English Judicature Act, 1873. There was admittedly no notice in writing to the defendant of any assign-

ment to the plaintiff; the plaintiff is, therefore, not entitled to the benefit of said subsection (25).

Default having been made by defendant in the payment of said first instalment, the plaintiff brought this action in his own name, and without joining the assignor, either as plaintiff or defendant, and obtained judgment in his favour, and from that judgment defendant appeals.

While it is clear that there was no assignment under the Act, I think it is equally clear that there was a good equitable assignment. The case is therefore narrowed down to the question: Was the right assigned an equitable chose in action or was it, on the contrary, a "debt or other legal chose in action?" Either could be assigned in equity, or, to put it another way, there could be a good equitable assignment of a debt or legal chose in action as well as of an equitable chose in action. The said subsection does not affect the matter except to this extent, that when the chose in action is a legal one, and is assigned in writing, and notice is given in the manner provided by the subsection, the assignee obtains a remedy for its recovery by action in his own name, and is not obliged, as formerly, to sue in the name of his assignor. It is only when the right assigned is an equitable one—that is to say, one which, before the Judicature Act, could have been enforced only in the Court of Chancery, that the assignee can sue in his own name. The law in this regard has not been changed by the said Act. Legal choses in action could and have been recovered by suit in the name of the assignor. It is here that that law has been changed. The Act gives the assignee of a legal chose in action who complies with its provisions the right to sue in his own name, but when a legal chose in action is assigned otherwise than in conformity to the Act he must still sue in the name of his assignor. It is necessary, therefore, to ascertain what the nature of the right in question in this appeal was. Was it an equitable right which was assigned or was it a legal one?

MACDONALD, C.J.A.

It was strongly urged by respondent's counsel that because at the date of the assignment in question the moneys were not due, but were merely accruing due, the right to recover them at maturity was an equitable right only. That contention is dis-

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posed of by the judgments in *Walker* v. *Bradford Old Bank* (1884), 12 Q.B.D. 511 at p. 516; *Buck* v. *Robson* (1878), 3 Q.B.D. 686; and *Brice* v. *Bannister, ib.* 569 and 575. The authority of the latter case has been questioned, but only because it was there held that an assignment of part of a debt or fund was within the section: *Durham Brothers* v. *Robertson* (1898), 1 Q.B. 765; *Jones* v. *Humphreys* (1902), 1 K.B. 10. It was not, however, doubted that had the whole debt been assigned, the assignment would have been one of a debt or legal chose in action within the meaning of the subsection.

Again, it was held by Lord Alverstone, C.J., Darling and Channell, JJ., in *Torkington* v. *Magee* (1902), 2 K.B. 427, that the assignment of a contract of sale of a reversionary interest in property was an assignment of a legal chose in action. Channell, J., in delivering the judgment of the Court, said at p. 431:

> "Now, the question we have to consider in the present case is whether an executory contract of purchase under which each party has rights and responsibilities, but of which there had been no breach at the date of the assignment, so that at that date no action could be brought upon the contract, but which, if occasion shall ever arise to enforce it, must of necessity be enforced by action, is assignable by this sub-section as a 'legal chose in action.'"

MACDONALD, C.J.A.

He then proceeds to say that it unquestionably was a legal chose in action, and that it was also such within the meaning of the subsection, and that a Court of equity would have enforced it in an action brought by the assignee in the name of the assignor. The case at bar is the converse of that case in this respect that there the purchaser assigned his contract, while here the vendor assigned hers. I see no distinction in principle between the two cases.

I have examined a number of other authorities bearing on this question, and nowhere have I found anything to support the submission that rights of the kind here in question when assigned otherwise than in accordance with the subsection can be recovered by the assignee in the absence of the assignor as nominal plaintiff or as a defendant.

One other question remains to be noticed, although it was not strongly pressed. *Sir Charles Hibbert Tupper* argued that

there had been such a recognition of the assignment by the defendant as to amount to an implied promise on her part to pay directly to the plaintiff. The facts bearing upon this point are that defendant, in February, about the time of the assignment, wrote a letter to plaintiff's agent, Honeyman, presumably at plaintiff's request, informing him that she accepted the house on said lot as being complete. I infer that it was part of Mrs. Blackwell's agreement with defendant to build a house on the lot and plaintiff wanted to be sure that the house had been completed. Manifestly that letter, standing alone, is not evidence from which a promise to pay the moneys due under her agreement directly to the plaintiff can be implied. Honeyman was a witness on behalf of the plaintiff. He testified that defendant's husband had made promises to him to pay the instalment now sued for, and had told him that he was acting on behalf of his wife, the defendant.

Now, while it is true that a novation may be inferred from the acts and conduct of the parties, it must not be forgotten that the facts relied upon to shew a novation must be such as to establish a new contract, and are governed by the ordinary rules respecting contracts. There must be, for instance, consideration, and there is no suggestion of any consideration having passed between the parties here. The promises by the husband were made, as I understand the evidence, after the instalment sued on was due, and in arrears. Moreover, there is no suggestion that the assignor was released by the assignee.

Apart from the objection that the husband's agency was not proven by Honeyman's evidence of his admission of it, and assuming that the defendant herself had promised the plaintiff that she would pay this instalment, that was a promise founded on no consideration.

Besides, I am unable to find any legal evidence of the husband's actual authority, or of any holding out by the wife of him as having authority to make any contract of this sort with the plaintiff.

The action being defective for want of parties, there remains the question of whether or not we ought to allow an amendment if the respondent so desires. As was said in *William*

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Brandt's Sons & Co. v. *Dunlop Rubber Co.* (1905), 74 L.J., K.B. 898, actions are not now dismissed for want of parties. Hence I think, subject to what counsel may say, that question not having been argued, that the plaintiff should have leave to add the assignor as a plaintiff, if she will consent, and, if she refuse, then as a defendant.

IRVING, J.A.

IRVING, J.A.: I would allow this appeal.

Plaintiff seeks to recover a debt due from the defendant to one Blackwell, at the date of the assignment, though not payable until a future time, but he has not obtained an assignment in writing of the debt. No particular form of assignment is necessary, but the plaintiff, in this case, has nothing but an equivocal recital in a deed. I do not think the recital is sufficient to enable plaintiff to maintain this action.

MARTIN, J.A.

MARTIN, J.A.: I agree that the appeal should be allowed. The contention of the appellant that as a matter of fact there never was an assignment of any kind of the agreement for sale is, I think, correct. The only evidence in support of it is the recital of such assignment in the conveyance of the 13th of February, 1913, from Blackwell to the plaintiff of another lot, while in this conveyance of same date by Blackwell to the plaintiff of the lot in question the conveyance is "subject to" the said agreement for sale.

The present defendant is not precluded from denying the fact of the assignment, and the estoppel in said conveyance, which was executed by Blackwell alone, does not extend to her. I can see nothing in the conduct of the plaintiff which disentitles her to rely on all the defences set up.

The case is not one where an amendment should be allowed by adding a party, because, apart from other reasons, the respondent's counsel during the argument disclaimed any such application or desire when the point was taken against him.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This is an appeal from a decision of McINNES, Co. J. The action, commenced on the 15th of Sep-

tember, 1913, was one brought for the recovery of an instalment of purchase-money in amount $525 and interest due and payable on the 23rd of June, 1913, and due under an agreement for sale dated the 23rd of November, 1912, made between one Ruby Blackwell as vendor and the defendant Saunders as purchaser. Under date the 11th of February, 1913, by a deed made in pursuance of the Real Property Conveyancing Act, Ruby Blackwell conveyed the land, the subject-matter of the agreement for sale of the 23rd of November, 1912, to the plaintiff, subject to a mortgage thereon for $2,300 to Francis W. and William H. Underhill and subject to the agreement for sale above referred to, namely, of the 23rd of November, 1912, under which agreement the defendant was the purchaser of the land. A further deed of the same date, under the same statutory form, was executed by Ruby Blackwell to the plaintiff, conveying certain other land, which contains a recital in these words: "Whereas the grantor has assigned to the grantee her interest in a certain agreement for sale wherein she was the vendor and one Mary E. Saunders, the purchaser, and the grantor gives these presents to secure the first payment under the said agreement, namely, $525, due on the 23rd day of June, 1913," the payment for which security was given is the payment sued for in this action.

The trial judge entered judgment for the plaintiff for $697.20, being the amount of the instalment, interest and costs.

Counsel for the plaintiff at the trial, Mr. *Bray,* who also appeared in support of the appeal, introduced no evidence for the defence, but relied upon the contention as then advanced that the action should stand dismissed in that no notice of the assignment or conveyance had been given, that there was in fact no sufficient assignment, as the conveyance in terms states that it is subject to the agreement for sale, and no assignment of the moneys due and payable under the agreement for sale.

The conveyance as proved recites a valuable consideration and it is under seal, the express consideration being $1,890, and grants the land covered by the agreement for sale to the plaintiff, and also "the existing rights, title, interest, property claim and demand of her, the said grantor [Ruby Blackwell]

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in to or upon the said premises." At the time the conveyance was made the instalment sued for was not then due, but the effect of the conveyance was to absolutely transfer to the plaintiff all title in the said land, subject to the mortgage and the agreement for sale.

A letter was introduced in evidence from the defendant written to the agent of the plaintiff, dated the 21st of February, 1913, before the instalment sued upon fell due, reading as follows:

"I hereby accept the house purchased by me from Ruby Blackwell as complete. Lot 16, block 70, D. L. 50."

It is affirmed that the defendant treated with the agent for the plaintiff on the basis of the plaintiff being the owner of the land subject to the agreement for sale in her favour, and that it was to him she was to look for title, *i.e.,* that she was satisfied with the property and accepted the premises. To complete the assignment and to entitle the assignee to sue, notice to the person owing the debt—the defendant in the present case—was not necessary: *Ward* v. *Duncombe* (1893), A.C. 369, *per* Lord Macnaghten at p. 392.

Here we have the land conveyed to the plaintiff, and the assignment of the agreement for sale to the plaintiff. The entire estate and contract is vested in the plaintiff, and the plaintiff is unquestionably entitled to sue in his own name: *Forster* v. *Baker* (1910), 79 L.J., K.B. 664.

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Further, evidence was adduced that at the time of the conveyance the husband of the defendant, acting as her agent, promised the agent of the plaintiff that the payments under the agreement for sale would be made when due.

The appeal is taken upon the following grounds: (1) that the judgment is against evidence and the weight of evidence, and (2) that the judgment is contrary to law. It is to be observed, as previously remarked, that no evidence was adduced by the defence, and apparently no equities were set up of likely prejudice on the ground of non-joinder of the assignor, Ruby Blackwell.

Mr. *Bray,* in a very careful argument, endeavoured to shew that the action was not maintainable, being brought in the name

of the grantee, the plaintiff only—and want of notice—under the Laws Declaratory Act, R.S.B.C. 1911, Cap. 133, Sec. 2, Subsec. (25), and, further, that the conveyance containing the recital executed by Ruby Blackwell acknowledging the assignment of the agreement for sale was insufficient to transfer to the plaintiff the right to sue for the moneys payable under the agreement for sale, that all that was granted or assigned was the land itself, not the moneys payable therefor—subject to the agreement for sale. In my opinion, the land having been granted to the plaintiff (the respondent), the right to the moneys payable under the agreement for sale passed by virtue of the conveyance and the recited assignment, and as well by operation of law. Assuredly the lien for the purchase-money, for instance, passed to the plaintiff.

One further point of evidence is to be noted, and that is: that it was admitted at the trial that the defendant was in possession of the land and in receipt of the rent thereof. In my opinion, the chose in action sued upon is equitable, and that the plaintiff in this appeal, being the owner of the land and the assignee, was and is entitled to sue thereon in his own name, and that there was no requirement to join the assignor as a party to the action. In *Fulham* v. *McCarthy* (1848), 1 H.L. Cas. 703, the Lord Chancellor at p. 719 pointed out that if the assignment was valid then the assignee was entitled—if invalid, then the assignor was entitled to the moneys—and when valid there was no necessity to join the assignor in the action. In the present case the assignment, in my opinion, is valid; therefore, there was no necessity to join the assignor.

In *Cator* v. *The Croydon Canal Company* (1841), 4 Y. & C. 405, 421, it was held that there was the equitable right to the money, it not being then due, which is the present case; the instalment sued upon was not due when assigned.

In *Bagshaw* v. *The Eastern Union Railway Co.* (1849), 7 Hare 114, it was held that the original subscriber of the sum represented by the scrip certificate as the vendor of the same to the plaintiff was not a necessary party to the suit, inasmuch as the contract between the original subscriber and the company gave the former the right to assign his interest and be

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discharged, and such interest was duly assigned by him to the plaintiff and the plaintiff was accepted by the company in his stead. In the present case we have evidence shewing that the defendant recognized the plaintiff as being the owner of the land subject to the agreement for sale. In my opinion, the plaintiff, by virtue of the grant of the land subject to the agreement for sale—and the declared assignment—became possessed by reason thereof of an equitable right, properly enforceable in a Court of equity, and that the plaintiff was entitled to sue in his own name. It might almost be said upon the facts that a novation was created, but I do not go so far as to hold that, nor do I think it necessary to do so. The assignor having parted with the land, and the plaintiff having all the estate therein of the assignor subject to the agreement for sale, the assignor has no further interest or estate in the land and there remains no need for his being a party to the action: *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (1905), 74 L.J., K.B. 898.

In *King* v. *Victoria Insurance Company* (1896), 65 L.J., P.C. 38, the point was taken that the assignment by the bank did not confer upon the respondents any right of action against the appellants and the respondents were not entitled to sue the appellants in their own name; in fact, the stipulation was that the assignment should not authorize the use of the name of the insured. Notwithstanding this exception taken (and the statute law of Queensland is similar to that of British Columbia), it was held, affirming the decision of the Supreme Court, that there had been a valid assignment of a legal chose in action. In my opinion, however, the present case is not one of the assignment of a legal chose in action—it is in effect an equitable assignment for value, and it is clear that the defendant must look to the plaintiff for title when completion of payment is made under the terms of the agreement for sale, and her right of action would be the equitable right of compelling specific performance—and assuredly there must be in the exercise of the equitable rights: see Williams on Vendor and Purchaser, 2nd Ed., Vol. 1, p. 527, Sec. 2. It is clear to me that the plaintiff is in the position of

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having assigned to him the rights of the vendor (Ruby Blackwell) under the contract, *i.e.*, the agreement for sale: see Williams on Vendor and Purchaser at pp. 528 and 564. In the present case the assignment of the land sold was expressly made, subject to the agreement for sale. Williams at p. 565 says:

"If, however, the vendor do make any such alienation of the land sold, either for a legal estate to a volunteer, with or without notice of the contract for sale, or to a purchaser with notice of the contract (*Dawson* v. *Ellis*, 1 J. & W. 524), or for an equitable estate only to any person, the alienee takes subject to the purchaser's equities under the contract, may be joined as a party to an action for its specific performance, and may be ordered to convey his interest in the land to the purchaser in order to complete the sale."

In *Daniels* v. *Davison* (1809), 16 Ves. 249; (1811), 17 Ves. 433; 10 R.R. 171, specific performance was decreed of a contract to sell, against a person who had purchased the property from the vendor at an advanced price with notice of the prior contract, the subsequent purchaser being ordered to convey on payment to him of the price which the original purchaser contracted to pay. The Lord Chancellor (Eldon) at p. 255 said:

"The estate by the first contract becoming the property of the vendee, the effect is, that the vendor was seised as a trustee for him; and the question then would be, whether the vendor should be permitted to sell for his own advantage the estate, of which he was so seised in trust; or should not be considered as selling it for the benefit of that person, for whom by the first agreement he became trustee; and therefore liable to account."

And see the further remarks of Eldon, L.C. in the same case (17 Ves.) at p. 433.

It is absolutely clear from the decision of Lord Eldon what the equitable rights are in this present case, and, obviously, they are these—that the plaintiff is entitled to the moneys under the agreement for sale and the defendant completing payment will be entitled to a conveyance from the plaintiff. It seems to me that the language of Farwell, J. in *Manchester Brewery Co.* v. *Coombs* (1901), 70 L.J., Ch. 814 at p. 819, is particularly applicable:

"It is well settled that the assign of one of the parties to a contract can obtain specific performance of that contract against the other contracting party; and although it is usually necessary in such an action to make the assignor a party, I do not think it is essential in a case

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like the present, where the sub-contract is no longer *in fieri*, and there are no equities between the parties to the original contract, and no suggestion of any reason for making the original contractor a party."

The line of reasoning of Farwell, J., although not upon similar facts, is equally applicable to the present case, where the plaintiff has the complete estate in the land subject to the agreement for sale held by the defendant, and the defendant has notice of the transfer of title in the land to the plaintiff subject to the defendant's right to complete the contract and obtain title in ordinary course, not from the assignor (Ruby Blackwell), but admittedly the only person who could give title, namely, from the plaintiff.

In *William Brandt's Sons & Co.* v. *Dunlop Rubber Co., supra,* the question as to the non-necessity of joining the assignor where, as here, there has been a complete equitable assignment is, to my mind, finally settled. We find in the head-note this statement:

"To constitute a good equitable assignment of a debt all that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person, and if the debtor disregards such notice he does so at his peril."

The action was one brought by the appellants to recover certain moneys, due by the respondents in the first instance to the firm of Kramrisch & Co., the price of india rubber bought of this firm by the respondents. This debt, the appellants contended, was validly assigned to them by Kramrisch & Co., and notice given of the assignment to the respondents. I would refer to the language of Lord Macnaghten at pp. 902-3, and, in view of what he there says, it is, perhaps, idle to say more, and it follows that the contentions put forward by counsel for the appellant are untenable. Further, to give effect to the objection of non-joinder—and it goes to the real root of the defence, as assuredly, if the assignor (Ruby Blackwell) had been joined in the action, the defence as set up would not be capable of even being argued—would offend against Order XVI., rule 2, marginal rule 224, of the County Court Rules, which is the same as that of the Supreme Court Rule, Order XVI., rule 11, marginal rule 133.

MCPHILLIPS, J.A.

In the Annual Practice, 1914, p. 237, it is pointed out that

the rule is intended to do away with the plea in abatement, which is the present case. The cases cited are: *Re Harrison* (1891), 2 Ch. 349; *Hall* v. *Heward* (1886), 32 Ch. D. 430; *cf. Viscount Gort* v. *Rowney* (1886), 17 Q.B.D. 625. And see also p. 238.

The trial judge, in my opinion, upon the facts, was rightly entitled to enter judgment, as he did, for the plaintiff, instead of requiring the assignor to be a party to the action, and it will be seen that there is ample authority to support the action in the name of the assignee alone, especially upon the specific facts of the present case.

It therefore follows that, in my opinion, the decision of the trial judge was right and the judgment should be affirmed and the appeal dismissed.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellant: *H. R. Bray.*
Solicitor for respondent: *F. N. Raines.*

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EDBORG v. IMPERIAL TIMBER AND TRADING CO.

EDBORG *ET AL.* v. IMPERIAL TIMBER AND TRADING COMPANY, LIMITED, AND THE ROYAL BANK OF CANADA.

Bank—Security on stock of customer—Action by employees against employer and bank—Liability of bank for wages—Continuance of, after judgment against employer.

Practice—Pleading—Defence of judgment against co-defendant—Application to set aside own judgment—The Bank Act, Can. Stats. 1913, Cap. 9, Sec. 88, Subsec. 7.

The plaintiffs brought action for wages against the defendant Company at common law, and sought also to recover in debt from the defendant Bank under the Bank Act. The defendant Company not having entered an appearance, judgment by default was entered by the plaintiffs against the Company and they proceeded with the action against the Bank. The point was raised by the Bank at the trial that the plaintiffs had elected their remedy by entering judgment against the Company, and were thereby debarred from enforcing their action against the Bank. The plaintiffs thereupon applied for an order vacating their judgment against the Company, which was granted, and they then sought to recover solely from the Bank.

Held, that assuming the judgment was not properly set aside by the order made at the trial, it nevertheless did not operate as a conclusive election and a bar to the plaintiffs' right to recover.

Held, further, that the defence that the plaintiffs had elected was open to the Bank without being specially pleaded.

Semble, that the statute might be construed as placing the Bank in the position of a guarantor, or a surety for the employer, and the employer could be sued and judgment recovered against him without releasing the Bank.

Statement

ACTION by employees to recover wages from the defendant Company, and against the defendant, the Royal Bank of Canada, under section 88, subsection 7 of The Bank Act. Heard by MACDONALD, J. at Vancouver, on the 20th of February, 1914. The facts are set out fully in the head-note and reasons for judgment.

S. S. Taylor, K.C., and *Jamieson,* for plaintiffs.

Sir C. H. Tupper, K.C., and *Head,* for defendant Bank.

18th March, 1914.

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MACDONALD, J.: In this action the plaintiffs seek to recover from the defendant Bank under subsection 7 of section 88 of The Bank Act. This subsection reads as follows:

"The bank shall, by virtue of such security, acquire the same rights and powers in respect of the products, goods, wares and merchandise, stock or products thereof, or grain covered thereby as if it had acquired the same by virtue of a warehouse receipt; provided, however, that the wages, salaries or other remuneration of persons employed by any wholesale purchaser, shipper or dealer, by any wholesale manufacturer, or by any farmer in connection with any of the several wholesale businesses referred to, or in connection with the farm, owing in respect of a period not exceeding three months, shall be a charge upon the property covered by the said security in priority to the claim of the bank thereunder, and such wages, salaries or other remuneration shall be paid by the bank if the bank takes possession or in any way disposes of the said security or of the products, goods, wares and merchandise, stock or products thereof, or grain covered thereby."

The intention of this change was that the salary and wages of employees should, to a limited extent, be protected, in the event of the Bank taking a security under section 88 of the Act and attempting to realize thereunder. Heretofore, employees were in danger of losing their claims, and the amendment being remedial, such a liberal construction should be applied as will best ensure the attainment of the object of the Act. The legislation was following the trend of other enactments, creating a like preference in favour of wage-earners. It was doubtless deemed especially necessary, where a security is thus taken by a bank, as the employees might have no knowledge of its existence, and a major portion of them might even be in total ignorance of the financial position of their employers. They might by their services be improving the value of the property covered by the security, and then find, if steps were taken to realize under the security, that their claims were completely lost. Even if the usual meaning of the language of the amendment falls short of the purpose intended, I think a more extended meaning should be applied, if fairly susceptible. I question if this be necessary, and consider the amendment applicable to the facts disclosed in this action, both on the ground of the Bank having taken possession and also having disposed of property covered by its security under section 88.

Judgment

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I think the statute, in addition to giving a lien, also creates a debt which may be recovered by action.

"Wherever a statute gives a right to a sum of money, and provides no other means of enforcing it, an action lies":

Per Kelly, C.B. in *Richardson* v. *Willis* (1873), 42 L.J., Ex. 68. Martin, B. in the same case, referred to Com. Dig. tit. Debt A.9:

"'Debt lies upon any statute which gives an advantage to another for the recovery of it.'"

Subject to the consideration of a further matter affecting the liability, I find the defendant Bank liable to the several plaintiffs for the amounts due them up to the time of taking possession. As to the plaintiffs employed by the month, this would apply to the end of December, 1913, and to those hired by the day, up to the 24th of December, 1913. The situation, however, as to liability became complicated by the form of the action and subsequent proceedings.

Plaintiffs claimed from the defendant Timber and Trading Company at common law, and sought also to recover in debt from the defendant Bank under the statute. Both these claims were included in the same writ of summons, and the defendant Timber and Trading Company not having entered any appearance, final judgment by default was entered against such Company, and the action proceeded as against the defendant Bank. At the trial counsel for the defendant Bank contended that, through this default, judgment having been signed, an election had taken place, and that the plaintiffs were debarred from enforcing any statutory claim they might have against the Bank.

Judgment

Counsel for the plaintiffs, while not admitting that the judgment had been properly entered, applied *ex parte* in open Court and obtained an order vacating the judgment, and subsequently counsel formally abandoned any claim against the Timber and Trading Company, and sought to recover solely from the defendant Bank.

If the default judgment had not been entered, and both defendants were regularly before the Court at the trial, I think I could properly have applied the provisions of Order XVI., r. 11, marginal rule 133—providing that no cause should be

defeated by misjoinder. The question is whether the judgment having been entered on the 14th of January, 1914, and remaining of record until the trial, operated as an effectual defence to the defendant Bank. As apparently all the tangible assets of the Timber and Trading Company had been taken possession of by the Bank, no material object was gained by the entering of the judgment, nor does it appear that any execution was issued thereunder. It was an unnecessary step to take and was not likely to confer any present or future benefit upon the plaintiffs.

Unless the defendant Bank obtained a vested right by the signing of the default judgment, I think the plaintiffs should not be injured, by what I consider was a mistake. In *Kendrick* v. *Barkey* (1907), 9 O.W.R. 356 at p. 361, Riddell, J. says:

"Courts were not made and are not sustained by the people for the sake of counsel, but counsel exist for the assistance of the Courts in determining the rights of the people. I do not, therefore, hold plaintiff to her election, if such it can be called."

If the signing of the judgment, even for the moment, operated as an election by the plaintiff as between the two defendants, then was it such a binding act that it could not be remedied, even though the other defendant was unable to shew that it had in the meantime been prejudiced by the course pursued?

Judgment

Plaintiffs contended that the judgment was so irregularly signed that it was not simply voidable, but void. The grounds in support of this contention are that the writ was not specially endorsed, nor was it for a liquidated demand, and it would appear that both these statements are correct, and the judgment was thus irregularly signed. The plaintiffs could have moved to set aside the judgment so irregularly entered: see Chit. Arch. Prac. 14th Ed., p. 265.

In *Doe d. Gretton* v. *Roe* (1847), 4 C.B. 576, Maule, J. at p. 578, said:

"I do not see why you should not have leave to set aside your own judgment, without assigning any reason for it."

Still, in order to set aside the judgment an application should have been made on notice pursuant to the rules, and I

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do not think that the order made at the trial was sufficient to formally vacate the judgment and the record.

Assuming that the judgment was irregularly signed and was not properly set aside, did it nevertheless operate as a conclusive election and a bar to the plaintiffs' right to recover? Were the plaintiffs in a worse position than if they had proceeded to trial in the ordinary course against both defendants? If the judgment had been regularly signed and operated as a conclusive election, it created a vested right in the defendant Bank. The judgment could not even by consent be set aside to the prejudice of such defendant: see *The Bellcairn* (1885), 10 P.D. 161 at p. 165. I consider, however, that judgment was irregularly and improperly obtained, and that the defendant Bank was in the same position at the trial, as if the judgment had not been entered.

In *Hammond* v. *Schofield* (1891), 1 Q.B. 453, Wills, J. at p. 455, said:

"If a judgment be improperly obtained, so that it never ought to have been signed, there can be no doubt when set aside it ought to be treated as never having existed."

No defence was delivered, nor objection taken by the defendant Bank, based on this default judgment, until the commencement of the trial. If a formal and proper setting aside of this judgment be necessary, then I think the plaintiffs should, as to the defendant Bank, be in the same position as if they had been afforded an opportunity before the trial of moving for that purpose. If this course had been pursued, it would no doubt have been successful. If the plaintiffs sought to recover in the alternative, this would doubtless have been the correct procedure, as there cannot be two judgments for the same debt, except where there is a separate liability: *Morel Brothers & Co., Limited* v. *Earl of Westmorland* (1904), A.C. 11.

Judgment

It was contended on the part of the plaintiffs that the defendant Bank could not, without a plea to that effect, set up as a defence at the trial that the judgment operated as an election. I think such defence, even though ineffectual, was open to the defendant Bank to be raised at the trial without being specially pleaded. The case of *McLeod* v. *Power* (1898), 2 Ch. 295, is

decisive on this point. The facts there disclosed that a judgment had been signed against one joint debtor, and at the trial a defence was sought to be set up by the other defendant on this ground. Such defence was allowed, although not pleaded, but the successful defendant was ordered to pay costs up to the time when the judgment had been obtained, and no subsequent costs were allowed to either party.

Plaintiffs contend, however, that even if the judgment had been regularly signed, and was not properly set aside, that the defendant Bank is in any event liable, on the ground that the statutory liability has not been destroyed by the plaintiffs pursuing their common-law liability. They practically contend that they could have sued the Timber and Trading Company separately and obtained judgment for their claims, and still not have the lien in their favour afforded by The Bank Act destroyed, nor the right to sue and recover against the Bank affected. In other words, that both remedies for collection might be pursued either together or separately. I consider this position tenable. *Wake* v. *Canadian Pacific Lumber Co.* (1901), 8 B.C. 358, was cited against this contention, and as a conclusive authority in favour of the defendant Bank, but it appears to me that the facts, as well as the statutes there considered, are quite distinguishable from the present action. MARTIN, J. in *Dillon* v. *Sinclair* (1900), 7 B.C. 328, says:

"The alleged liability of the defendant is not a debt, but a statutory penalty under section 27 of the Mechanics' Lien Act."

He expresses surprise if two separate judgments for the same claim could be recovered against two strangers, one as and for the debt (wages) and the other as and for a penalty. Here the plaintiffs may have sought in launching their action to recover judgment for the same claim against two distinct persons, but it was solely an action for debt, and defendants were not strangers. The Bank in the course of its business loaned money to its co-defendant, and in securing such advance it might be said to have only received from its debtor a lien or mortgage on the property, which was to be subsequent to the claim of the plaintiffs against the same debtor. It obtained the benefits to be derived from section 88 and had also to

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assume its burdens. A lien is not ordinarily destroyed by obtaining judgment for the debt: see Jones on Liens, p. 675. I do not think the lien afforded by statute was destroyed in any way, and the property covered by the security given the Bank may either be resorted to by plaintiffs for payment of their claims, or the more direct course of action for debt pursued: see on this point *Pomerleau* v. *Thompson et al.* (1914), 5 W.W.R. 1360.

The statute might be construed as creating a guarantee on the part of the Bank, and placing it in the position of a surety. In that event, while there would be no liability on the part of the Bank until default of the employer as principal debtor, still such employer could be sued and judgment recovered without releasing the Bank: see De Colyar on Guarantees, 3rd Ed., 207.

Judgment

In my opinion, the intention of the statute is clear as creating a liability, and nothing transpired to prevent plaintiffs recovering their claims from the defendant Bank. There will be judgment accordingly for $10,051.80, and costs.

Judgment for plaintiffs.

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Admiralty law—Ship—Foreign fishing vessel within three-mile limit—Seizure outside limit—Customs and Fisheries Act, R.S.C. 1906, Cap. 47, Sec. 10—Can. Stats. 1913, Cap. 14, Sec. 1—Fisheries and Boundaries Convention, 1818—Convention of Commerce and Navigation, 1815.

The defendant ship, a foreign fishing vessel, was seized by a Canadian fisheries protection officer, because of an alleged infraction of section 10 of the Customs and Fisheries Protection Act. The ship was first sighted within the three-mile limit, and being suspected of poaching, was, after a "hot pursuit," seized about five miles off shore. There was evidence of the dories and skates of gear having the appearance of being just hauled out of the water, also of live halibut being found in the hold. In an action for forfeiture of the vessel after seizure:—

Held, that the ship had, by entry within the three-mile limit for a purpose not permitted, committed a breach of clause (*b*) of section 10 of the Act, and was liable to seizure and forfeiture, notwithstanding that she was actually seized outside of the three-mile limit.

Held, further, that the Fisheries and Boundaries Convention of 1818, between Great Britain and the United States, respecting fisheries, etc., does not apply to the coast of British Columbia as far as fisheries are concerned.

Held, further, that under Article 1 of the Convention of Commerce and Navigation, 1815, between Great Britain and the United States, no liberty or right is given to foreign vessels to carry on fisheries, but simply "to come with their cargoes to all such places, ports and rivers in the territories aforesaid, to which other foreigners are permitted to come, but subject always to the laws and statutes of the two countries respectively." Section 186 of the Canada Customs Act would, therefore, apply, which makes it unlawful for a vessel to enter any place other than a port of entry, unless from stress of weather or other unavoidable cause; as there was no cause justifying the entry of the vessel into the "place" or natural harbour on Cox Island, it was liable to seizure.

Statement

ACTION for the forfeiture of the gasoline schooner Valiant, a foreign fishing vessel seized off West Haycock Island by the fisheries protection officer, because of an alleged infraction of the Customs and Fisheries Protection Act. The trial took place before MARTIN, Lo. J.A. at Victoria on the 18th, 19th and 30th of December, 1913.

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Ritchie, K.C., for the Crown.
A. H. MacNeill, K.C., for the ship.

30th March, 1914.

MARTIN, Lo. J.A.: In this action is sought the forfeiture of the gasoline schooner Valiant, a foreign fishing vessel of Seattle, U.S.A., gross tonnage 18 tons, length 40 feet, breadth 12 feet, 6 inches, depth 4 feet 9 inches, engaged in the halibut fishery, and seized on the 11th of May last off West Haycock Island, about 16 miles from Cape Scott, V.I., by Captain Holmes Newcombe, Canadian fisheries protection officer, then on board the S.S. William Joliffe, employed in that service, under command of Captain Thomas Thomson, because of an alleged infraction of section 10 of the Customs and Fisheries Protection Act, R.S.C. 1906, Cap. 47, as amended by section 1 of Cap. 14 of 3 & 4 Geo. V., 1913. The Valiant was seized outside the three-mile limit, about five miles off shore, after a "hot pursuit," which began, I am satisfied, when she was first sighted within said limit and suspected of poaching.

I first consider the reference in subsections (*a*) and (*b*) of said section 10 to a fishing vessel being "permitted by any treaty or convention" to fish or prepare to fish within Canadian territorial waters, or being prohibited from entering such waters for a purpose not permitted thereby. The contention of the Crown counsel on this point was that the Convention of 1818 between Great Britain and the United States respecting fisheries, boundaries, etc., applied to the coast of British Columbia as regards fisheries. Article 1 thereof contains this proviso:

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> "Provided, however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them."

And it is urged that since upon the evidence it clearly appears that the Valiant did not enter British waters for any of these special purposes, but merely spent the night before the seizure in a bay on the uninhabited Cox Island, in Canadian territory, because it was more pleasant and convenient to do so than to

remain outside in rough but not dangerous waters; therefore, the Convention affords no justification for her presence in said waters. It is further submitted, alternatively, that if the Convention does not apply to these waters, the Valiant had no right at all to be where she was, thereby using Canadian bays and natural harbours as bases or points of vantage from which she could conveniently and expeditiously carry on fishing operations on the contiguous halibut banks either within or without the three-mile limit.

For the defence it is submitted that said Convention does not apply to said waters, and that the Valiant was entitled to be where she was under the 1st Article of the Convention of Commerce and Navigation of 1815 between Great Britain and the United States (conveniently given with notes in Malloy's Treaties and Conventions, Vol. 1, p. 624, Wash., 1910), as follows:

"There shall be between the territories of the United States of America, and all the territories of His Britannick Majesty in Europe, a reciprocal liberty of commerce. The inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports and rivers, in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively; also to hire and occupy houses and warehouses for the purposes of their commerce; and, generally, the merchants and traders of each nation respectively shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively."

Judgment

I entertain no doubt that the Convention of 1818 (see Malloy's Treaties, *supra,* Vol. 1, p. 631), does not apply to these Pacific waters, so far as fisheries are concerned, because it purports only to enter into an agreement to give the inhabitants of the United States "forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind" on certain specified coasts of Newfoundland and Labrador, and also to dry and cure fish thereon, with certain limitations. And Article 1 then goes on to provide that:

"The United States hereby renounce forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry or cure fish on, or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America not included within the abovementioned limits; Provided, however" [then follows the proviso quoted, *supra.*]

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Now, on this Pacific coast there never was any such "liberty heretofore enjoyed or claimed" to take fish, etc., within three miles of the British coasts, etc., so the proviso has no application thereto. And, furthermore, it is apparent by Article III., relating to territorial and navigation claims "on the northwest coast of America, westward of the Stony [Rocky] Mountains," that such matters were excluded from the Convention and that it had no reference to disputes between them or "to the claims of any other power or state to any part of the said country," which was then almost wholly *terra incognita.*

Then, as to the claim under the Convention of 1815. The article already cited shews that no liberty or right whatever is given to foreign vessels to carry on fisheries, but simply, as to vessels, "to come with their ships and cargoes to all such places, ports and rivers in the territories aforesaid to which other foreigners are permitted to come . . ., but subject always to the laws and statutes of the two countries respectively." Now, one of the laws of Canada is section 186 of the Customs Act, R.S.C. 1906, Cap. 48, which declares that:

"If any vessel enters any place other than a port of entry, unless from stress of weather or other unavoidable cause, any dutiable goods on board thereof, except those of an innocent owner, shall be seized and forfeited, and the vessel may also be seized, and the master or person in charge thereof shall incur a penalty of eight hundred dollars, if the vessel is worth eight hundred dollars or more, or a penalty not exceeding four hundred dollars, if the value of the vessel is less than eight hundred dollars, and the vessel may be detained until such penalty is paid.

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"2. Unless payment is made within thirty days, such vessel may, after the expiration of such delay, be sold to pay such penalty and any expenses incurred in making the seizure and in the safe-keeping and sale of such vessel."

Here there was no "stress of weather or other unavoidable cause" justifying the entry into this wild "place," *i.e.*, natural harbour on Cox Island, not a port of entry, which the Valiant was making use of for fishing purposes, and the vessel was consequently liable to seizure and sale in default of payment of fine, and her dutiable goods to forfeiture, *i.e.*, stores and supplies, gear and bait, which had been purchased in the State of Washington and which were not those of an innocent owner, because her master, John Courage, was half owner, subject to a

bill of sale. In so making use of Cox Island she was not entering a Canadian port for any one of those "innocent and mutually beneficial purposes" which were detailed by Mr. Phelps in 1886 in the *David J. Adams* case, set out in Vol. 1, Moore's International Law Digest (1906), pp. 818 *et seq.* and 847, which may in appropriate circumstances be well regarded with a lenient eye.

It follows, therefore, that the Valiant has, by said entry of "such waters for [a] purpose not permitted," committed a breach of said subsection (*b*) and is liable to seizure and forfeiture as therein provided. The objection was taken that, as she was seized outside the three-mile limit, she is not liable to seizure under the decision of this Court in *The King* v. *The Ship North* (1905), 11 B.C. 473, affirmed by the Supreme Court of Canada (1906), 37 S.C.R. 385, which, it was argued, does not extend to an infraction of subsection (*b*). A perusal of that case, however, shews that there is no such distinction and that the same right of seizure exists in regard to that subsection as to subsection (*a*), which deals with fishing only. This is clear from the judgment of Davies, J. with which Maclennan, J. concurred, at p. 394, as follows:

"I think the Admiralty Court when exercising its jurisdiction is bound to take notice of the law of nations, and that by that law when a vessel within foreign territory commits an infraction of its laws either for the protection of its fisheries or its revenues or coasts she may be immediately pursued into the open seas beyond the territorial limits and there taken."

Judgment

And Idington, J. says at p. 403:

"The fundamental right existed to so legislate that a foreign vessel might become forfeited for non-observance of a municipal regulation, and be seized beyond the three-mile zone. This right has been repeatedly asserted by legislation relative to breaches of shipping laws, neutrality laws, and customs or revenue laws, as well as the case of fisheries."

But, while I should feel justified in condemning the Valiant on this charge alone, I prefer also to consider the other charge of unlawful fishing, because of the misapprehension that may have existed in regard to liberties or rights under conventions, but I trust that hereafter the owners of foreign fishing vessels will be careful to ascertain what their rights and duties are before venturing into these Canadian waters. I make this observation and give this warning because, in the course of

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many years' experience, I have had in trying cases of this description in this Court, I take judicial cognizance of the fact that immense damage has been done to Canadian fisheries on this coast by foreign vessels using these waters and bays and natural harbours as shifting and temporary headquarters, from which they have for years made repeated sudden and secret raids upon adjacent Canadian fishing banks. These acts are a gross "abuse" (to use the word employed in the Convention of 1818) of international hospitality, and the presence of such vessels in such localities without good and sufficient cause is calculated to raise a just suspicion of their motives and conduct. I again draw attention to this apt language of the Chief Justice of the United States (Marshall), uttered in the case of *The Exchange* (1812), 7 Cranch 116 at p. 144, cited by me in the *North* case, *supra,* p. 476, as follows:

> "When merchant vessels enter [foreign ports] for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degredation, if such . . . . merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country."

But, leaving this aspect of the matter, and turning to consider the facts of the present seizure, it is sufficient in the view I take of the matter to say, in addition to the facts already stated, that the question as to whether or no the Valiant was fishing within the three-mile limit primarily depends upon the contention of the Crown that the halibut which were discovered in her hold that day packed in ice were caught that morning. She was first observed at 11.35 a.m., and was pursued and finally overhauled at 12:20, when Captain Newcombe, accompanied by Chief Officer Moore, went on board her. The master of the Valiant, John Courage, says, in brief, that said fish (about two thousand five hundred pounds in all) had all been caught the evening before between 6 and 9.15 o'clock at a point outside the three-mile limit, and that he had gone to a bay or natural harbour in Cox Island, near by, to spend the night, which bay he reached about midnight. Next morning, about 6 o'clock, the day being fine and clear, he left to return to the same halibut bank, passing the N.W. corner of Lanz Island on the way, and then setting a course about N.W. by W. ½ W. (which he had taken bearings

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for the night before, so as to reach said bank); and, after proceeding on that course about an hour, at a speed of about five knots, the engine broke down and he had to lie-to for repairs, which took all on board (except the cook) about three hours to make, and the vessel during that time drifted about, carried by the tide, which was setting in an easterly direction between Lanz and West Haycock Islands, till a quarter past eleven, when the vessel started again, on a N.W. course, and ran on it for about 15 minutes, when the master took soundings; then ran on again for ten minutes and sounded again; then ran on for eight minutes more and sounded again; and he had, he says, just satisfied himself that he had reached the fishing bank when the William Joliffe was observed coming up just as the dories were being set out. Up to this time the master affirms that no fishing had been done or attempted, and if his story is true, then he is not guilty of this charge, because he was at the time of overhauling and preparing to fish, well outside the three-mile limit. It will consequently be seen that if the contention of the Crown is correct that the fish were caught that morning his story cannot be true and the fish must have been caught within the three-mile limit. It is not asserted by the Crown that the vessel fished outside the limit, but that, being, or having been, engaged in fishing within the limit, she stood out to sea to escape from the approaching Government ship, which, being much larger, was visible to her a long way off. This fact of the time of the catching of the fish must, then, be determined and is of the first consequence. I have deliberated longer than usual over the facts of this case, because the seizure of a vessel is an unusually serious matter, and because of the forcible manner in which Mr. *MacNeill* has presented his client's case, and the result is that I find I can reach only one conclusion, which is that the fish were caught that morning within said limit. The evidence of Captain Newcombe of the state of the three halibut which he took out of the ice in the hold is that "They were all alive, every one I handed up; they were good, lively fish, all flapping on deck," and this is confirmed by Moore, who says they "were alive, quite lively" and "wriggled on the deck" close by the feet of the master of the Valiant. To meet this testimony there is the

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denial of the master, and of his cousin, Mark Courage, and Peter Sunde, that there had been any fish caught that day, and evidence was also given by various witnesses as to the length of time halibut will live or shew signs of life out of water on ice, or otherwise, under varying conditions. No evidence, however, was adduced that could reasonably explain the degree of vitality exhibited by these fish on the theory that they had been caught the previous night before 9.15 and since kept on ice, and the testimony of Captain Newcombe, who is the most experienced and reliable of all the witnesses on the subject, is opposed to it. Moreover, this view is further supported by the fact that certain of the dories and skates of gear "had every appearance of being just hauled out of the water," and, lastly, I am the more inclined to reject the story of Captain Courage, because, I regret to say, the answers he gave to Captain Newcombe were unquestionably untrue, both as regards his statement that there was nothing but bait and ice in the hold and that he had not been inside the three-mile limit that day, and also, later, after he admitted that he had been inside, that he had gone in only for the purpose of getting his position. In view of these deliberate misstatements, no Court could give credence to his evidence as against that of witnesses of unimpeached veracity, and, since the facts on vital points are irreconcilably in conflict, I have no other course open to me than to find them against the defendant. It would now be unprofitable to go into other features of the case, and express my opinion thereon, so I shall content myself with saying, generally, that they have not escaped my attention.

Judgment

The result is that judgment will be entered against the Valiant, and she is, together with her tackle, rigging, apparel, furniture, stores and cargo, hereby forfeited to the Crown.

Judgment for plaintiff.

BROWN *ET AL.* v. THE "ALLIANCE No. 2."

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BROWN v. THE "ALLIANCE No. 2"

Admiralty law—Ship—Small fishing vessel—Seaman's wages—Responsibility of master for fishing gear—Application to re-open for further evidence.

The master of a fishing boat entered a claim against the owners for wages, and the owners counter-claimed against him for the value of missing fishing gear. Judgment was reserved at the close of the hearing, and before delivery of judgment the master applied to re-open the case in order to give further evidence as to the missing gear.

Held, that such an application should only be granted in a very special case, and in circumstances which would not put the other party in an unfair position. The attention of the master was drawn to the point in the pleadings, on the evidence at the trial and during argument. The plaintiff cannot claim that he was taken by surprise in any way, and the application should therefore be refused.

Held, upon the claim and counter-claim, that the master was entitled to wages, but was responsible for the value of the missing gear not accounted for.

In a small vessel of this description the master must personally account for the property of the owner entrusted to his charge whatever may be said as to his responsibility in larger vessels, where property may be entrusted to the custody of various officers.

Statement

CONSOLIDATED ACTIONS by the master and certain fishermen of the vessel "Alliance No. 2" for wages against the owners thereof. The defendants counterclaimed against the master for the value of fishing gear which was missing. Heard by MARTIN, LO. J.A. at Victoria on the 25th of February, 1914.

J. Percival Walls, for plaintiffs.

F. C. Elliott, for defendant.

24th March, 1914.

Judgment

MARTIN, LO. J.A.: These are consolidated actions for wages against the ship "Alliance No. 2," an auxiliary gas boat, 95 feet long, engaged in the halibut fishing. Four of the claims are those of fishermen and they were disposed of at the trial, that of Davis being settled when called on for hearing, and judgment being given in favour of Armstrong, William Brown, and Milne for the full amount claimed. I was asked not to

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give said Brown and Armstrong their costs of suit, as their conduct on the vessel had not been satisfactory, and was open to suspicion as regards the missing fishing gear, and their threats against Larsen, the chief engineer, with respect to the same, but though I felt justified in giving them a warning in open Court, I do not, on further consideration, think I would be justified in taking the extreme step of depriving them of costs.

Judgment was reserved on the claim of the master, Daniel Brown, but a few days after the trial was over, a motion was made to re-open the case and, in effect, to allow the master to give further evidence to account for the missing gear in his charge, which his employers, the owners of the ship, sought to make him liable for. Such an application is an unusual one which should only be granted in a very special case, and also in circumstances which would, in any event, not put the other party at a disadvantage or in an unfair position. The matter was fully argued, and I have come to the conclusion that the application should be refused in the circumstances at bar. The attention of the plaintiff was sufficiently drawn to the point by the pleadings, on the evidence at the trial, and during the argument; there has been no surprise, and the fact that the evidence in his favour was not more fully brought out when it might, possibly, have been, is not enough to re-open the case. He had the opportunity but did not take advantage of it. The application will therefore be dismissed, with costs.

Judgment

Then as to his claim and the counter-claim. I allow him his wages and give him judgment therefor, but hold him responsible for the value of the missing gear, $349.59, less two skates thereof at $17 each, which were lost, and tardily accounted for at the trial. I am unable, on the evidence, to allow any further deduction. The vessel was amply outfitted with fishing gear, new and additional gear to the value of $349.59 having been put on board before sailing, which was admittedly in the custody of the master, and which he must account for. In a small vessel of this description, which carried only a master, mate, chief and assistant engineer, cook, and one seaman (not counting the fishermen, who were not shipped as seamen and

therefore did not perform seamen's duties), the master must personally account for the property of the owner entrusted to his charge, whatever may be said as to his responsibility in larger vessels, where property may be entrusted to the custody of various officers. It would never do for this Court to encourage the opinion that a well-equipped fishing vessel may leave a port in charge of a master and return with, *e.g.*, missing tackle, boats, gear, etc., and the master escape any responsibility simply by omitting to give any reasonable explanation of what has become of said property. On the contrary, it is his duty to give it to his owners at the first opportunity, and in the present case he should have done so when his attention was directed to the shortage in the gear and his wages refused on that account, instead of which he did nothing, treating the matter, in effect, as one in which he had no deep concern.

Judgment

The result of the adjustment of the accounts and opposing claims is that the plaintiff is indebted to the owners in the sum of $76.52, for which sum said owners will have judgment against the plaintiff over and above his claim against them. The costs of claim and counter-claim will be allowed in the ordinary way, and the reserved costs of the adjournment of the trial will be costs in the cause.

Order accordingly.

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CLARK v. SWAN

CLARK v. SWAN.

Land Act—Scheme by one person to purchase more sections than one—Use of names of pretended purchasers—Fraudulent evasion of Act—Deceit—Action for, through fraudulent misrepresentation of staker—Action fails when associated with illegal transaction.

The plaintiff employed B. to stake a large quantity of Crown lands under the Land Act, for purchase from the Provincial Government. B., in turn, employed the defendant and, acting under the plaintiff's instructions, supplied the defendant with the names of certain persons as ostensible purchasers. It was the intention of the plaintiff to purchase the lands from the government and sell for agricultural purposes; of this the defendant was aware. The defendant staked certain sections of land, using the names given by the plaintiff, and later reported to the plaintiff that they were good bottom lands which would cost from $20 to $30 to clear, and were first-class agricultural and fruit lands. These statements turned out to be untrue. On the strength of the report the plaintiff paid the defendant for his services, became the purchaser of the property staked, using the names that were supplied the defendant for staking to satisfy the Act, paid the Government a large amount on account of the purchase price of the property, and also expended money in advertising and surveys. The plaintiff, discovering that the defendant's representations were untrue, brought this action for damages.

Held, that the transaction was a fraud on the Land Act, and no right of action against the staker for fraudulent misrepresentation in his report can spring therefrom; nor will the Court assist in the recovery of moneys paid to the staker in such circumstances.

Brownlee v. *McIntosh* (1913), 48 S.C.R. 588, followed.

Statement

ACTION to recover damages for misrepresentations made by the defendant with respect to certain lands situate in the Naas Valley, British Columbia, tried by MACDONALD, J. at Victoria of the 19th of March, 1914. The facts are set out in the headnote and reasons for judgment.

Green, for plaintiff.
Macfarlane, for defendant.

23rd March, 1914.

Judgment

MACDONALD, J.: Plaintiff seeks to recover damages from the defendant for misrepresentations made to him by the defend-

ant with respect to a parcel of land, comprising approximately 12,800 acres, situate in the Naas Valley, British Columbia.

In the month of September, 1910, defendant represented to the plaintiff that such lands were good bottom lands, which would only cost $20 to $30 per acre to clear, and were first-class agricultural and fruit lands. The defendant also furnished a written report to the plaintiff, in addition to making such verbal representations, as to the character and quality of the land. It appears that the plaintiff being desirous of obtaining a large quantity of land in the Naas Valley, arranged with H. N. Boss to stake such land under the Land Act for purchase from the Provincial Government. Boss in turn employed the defendant and accompanied him into the district, and, acting under instructions from plaintiff, supplied defendant with the names of persons who would be used, as ostensibly desirous of purchasing such land. Boss also arranged for one Dybhaven to assist in the staking and paid him directly for his services. The defendant was to receive 25 cents per acre for each acre of land so staked and reported upon.

After the staking had taken place defendant returned to Prince Rupert and thence to Victoria, with a letter of introduction to the plaintiff. He gave him the report, and at the same time made the statements which I find grossly misrepresented the character of the land. It was intended that the land should be obtained for agriculture and sold to intending purchasers for that purpose. Defendant was well aware of the object of the proposed purchase from the Government, and on the strength of the report and representations plaintiff paid the defendant at the time $500, and subsequently a further sum of $100. As a further result of such favourable representations, plaintiff paid the Provincial Government $6,400 on account of purchase, and expended in advertising in the Gazette $260, and later on, having negotiated for a sale, felt justified in proceeding with the survey of the property at a cost of $6,400. I accept his statements that all these payments were made on the strength of the report and representations made by the defendant. Defendant, except for the question of the illegality of the transaction, would be liable to the plaintiff for those amounts.

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It appears that a sale of the property was made to Mr. Cronyn, of London, Ontario, and he paid on account of the purchase $50,000, but on making a personal inspection of the land, rescinded the transaction and obtained repayment of a large portion of the money and security for the balance. It might be that the defendant would also be liable for the loss of profit which thus ensued to the plaintiff, but this claim was not pressed at the trial by the plaintiff.

Defendant, however, seeks to escape liability on the ground that the whole transaction, in which the parties were engaged, was contrary to public policy, as being an evasion of the Land Act, and thus illegal. It is quite apparent that the persons whose names were used by the defendant in staking the land were not really intending purchasers from the Government: they were simply utilized for the purpose of enabling the plaintiff to secure a number of sections of land, contrary to the provisions of the Act, which provides that only one section can be purchased at one time. This practice of using names for staking has been too prevalent in the Province, and was recently considered by the Supreme Court of Canada in *Brownlee* v. *McIntosh* (1913), 48 S.C.R. 588; 5 W.W.R. 1137; 26 W.L.R. 906. The facts are similar to those disclosed in this action, and Duff, J. at p. 590, in referring to them, says:

Judgment

"It is perfectly obvious that the scheme entered upon and successfully carried out by McIntosh and Garnham, through the agency of the plaintiff, was a fraud upon the Land Act."

He then refers to the sections of the Act dealing with the right to purchase, and points out the restrictions upon purchase, of even an additional section of land, without having complied with the conditions as to improvements. He refers to the scheme being one to obtain the lands in violation of the provisions of the statute although in professed compliance with it, and then sell the lands to *bona-fide* purchasers. I quote his judgment as follows (p. 591):

"Any agreement entered into for the purpose of carrying out or facilitating the carrying out of this fraud upon the Land Act would be an agreement which it would be the duty of the Courts to refuse to enforce as soon as the character of it should become apparent. The contract set up by the plaintiff under which he agreed to assist in the sale of the lands is necessarily tainted by the character of the scheme as a whole. It follows that

the action ought to be dismissed. For these reasons I concur in dismissing the appeal with costs."

When it became apparent at the trial that the lands in question had been staked in the manner indicated, I considered whether I should not apply this decision immediately. The statement of claim, however, was framed in such a way as not to disclose any illegality, and the plaintiff's counsel developed his evidence in the same manner, so it was only as a matter of defence that the nature of the transaction became evident.

I was impressed by the fact that the parties engaged in staking in this manner were simply following in the train of numerous instances of a like nature, and that it was advisable to have all the evidence available before the Court. Had I not entertained this view, I would have followed the cases referred to in *North-Western Salt Co.* v. *Electrolytic Alkali Co.* (1912), 107 L.T.N.S. 439 at p. 440, and dismissed the action.

It was contended that the decision in *Brownlee* v. *McIntosh, supra,* was not applicable to the present facts, and that the misrepresentations which brought about the loss to the plaintiff existed as a separate cause of action. I cannot disassociate this cause of action from the subject-matter, out of which it arose. Carried to a logical conclusion, it would mean that the plaintiff might not be able to succeed in an action involving the title or ownership of the property so illegally acquired, but might recover in an action for misrepresentation, as to the character of such property. This would be inconsistent, and, in my opinion, the position taken by the plaintiff is not tenable. The misrepresentations having been made in the manner and in the circumstances indicated, plaintiff cannot recover. "No right of action can spring out of an illegal contract": see Broom's Legal Maxims, 8th Ed., 570, and cases there cited.

Judgment

It was contended that in any event the plaintiff was entitled to recover the $600 paid to the defendant. Having found that the nature of the transaction was illegal, the Court will not assist in the recovery back of moneys in such circumstances.

As to the question of costs, I think the defendant, on the facts disclosed, is not entitled to his costs.

The action is dismissed without costs.

Action dismissed.

CLEMENT, J.

1914

April 1.

RE DOE

RE DOE.

Constitutional law—Succession duty—Property within Province—Tax imposed not indirect taxation—R.S.B.C. 1911, Cap. 217.

The tax imposed by the Succession Duty Act is not an indirect tax, and is within the powers of the Provincial Legislature.

The impost is laid expressly upon the property passing under the will (or the intestacy as the case may be), and there is no legal obligation to pay the duty upon any person or persons other than the beneficiaries; even as to them the liability to pay is inferential, or arises under order of the Court made in the course of the enforcement of the charge upon the property.

Rex v. *Lovitt* (1912), A.C. 212, followed; *Cotton* v. *Rex* (1914), A.C. 176, distinguished.

Statement

APPLICATION heard by CLEMENT, J. at chambers in Victoria on the 1st of April, 1914, by the executor of the will of E. H. R. Doe, deceased, for a direction to the registrar of the Supreme Court to deliver to the applicant or his solicitor the Letters Probate of the will without first exacting payment or security for the payment of the amount due or payable under the Succession Duty Act. It was admitted that the property passing under the will was all within British Columbia.

Aikman, for the applicant.
Maclean, K.C., for the Crown.

Judgment

CLEMENT, J.: The application is based upon the one contention only, namely, that even as to property within the Province, the tax imposed by the Act in question is an indirect tax, and as such, not within Provincial competence. It is not contended that the registrar is not justified under the statute in withholding the Letters Probate until the duty is paid or secured, if, in fact, any duty has been lawfully imposed. To this question alone I have to address myself.

It is urged that in the recent case of *Cotton* v. *Rex* (1914), A.C. 176, their Lordships of the Judicial Committee of the Privy Council have held all succession duties to be indirect

taxation. I do not so read the judgment. The Act there in question was an Act of the Quebec Legislature. It required certain persons (one or more) to make a declaration as to the value of the estate left by any deceased person, and it imposed a legal liability upon the person making the declaration to pay the succession duty, that person not being necessarily interested in the estate as a beneficiary, "leaving him to recover the amount so paid from the assets of the estate or, more accurately, from the persons interested therein." In the case—which alone was before them—of property situate beyond the Province of Quebec, which the Provincial Legislature obviously could not charge directly with the duty, such an impost appeared to their Lordships "plainly to lie outside the definition of direct taxation accepted by this board in previous cases." It fell, in fact, squarely within the accepted definition of indirect taxes, *viz.*: "those which are demanded from one person in the expectation or intention that he shall indemnify himself at the expense of another." And when, in the following paragraph of the judgment, Lord Moulton says that "the whole structure of the scheme of these succession duties depends on a system of making one person pay duties which he is not intended to bear but to obtain from other persons," he is, I think, speaking of the scheme of the Quebec Act then under examination, and not of succession duties in general, as if the phrase "succession duty" had a well-known and definite legal significance. Its real meaning, I think, must be gathered from the statute in which it is used; the real character of the tax, whatever it may be styled, depends upon its intended incidence as disclosed by the statute itself.

Judgment

I have carefully examined our own Act, and I find that the impost is laid expressly upon the property passing under the will (or the intestacy, as the case may be) and that there is apparently a studied effort to avoid laying any legal obligation to pay the duty upon any person or persons other than the beneficiaries; and even as to them the liability to pay is inferential, or arises under order of Court made in the course of the enforcement of the charge upon the property. There seems little, if any, difference in principle between such a tax and the ordinary

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familiar municipal taxation of land. According to a certain school of economists a tax upon land is the most scientific form of indirect taxation, reaching ultimately and indirectly, as they claim, to all classes of society; but I have never heard of such a tax being held by any Court to be other than a most obvious example of direct taxation. If a tax upon land is in law an indirect tax, the owner of land in this or any Canadian Province who is non-resident in the Province, and who, therefore, cannot be taxed directly, cannot be reached at all under Provincial law.

This would be a startling proposition, and one which I am not disposed now for the first time to countenance. It is true that in the cases in which their Lordships of the Privy Council have sought for a legal definition of direct taxation they have had regard to the incidence of a tax upon persons (who alone, in a sense, can pay taxes) and not upon property. But that a tax can be laid on property, and that such a tax may be direct taxation, is, in my opinion, not negatived by any of those cases.

However, I am relieved of any necessity for further discussion along this line. In *Rex* v. *Lovitt* (1912), A.C. 212, the Succession Duty Act of the Province of New Brunswick came under review before the board. In its main outlines it closely resembles our Act. As with us, the tax is "laid on the *corpus* of the property" and there, just as under our Act, the executor has to provide for payment of the duty as a condition of holding the grant of Letters Probate. The only difference I can see is that in New Brunswick the executor is required to give a bond; with us he may either forthwith pay the duty or give a bond for its future payment. In neither case does the statute impose a legal liability upon the executor; no tax is laid upon him. "As a condition for local probate on property situated within the Province," payment of a succession duty thereon may be required under Provincial legislation. That is what was held in *Rex* v. *Lovitt,* as explained in *Cotton* v. *Rex,* and it seems to me to exactly cover this case.

Judgment

The application is refused. Under the Crown Costs Act I fear I can make no order as to costs, but this feature of the case may be spoken to.

Application refused.

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REX v. WALDEN

Constitutional law—Sunday trading—Validity of municipal by-law—Criminal law—British North America Act—Lord's Day Act—29 Car. II., Cap. 7—R.L.B.C. 1871, No. 46—R.S.B.C. 1911, Cap. 170, Sec. 53, Subsecs. (129) and (130.)

A by-law prohibiting Sunday trading in the interest of public morals, being a subject of criminal law, cannot be authorized by the Provincial Legislature and is invalid.

Subsections (129) and (130) of section 53 of the Municipal Act, authorizing municipalities to pass by-laws "for the regulating of public morals, including the observance of the Lord's Day," are *ultra vires.*

Decision of HUNTER, C.J.B.C. affirmed.

Statement

APPEAL from a decision of HUNTER, C.J.B.C. on an application by the defendant for a writ of *certiorari* and for an order *nisi* to quash the conviction of the defendant for selling two loaves of bread on Sunday, the 5th of October, 1913, contrary to the Sunday trading by-law of the Municipality of South Vancouver. It was held by HUNTER, C.J.B.C. that the by-law was *ultra vires,* and the conviction was set aside. The Crown appealed.

Woodworth, for the prisoner.

H. C. Clarke, for the Municipality of South Vancouver.

26th November, 1913.

HUNTER, C.J.B.C.

HUNTER, C.J.B.C.: The case of *Ouimet* v. *Bazin* (1912), 46 S.C.R. 502, is not exactly in point. That was a case where the Act impugned undertook to deal generally with the subject of Sunday observance; this is a case where it is sought to uphold a by-law as being within the power reserved to the Province by the proviso in section 5 of the Dominion Act. The by-law goes further than the Province itself could go: for example, its prohibition would cover the supply of gas for cooking which is allowed by section 12 of the Dominion Act. The proviso enables the Province to reduce the scope or mitigate the severity of the general prohibition in

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respect of the topics mentioned in the section, but it does not clothe the Province with power either itself to deal generally with the matter of Sunday observance or to devolve such powers on municipalities as purports to be done by the Municipal Act. The conviction must be set aside.

The appeal was argued at Victoria on the 30th of January, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Bodwell, K.C., for appellant: The question is the validity of a by-law of the Municipality of South Vancouver "to prevent the sale of goods on Sunday" pursuant to the powers conferred on municipalities by subsections (129) and (130) of section 53, Cap. 170, R.S.B.C. 1911. Under the Lord's Day Act, R.S.C. 1906, Cap. 153, Sec. 16, the Provincial law as to observance of Sunday still remained in force, so that 29 Car. II., c. 7, is, under R.L.B.C. 1871, No. 46, still in force. The case of *Ouimet* v. *Bazin* (1912), 46 S.C.R. 502, is distinguishable. In that case there was an Act passed within the Province after the Dominion Act relating to the observance of Sunday, but here we have a Sunday Observance Act, and all the Legislature has done is to give the municipalities the power to make regulations for carrying the existing law into effect. In Quebec they formulated a subsequent Act on the subject. The old Act was in force there as here, but they ignored the old Act and passed a new one subsequent to the Dominion Act. The Dominion Act, under one of its own sections, does not interfere with any existing legislation, and where there is law in existence on the subject the Legislature can give power to the municipalities to make regulations on the subjects set out in the Act: see *Hodge* v. *The Queen* (1883), 9 App. Cas. 117 at p. 132.

Woodworth, for respondent: They cannot escape from the *Ouimet* case. The Province of Quebec is in the same position as regards 29 Car. II. as British Columbia; they cannot pass any criminal legislation, and, if they do, it is *ultra vires* both of the Legislature and of the municipality, its creatures:

see *Attorney-General for Ontario* v. *Hamilton Street Railway* (1903), A.C. 524.

Bodwell, in reply.

Cur. adv. vult.

7th April, 1914.

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MACDONALD, C.J.A.: The Municipality of South Vancouver passed a by-law "to prevent the sale of goods on Sunday." It declared it to be unlawful to sell or expose goods for sale on Sunday, and empowered the convicting magistrate to impose a fine for its infraction of not more than $100, to be enforced by distress, and, in default, by imprisonment for not more than thirty days with or without hard labour.

The by-law, it was conceded, was passed pursuant to powers which the Legislature purported to confer upon municipalities by section 53, subsections (129) and (130), Cap. 170, R.S.B.C. 1911. These subsections authorize municipalities to pass by-laws—

> "For the regulating of public morals, including the observance of the Lord's Day, commonly called Sunday, and for the prevention of sales or the exposing for sale or the purchase of any goods, chattels or other personal property whatsoever, except milk, drugs and medicine, on Sunday."

The by-law conforms to the sections, but it is contended by the respondent, and it was held by the Court below, that the Province had no jurisdiction to confer such powers upon the municipality, and in this result I agree.

MACDONALD, C.J.A.

There are two statutes in force in this Province affecting Sunday observance, 29 Car. II., c. 7, which was in force at the date of the union of British Columbia with Canada, and has remained in force ever since, and the Dominion Lord's Day Act, R.S.C. 1906, Cap. 153. The latter by its terms saves existing Sunday laws in force in any Province. It has long been settled that statutes of this nature are criminal laws, and hence since the union of the Province with Canada not within the powers of the Provincial Legislature to enact, add to or vary. These existing criminal laws may be enforced in the Province in accordance with their terms and provisions. But the prosecution and conviction in this case was not under either of these Acts, but under a by-law which is the creature entirely of the

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Legislature and of the municipality. Parliament is the sole custodian of authority to make, amend or repeal criminal laws. The contention that any other authority than Parliament could delegate power to local bodies by by-law to manipulate their law to suit local ideas, is, in my opinion, utterly unsound.

In dismissing the appeal I wish to guard against it being inferred from what I have said that the Province cannot in any circumstances regulate or control Sunday trading, or confer powers of regulation of the same upon municipalities, in matters falling within the class "property and civil rights." The distinction between this case and cases under local laws of the character of the Liquor Licence Act is pointed out in *Hodge* v. *The Queen* (1883), 9 App. Cas. 117; and is also noticed in *Ouimet* v. *Bazin* (1912), 46 S.C.R. 502.

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Our own Shops Regulation Act is an instance of Provincial legislation passed for the regulation of hours and days of closing not in any way dependent upon Sunday observance laws, but on the British North America Act. The by-law in question, however, is not of that character, but affects to prohibit Sunday trading in, as I think, the interest of public morals, which is a subject of criminal law.

IRVING, J.A.

IRVING, J.A.: The error in the argument in support of the by-law is in assuming that the 16th section of the Dominion statute (chapter 153) confers upon the Province the same power to entrust to a subordinate agency as is conferred on the Province by the British North America Act, 1867, in respect of matters mentioned in section 92 of that Act. This auxiliary power is dealt with in *Hodge* v. *The Queen* (1883), 9 App. Cas. 117.

The Dominion statute, chapter 153, declares that 29 Car. II., c. 7, is not to be construed as repealed or in any way affected: 29 Car. II. as it was enacted in 1677 stands as if it had been specially mentioned and enacted in the original Proclamation issued by Governor James Douglas at Fort Langley, on the 19th of November, 1858, and will continue to stand until repealed by the only body which has, by virtue of the British North America Act, 1867, power to deal with criminal law.

In my opinion, the Province has no power to authorize the municipality to pass a by-law under which this conviction was made.

MARTIN, J.A.: In my opinion, this case is governed by the principle laid down in *Ouimet* v. *Bazin* (1912), 46 S.C.R. 502, and I am unable to regard subsections (129) and (130) of section 53 of the Municipal Act as a mere attempt by the Provincial Legislature to delegate to municipalities the power to make regulations to carry into effect the Sunday Observance Act of 1863 which was in existence here when the Lord's Day Act came into effect on the 1st of March, 1907.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This is an appeal from the judgment of HUNTER, C.J.B.C. setting aside the conviction of the respondent for unlawfully selling goods, *viz.*: two loaves of brown bread, on Sunday, October 5th, 1913, contrary to the Sunday Closing by-law of the Corporation of the District of South Vancouver, being a by-law to prevent the sale of goods on Sunday.

Section 1 of the by-law reads as follows:

"1. It shall be unlawful to sell or expose for sale or to purchase any goods, chattels or other personal property whatsoever (except milk, drugs or medicines) between the hours of 12 o'clock in the afternoon on Saturday and 12 o'clock in the afternoon on Sunday."

The respondent sold the two loaves on Sunday, and was paid fifteen cents for them.

The learned Chief Justice held that the by-law in its terms goes further than the Province could go in legislating, and that it prohibits that which is permitted in section 12 of the Lord's Day Act, R.S.C. 1906, Cap. 153.

Counsel for the appellant, in his argument in support of the conviction, relied strongly upon 29 Car. II. c. 7—an Act for the Better Observation of the Lord's Day, commonly called Sunday—(A.D. 1676), and No. 46—the Sunday Observance Act, 1863—declaring the English Sunday Laws in force—as contained in the Revised Laws of British Columbia, 1871, 29 Car. II., c. 7, being referred to in the schedule to the latter Act; and that there was the power of delegation in

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the Legislature to authorize the passage of the by-law by the municipality.

In my opinion, it may well be said that 29 Car. II., c. 7, is a part of the criminal law as applicable to British Columbia, as unquestionably it was the law at the time of the Union, *viz.*: the 20th of July, 1871 (Terms of Union, p. xlix., Vol. 1, R.S.B.C. 1911).

Under the Terms of Union, section 10, the provisions of the British North America Act, 1867, are applicable in the same way, and to the same extent, as to the other Provinces of the Dominion, and as if the Colony of British Columbia had been one of the Provinces originally united by the Act. That legislation having relation to what may be done upon Sunday, or the Lord's day, is criminal legislation, is not open to any controversy since the decision of the Privy Council in *Attorney-General for Ontario* v. *Hamilton Street Railway Co.* (1903), 72 L.J., P.C. 105, wherein it was held that "chapter 246 of the Revised Statutes of Ontario, 1897, intitled 'An Act to prevent The Profanation of the Lord's Day,'" treated as a whole, was beyond the competency of the Ontario Legislature; that section 91, subsection (27) of the British North America Act, 1867, reserves for the exclusive legislative authority of the Parliament of Canada "the criminal law except the constitution of Courts of criminal jurisdiction."

MCPHILLIPS, J.A.

Therefore, the question in the present case is: Has the respondent been rightly convicted?—but, if rightly convicted, it could only have been for an infraction of the criminal law. Now, what is the criminal law relative to the observance of the Lord's Day in British Columbia? To determine this question it becomes necessary to turn to the Criminal Code, and such other legislation of the Dominion Parliament as may have been passed dealing with the observance of the Lord's Day.

Section 11 of the Criminal Code reads as follows:

"The criminal law of England as it existed on the nineteenth day of November, one thousand eight hundred and fifty-eight, in so far as it has not been repealed by any ordinance or Act—still having the force of law—of the Colony of British Columbia, or the Colony of Vancouver Island, passed before the union of the said colonies, or of the colony of British Columbia passed since such union, or by this Act or any other Act of

the Parliament of Canada, and as altered, varied, modified or affected by any such ordinance or Act, shall be the criminal law of the Province of British Columbia."

The Acts, 29 Car. II., c. 7, the Sunday Observance Act, 1863, as contained in the Revised Laws of British Columbia, 1871, was the law in British Columbia at the time of the Union. Section 1 of that Act reads as follows:

"1. The law, statutory and otherwise, and the penalties for the enforcement thereof, as at present existing and in force in England for the proper observance of the Lord's Day, commonly called Sunday, as referred to in the schedule hereto, shall be deemed and taken to have been included in the Proclamation made and passed on the 19th November, A.D. 1858, and to be of full force and effect in the said Colony, with and under the same penalties *mutatis mutandis* in all respects as if the said laws had been specially mentioned and enacted in the said Proclamation of the 19th day of November, A.D. 1858."

In the schedule to the Act the following appears:

"29 Car. 2, c. 7, so far as the same is applicable to the said Colony."

In my opinion, after the Union it was not competent for the Legislature to enact any legislation in the nature of criminal law, nor was it competent for the Parliament of Canada to confer upon or delegate to the Legislature any authority to enact legislation in the nature of criminal law, as the British North America Act reserved the exclusive authority in that regard to the Parliament of Canada—the authority going to the Parliament of Canada and the Legislature of British Columbia —went from the paramount authority—the Imperial Parliament—and the scheme of Confederation was the conferring of sovereign authority upon the Parliament of Canada and the Legislatures of the Provinces as specifically set out in the British North America Act, and within the ambit of such authority the Dominion and Provincial Parliaments may solely legislate.

It therefore follows that, in my opinion, section 53, subsection (130) of the Municipal Act, being in its nature criminal law, is *ultra vires,* and beyond the competency of the British Columbia Legislature.

That there has been previous legislation to the present Municipal Act of the Legislature of British Columbia of a like or similar nature since the Union, in my opinion, does not add strength to the contention in the slightest to support the convic-

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tion, as it equally was *ultra vires* and beyond the competency of the Legislature.

The result, therefore, in my opinion, is that the existing law dealing with the observance of Sunday in British Columbia is that 29 Car. II., c. 7, is in force, as well as the Dominion Lord's Day Act.

That 29 Car. II., c. 7, is in force is made plain by section 16 of the Lord's Day Act (Dominion).

The section, however, does not give force and cannot give force to *ultra vires* legislation, such as that contained in the Municipal Act, and under which the by-law in the present case is sought to be supported. Giving the fullest effect to section 16, it can only support in British Columbia the validity of 29 Car. II., c. 7. In the result, the Acts which today are in force in British Columbia with respect to the observance of the Lord's Day are 29 Car. II., c. 7, and the Lord's Day Act, R.S.C. 1906, Cap. 153.

The learned counsel for the appellant strongly argued that the respective Municipal Acts passed by the Legislature dealing with the subject of the prevention of sales or purchase of goods, except those enumerated, were passed in pursuance of 29 Car. II., c. 7, and the Legislature had the power to delegate the authority to the municipalities, and that the by-law in question was supported by 29 Car. II., c. 7. I cannot, with all deference to the learned counsel, agree to this contention, as the Act does not in any of its terms make provision for the delegation of any authority or provide for the passage of any by-laws or regulations in the way of the enforcement of its provisions.

MCPHILLIPS, J.A.

Further, the by-law in question in its prohibitions is more extensive than the provisions of 29 Car. II., c. 7, although in the same terms as the Municipal Act, but the learned counsel for the appellant could only rely upon the validity of the provision in the Municipal Act as being supported by 29 Car. II., c. 7. s. 1.

It is evident from the reading of that section that the Municipal Act and the by-law are in terms more extensive than 29 Car. II., c. 7. No exception is made at all for "works of necessity and charity," and, although it is unnecessary, perhaps, to refer

to it—as the conviction in the present case was not under 29 Car. II., c. 7, yet it is both interesting and instructive to know that the statute 29 Car. II., c. 7, does not prohibit a baker baking dinners for his customers on a Sunday: this was held in *Rex* v. *Cox* (1759), 2 Burr. 785.

In *The King* v. *J. Younger* (1793), 5 Term Rep. 449 at p. 452 it was also held that the statute 29 Car. II., c. 7, does not prohibit a baker baking dinners for his customers on a Sunday: see *per* Grose, J. at p. 452.

In my opinion, had the prosecution in the present case been under 29 Car. II., c. 7, no conviction could be had following the decisions above referred to—and, further, the respondent in selling the two loaves would be justified under the Act—as it was (using the language of the Act) the "exercise [of] . . . . business . . . . work of [his] ordinary calling upon the Lord's Day . . . . [being] works of necessity."

It is quite conceivable that people would be brought to starvation if shops and stores are not to be permitted to be open for the sale of bread at least for some time on Sunday—no doubt, though, if the enactment is clear and positive, and no exception is admitted, it would be the duty of the Court to enforce the law, because, where there is inconvenience, it is not the province of the Court, but that of the Legislature, to remedy it; however, as I have pointed out, a prosecution of the respondent under 29 Car. II., c. 7, would have been ineffectual.

Then would a prosecution under the Dominion Lord's Day Act have been any more effective? In my opinion, it would not have been. No doubt section 5 of the Act is very extensive, and prohibits sales of all goods, chattels or other personal property, or business or work being done on Sunday, but works of necessity and mercy are safeguarded by section 12 of the Act, and assuredly the present case would be considered to come within the exception: *Rex* v. *Cox, supra, per* Mansfield, C.J. at p. 786; *The King* v. *John Younger, supra, per* Kenyon, C.J. at pp. 450-1.

Bullen v. *Ward* (1905), 74 L.J., K.B. 916, was the case of a tradesman who, in the course of his business, cut up and cooked and fried potatoes, sometimes alone, and sometimes with

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fish, which he sold hot on his premises to the poorer classes. He was charged with exercising his ordinary calling by doing this on Sunday, but it was held that his premises came within the exception in section 3 of the Sunday Observance Act, 1677 (29 Car. II., c. 7), as being a cook's shop for such as otherwise could not be provided, and that he was, therefore, not liable to the penalty imposed by section 1 of the Act: see the remarks of Lord Alverstone, C.J. (with whom Lawrence and Ridley, JJ. agreed) at p. 917.

In my opinion, the prosecution should never have been commenced against the respondent. When the facts in the present case are considered—two loaves of brown bread are bought on Sunday—unless it were that statute law intervened, what objection could there be to this? Could it be said to be against the common law, or even the moral law, to sell bread on Sunday? I think the answer must be in the negative. Let us turn to the greatest of all prayers, the Lord's Prayer: it in part reads, "Give us this day our daily bread"—it would seem to be an enjoined daily request—and the statute law, in my opinion, never intended to invade this right of the daily quest for bread, and assuredly where people have the means to pay for the bread they should do so—and, in paying for it, this would constitute, no doubt, a sale, but a sale of necessity. To make it impossible to procure bread upon Sunday I cannot believe it ever was the intention of the Legislature, and certainly I would only be impelled to so hold by the most intractable language. See the remarks of Lord Mansfield in *Swann* v. *Broome* (1764), 3 Burr. 1595 at p. 1597.

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The ancient Christians did not look upon the gathering of people at fairs, the carrying on of markets, and engaging in sports and pastimes on Sunday as being contrary to Christian faith and morals, and when for centuries this was indulged in, and not really until the seventeenth century do we find legislation curtailing the liberty of the subject upon Sunday, all legislation must be construed favourably in the way of the liberty of the subject. I agree that Sunday should be well observed, but certainly it is not to be expected that there will be imposed against the people such trammelling legislation as might bring

about starvation or affect the people in their natural right to engage in innocent sport and pastimes on the one day which to the great majority is their only day of rest and recreation.

Therefore, in construing legislation which affects the natural liberty which the people ought to enjoy—and Christianity has strengthened this natural right by its teachings, and by the example of the ancient Christians—there must be found positive inhibition in the statute to disentitle the Court to apply the decisions of the Courts throughout centuries—that is, that the equitable construction must be adopted, and, in my opinion, the present case is one particularly within the equity of the exceptions as contained in 29 Car. II., c. 7, and the Lord's Day Act, were it that the respondent had been proceeded against under either of the last above-mentioned Acts.

In my opinion, the decision of HUNTER, C.J.B.C. quashing the conviction was right, and the appeal therefrom to this Court should be dismissed. This conclusion was arrived at after consideration of the authorities already referred to, as well as the following: *Hodge* v. *The Queen* (1883), 53 L.J., P.C. 1; *Attorney-General for Canada* v. *Cain* (1906), 75 L.J., P.C. 81; *Ouimet* v. *Bazin* (1912), 46 S.C.R. 502; *Rex* v. *Laity* (1914), 18 B.C. 443.

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Appeal dismissed.

Solicitor for appellant: *H. C. Clarke.*

Solicitors for respondent: *Woodworth, Creagh, Banton & Fisher.*

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Contract—Sale of future crop of potatoes—Construction of agreement—Entire crop grown by vendor—Words of expectation and estimate.

The defendants, acting as commission agents for the sale of the plaintiff's crop of potatoes, agreed to handle and dispose of the whole future crop (except a small amount required for seed purposes for the following year), which the plaintiff, at the time the contract was made (as set forth in the written memorandum of the agreement) estimated at 600 tons more or less. The defendants disposed of 1140 tons out of an actual crop of 1230 tons, and then notified the plaintiff to cease shipping potatoes. The plaintiff brought action to recover $1,000 in damages for the non-acceptance or refusal to take delivery of the remaining 90 tons.

Held, on appeal (MACDONALD, C.J.A. and MARTIN, J.A. dissenting), that the contract was one for the disposal of the entire crop at the price fixed, and the words "estimated by the principal at 600 tons more or less" were not words of contract, but words of expectation and estimate only.

Per MACDONALD, C.J.A. and MARTIN, J.A.: The interpretation reasonably to be placed upon the contract was that the estimate of the principal amounted to an undertaking that he would not exceed his estimate by an amount greater than what would be considered a reasonable margin in the circumstances.

Decision of CALDER, Co. J. reversed.

Statement

APPEAL from a decision of CALDER, Co. J. in an action tried by him at Ashcroft on the 11th of September, 1913. The facts are set out fully in the head-note and reasons for judgment.

Murphy, for plaintiff.

S. S. Taylor, K.C., and *F. T. Cornwall,* for defendants.

24th September, 1913.

CALDER, CO. J.

CALDER, Co. J.: A paragraph of a contract for the alleged breach of which this action was brought, is as follows:

"The said principal [the plaintiff] hereby appoints the said Daykin & Jackson, sole and exclusive agents of the said principal to sell, ship and dispose of the entire crop of merchantable potatoes (except a fair and reasonable amount that the said principal may require for seed potatoes

for the next ensuing season) of the said principal grown during the year 1912 by the said principal on his farm, being on the Basque Ranch . . . . and the yield of potatoes being estimated by the said principal at 600 tons more or less."

The action was brought for damages for failure on the part of the defendants to sell a surplus of potatoes remaining on the plaintiff after having already sold 1,140 tons under contract.

At the close of the plaintiff's case counsel for the defendants moved formally for a nonsuit, but the motion was not argued until the case for the defendants was finished. The grounds for the motion principally were that as the defendants had sold more than 600 tons there could be no claim for damages for failure to sell beyond that quantity, and that in any event as the defendants had actually sold 1,140 tons, they had more than discharged their obligations under the contract.

The substance of the plaintiff's evidence bearing on this motion (and at this stage evidence for the defence may not be considered) is as follows: That he gave an increased estimate of 800 tons to the defendants in August—that he did not know if he ever gave them any higher estimate; that on the 16th or 18th of September the defendants quoted a price of $14 to $15 per ton, and plaintiff agreed to let them have all the crop at that price; that he shipped altogether 1,140 tons. About the 5th to the 10th of November defendants notified him to ship no more potatoes—that there was no market. Plaintiff stopped shipping. In March, 1913, following, he demanded of the defendants to take the balance left over. They refused to take them at the old price, but offered him $5 a ton, which he refused, and brought action.

It will be remembered that the contract calls for the entire crop estimated at 600 tons more or less. This estimate was made on the 1st of April, when the potatoes were not yet planted. The entire crop turned out to be more than double the estimate; and a conflict arises as to the precise weight which ought to be given to the words "being estimated at 600 tons more or less." To what extent, if any, may they be held to modify the words "entire crop" so as to reduce their meaning to something less than the actual entire yield? Are the words

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"being estimated at 600 tons more or less" to be treated as words of contract or words of vague estimate merely having no binding meaning whatsoever? The first rule of construction is that words are to be understood in their plain literal meaning. In the circumstances with which we have to deal here the rule cannot apply because its application leads us to a contradiction. The second rule of construction is that an agreement ought to receive that which will effectuate the intention of the parties to be collected from the whole agreement. The question under this rule is: What do the parties intend when they use the words "being estimated at 600 tons more or less"? The defendants are dealers on a large scale in the selling of potatoes by wholesale in the principal centres of the Canadian West, and in the course of their business have entered into scores of contracts similar to the one in hand. It is hardly likely that they would embark upon an enterprise of such magnitude without forming an estimate of the probable turnover for the season. The precaution would be necessary even if the principal motive of the defendants was, as the plaintiff contended it was, to corner the market. The pre-arrangements necessary to finance such a business would compel the setting of a limit somewhere to their possible obligations, and this object could only be obtained by limiting their obligations under each individual contract. It took no great foresight to see that disaster would follow an unlimited obligation to sell and dispose of a heavy crop in a glutted market; and I cannot doubt but that the estimate of 600 tons more or less was inserted in the contract to secure the defendants from such, or a like contingency.

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There are many cases dealing with the meaning of the words "more or less," "about" and "say" which shew that the quantity is not restricted to the exact amount or number specified, but that certain reasonable latitude is to be allowed in performance. I do not think that the cases yield any certain rules as to the value of such words, but their weight in most cases appears to be governed by circumstances extrinsic to the written contract such as conditions and customs peculiar to the trade with which the contract deals. In the case of *Morris* v.

Levison (1876), 1 C.P.D. 155, a charter provided that the ship load a full and complete cargo, say about 1,100 tons. The charterer provided a cargo of 1,080 tons. The actual capacity of the ship was 1,210 tons. It was held that the words "say about 1,100 tons" were words of contract, and must have been intended as a guide to the charterer with regard to the amount of cargo which he would have to provide; that he was therefore not bound to load a full and complete cargo of 1,210 tons, but was bound to provide a reasonable margin over 1,100 tons; and that 3 per cent. being such a reasonable margin he ought to have loaded 1,133 tons. So, here, I believe, that the words "being estimated at 600 tons more or less" are words of contract, and must have been intended as a guide to the defendants with regard to the amount of potatoes they would have to "sell and dispose of" and that they were bound to sell and dispose of a reasonable margin over and above 600 tons; and further that when the defendants had already sold and disposed of 540 tons over and above an estimate of 600 tons more or less they had liberally fulfilled their reasonable obligations under their contract. A nonsuit must follow accordingly, with costs.

The appeal was argued at Vancouver on the 7th of April, 1914, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Murphy, for appellant (plaintiff): The trial judge based his judgment on the plaintiff's statement that he estimated the yield at "600 tons more or less." We say the figures "600" are not part of the contract; they agreed to take the entire crop. As to the term "more or less," see *Embree* v. *McKee* (1908), 14 B.C. 45.

S. S. Taylor, K.C., for respondents (defendants): Before the defendants bind themselves under the contract they must know approximately the amount of potatoes it is necessary for them to dispose of, so that when "600 tons" is put in the contract it is a most material part of it.

The vague nature of the contract makes it unenforceable, as the plaintiffs do not say how much they require for seeding.

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The agreement says they undertake to dispose of the said entire crop; the word "said" refers to "600 tons more or less": see *Morris* v. *Levison* (1876), 1 C.P.D. 155. The entire crop means the estimated crop; the words "more or less" is ordinarily limited to 3 per cent. more: see *Miller* v. *Borner & Co.* (1900), 1 Q.B. 691; 69 L.J., Q.B. 429; *Carnegie* v. *Conner* (1889), 24 Q.B.D. 45; 59 L.J., Q.B. 122; *Leeming* v. *Snaith* (1851), 16 Q.B. 275; 20 L.J., Q.B. 164.

Murphy, in reply.

Cur. adv. vult.

2nd June, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I agree with the learned trial judge in thinking that under the contract between the plaintiff and defendants no liability is cast upon the defendants to make good the loss for which the plaintiff claims. The defendants agreed to act as commission agents for the sale of the plaintiff's crop of potatoes. They agreed to handle the whole crop which the plaintiff estimated at the time the contract was made, and which estimate is set forth in the contract itself at 600 tons. It turned out that the entire crop exceeded 1,200 tons, or more than double the plaintiff's estimate. The defendants disposed of 1,140 tons, leaving the plaintiff at the end of the season with a balance on his hands of 90 tons. The price of potatoes dropped, and the plaintiff brought this action for the difference between the price realized for those sold and the market price at a later date. The learned judge dismissed the action on the ground that the defendants had more than fulfilled their contract; that the estimate of 600 tons must be taken as a substantial part of the contract, and that having sold 1,140 tons the defendants had covered any reasonable margin allowable by the term "estimated at 600 tons more or less." Had the potatoes been *in esse,* and been seen by the defendants at the date of the contract, or had even the proposed acreage been known to them, there might be some warrant for saying that the estimate might be disregarded, but the estimate was that of the seller to the persons who are not shewn to have had any conception of the quantity of potatoes plaintiff intended to

grow, and who had no other guide than the plaintiff's estimate, and hence I think must be taken to have contracted in reliance thereon.

IRVING, J.A.: I would allow the appeal, and enter judgment for the plaintiff on the basis that he had elected in September to sell the whole of his crop, at September prices.

The general rule is that *prima facie* words of quantity inserted after the term "cargo" "all the steel," etc., represent only an anticipated estimate of what the cargo, steel, etc., will amount to. They are not a term of a contract unless made so. If it were intended that the specified quantity should govern it would be unnecessary to introduce the term "cargo" "all the steel," etc., at all.

In *Gwillim* v. *Daniell* (1835), 2 C. M. & R. 61; 4 L.J., Ex. 174, the defendant agreed to sell all the naphtha that he might make during the term of two years, "say from 100 to 2,000 gallons per month." The Court thought that these words amounted merely to "a sort of understanding of the parties at the time that that quantity might be expected to be the produce."

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In *Leeming* v. *Snaith* (1851), 16 Q.B. 275; 20 L.J., Q.B. 164, the words were "say not less than." That case is distinguishable. The insertion of the negative expression was to fix a minimum and therefore it was to be regarded as a term of the contract.

By the contract, the plaintiff was bound to sell to the defendants, or their nominee, at least 66⅔ of his entire crop, at the September prices, and such sale was subject to future delivery.

MARTIN, J.A.: This is not an easy case to decide, because, as was said by their Lordships of the Privy Council in the similar one of *McConnel* v. *Murphy* (1873), L.R. 5 P.C. 203 at p. 219, "there are no questions upon which Courts differ more frequently than upon this class of cases." Different views may well be taken as to the meaning of the agreement before us, the wording of which should be closely scanned and weighed, as very little would serve to turn the scale where the

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dividing line between words of expectation and of contract is so fine. The case differs from all those that have been cited to us, or that I have been able to find, in this important particular, *viz.*: that it is one dealing with a subject-matter which depends on two things, the future yield of a crop and the area to be planted to obtain it. Each of these elements is more or less in the control of the grower, the first not so much, because no husbandman can wholly foresee the ordinary course of Nature, yet nevertheless to a considerable extent he may greatly assist her and achieve the best possible results by proper tillage, care, and cultivation (including irrigation in the "dry belt" if necessary and available) according to the needs of the locality; the second is absolutely so, because in this case he might plant an area of one acre or one hundred acres, according to his sole discretion, for the number of acres to be planted on the farm is left blank in the space provided for that purpose in the agreement. Such being the case, and it being left to the power of the grower (if his "entire crop," saving the seed potatoes specially reserved, can be forced upon his agent) to plant an unlimited number of acres and, as is contended, compel his agent to take ten or over 10,000 tons thereof, we must see if there is no indication of some restraint contemplated by the parties and provided for by the document upon such an obviously unreasonable bargain. It can be found, I think, bearing the above situation in mind, in the words "and the yield of potatoes being estimated by the said principal at 600 tons more or less." It will be observed that not only the amount of the acreage is left to the principal, but also the making of the estimate: it is his decision as to the extent of his own planting, and his estimate of the result of his own decision, based upon a proper course of husbandry, that the agent was relying on, and therefore in these exceptional circumstances much more weight should be attached to this sole estimate than to a joint one made with respect to goods which were before the parties and could be estimated sufficiently closely, if they chose to spend the necessary time to do so, instead, *e.g.*, of "guessing" about a heap of iron in a yard, as the Court found was done in the instructive case of *McLay and Co.* v. *Perry and*

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Co. (1881), 44 L.T.N.S. 152, wherein the plaintiffs claimed they had bought "about 150 tons" of iron in a heap in the defendants' yard, but as it turned out there were only 44 tons in it, the plaintiffs unsuccessfully sued the defendants for damages for the 106 tons short. As was said in *Morris* v. *Levison* (1876), 1 C.P.D. 155 at p. 159:

"The nature of the subject-matter must be considered in determining what meaning is to be attributed to such expressions."

The case of *McConnel* v. *Murphy, supra,* does not assist the plaintiff, the facts being very different, and relating to a purchase of spars, which, as their Lordships point out at p. 216, "were to be paid for at so much for each spar, not in a round sum . . . ." Their Lordships go on to say, p. 219, that the interpretation they put upon the contract (*viz.*: that the words therein were really words of expectation and estimate), was the "one that the contract reasonably bears, and that is the true meaning which ought to be placed upon it." Likewise in this case I think that the interpretation, on the special facts that this "contract reasonably bears," is that the estimate placed by the grower "amounts to an undertaking" (p. 218, *supra*) that he will not exceed his estimate by an amount greater either way than would be considered a "reasonable margin in the circumstances." In other words, he should be allowed that "margin for a moderate excess in, or diminution of the quantity" that Thesiger, L.J. refers to in *Reuter* v. *Sala* (1879), 4 C.P.D. 239 at p. 244, wherein the contract was for the sale of "about 25 tons (more or less) Penang black pepper." In the case at bar, while doubtless a liberal construction to meet the special circumstances would be given to the expression "margin for a moderate excess . . ." etc., yet it could not possibly be extended to such a length as to enable the plaintiff to maintain this action, which, with every respect for contrary views, I think should be dismissed, because unless we do so, then we must be prepared to hold that the plaintiff could have forced the defendants to take the absolutely unlimited crop of potatoes which he arbitrarily chose to grow on his farm, for the reason that the expression "entire crop," if given effect to as proposed, has no half-way house whereat the principle of construction can halt between

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600 tons and 6,000 tons. Therefore, I think the learned judge below arrived at the right conclusion, and his decision should be affirmed.

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GALLIHER, J.A.: I regard the words "the entire crop" as being the governing words, or words of contract, and the 600 tons, more or less, as merely an estimate.

The defendants, who were dealing in potatoes in a large way, obtained the exclusive right to dispose of the entire crop grown by the plaintiff during the season of 1912 on the Basque Ranch. In accordance with paragraph 5 of the contract, the defendants quoted a price of from $14 to $15 per ton. The plaintiff might have retained one-third of his entire crop (being bound to deliver two-thirds under his contract at this price) until April 1st, 1913, but instead of so doing, he notified the defendants that he would sell all at that price—delivery to be made as provided in the contract. From the time of such notification the plaintiff merely held the potatoes subject to the order of the defendants as to dates and manner of shipping. In accordance with orders received, the plaintiff started to ship the potatoes and continued to do so until stopped by the defendants. At the time this stoppage took place there were some 90 tons of the crop sold still to be shipped, and as to what then took place between the parties there is a conflict of testimony. The learned judge has not dealt with this, basing his judgment on the ground that the words "600 tons more or less" were words of contract, and that defendants had fulfilled their contract.

GALLIHER, J.A.

On this conflict of testimony, I think I must hold in plaintiff's favour, especially as, if the view I take of the contract is right, it was the duty of the defendants to keep themselves advised as to the quantity still unshipped, and the 90 tons remaining over were being held by the plaintiff in the same way as the whole crop was after acceptance of the offer in September, and before any were shipped. Supposing, say within a week after the offer was accepted and before any potatoes had been shipped, the price had gone up, could the plaintiff have refused to deliver at the price agreed upon, and would that have to depend upon whether the defendants had contracted with others for sale at

that price? I think to hold so would be to leave dealings of this nature on rather a precarious footing.

Bearing in mind that the defendants had obligated themselves to sell and dispose of the plaintiff's crop, I think they were more than mere agents, and it seems to me that when the offer was received and accepted, the relation of the parties was such that the plaintiff, from that time on, held the potatoes subject to the order of the defendants at the price agreed upon, and could not himself have further dealt with them. The offer of $5 per ton for the 90 tons in March, 1913, as it was made by defendants, while disclaiming any responsibility, and as for potatoes held over by the plaintiff for himself, and not on account of defendants, should not, I think, be taken into account as reducing plaintiff's claim, as, in my view of the case, the defendants should have had the potatoes shipped, paying the price quoted in September.

As to storage claimed, I think this should be disallowed, so that the judgment should be for $1,000, less $225 storage, and $180 for unused sacks.

It follows that the appeal should be allowed, with costs.

McPhillips, J.A.: The action is one brought to recover $1,000, being the damages claimed for the non-acceptance or refusal to take delivery of 90 tons of potatoes and the storage thereof—the potatoes rotting in the cellars of the plaintiff—and the plaintiff appeals from the judgment of Calder, Co. J. dismissing the action.

The agreement is in writing, the plaintiff being referred to as the principal and the defendants as agents. It may be said to be somewhat peculiar, in that the defendants are appointed sole agents to sell, ship and dispose of the entire crop of merchantable potatoes grown during the year 1912 (except a fair and reasonable amount required by the plaintiff for seed potatoes for the next ensuing season), estimated by the plaintiff at 600 tons more or less, but apart from this agency it was in the agreement contemplated that on or before the 15th of September, 1912, on the defendants advising the plaintiff of the Vancouver market ruling price, then the plaintiff might sell—

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as I interpret the contract—to the defendants his entire crop, or at least 66⅔ per cent. thereof, and upon the facts as they present themselves to me, a sale of the entire crop was made to the defendants at the then ruling price, which was between $14 and $15 per ton, the defendants receiving a 15 per cent. commission on the gross price, the net price to the plaintiff being $12.33 per ton f.o.b. Basque, B.C., the point from which all the potatoes were to be shipped.

The plaintiff shipped altogether 1,140 tons. In the early part of the month of November, 1912, the defendants notified the plaintiff to cease shipping potatoes, that there was no market; and the plaintiff stopped shipping, and in the month of March, 1913, the plaintiff demanded of the defendants to take delivery of the balance left over, *viz.*: 90 tons, the quantity sued for. The defendants refused to take them at $12.33 per ton, but offered $5 per ton, which the plaintiff refused, and suit was brought on the 22nd of August, 1913.

It is a matter for remark and for consideration that the estimated quantity of potatoes was greatly exceeded. The crop was a very large one. However, that which was under contract was the entire crop for the season of 1912 grown on the Basque Ranch of the plaintiff, situate in Yale District, and from the evidence it is clear that the defendants were large operators—dealers in and purchasers of potatoes—and were desirous of obtaining the total crop grown by the plaintiff; and, in my opinion, the plaintiff was under contractual obligation, under the terms of the agreement, to hold for and deliver to the defendants his whole crop, save only such quantity as he was entitled to retain for seed potatoes. This being the legal position, it was not within the power of the plaintiff to otherwise dispose of the potatoes until the defendants refused to take delivery of the remaining 90 tons, the subject-matter of the action.

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The learned judge, in his judgment, went upon the words of the agreement, "estimated by the said principal at 600 tons more or less."

Unquestionably, in this case the excess over the estimated quantity was very great, being over twice the estimated quantity.

Yet it is clear that it was "the entire crop" which was being dealt with in the agreement, and it is so stated therein, and the necessity for parol evidence, to establish what was intended, does not arise.

In *Embree* v. *McKee* (1908), 14 B.C. 45, the facts shewed that what was in the mind of the parties was "all the hay in Brown's barn except 30 tons." The supposition was that the barn contained 100 tons. It was proved, however, to contain 122 tons, and the learned County Court judge held that the defendant was entitled to all the hay less only the 30 tons: see the judgment of IRVING, J. at p. 46, in which MORRISON and CLEMENT, JJ. concurred.

The words "more or less" were considered in *Cross* v. *Eglin* (1831), 2 B. & Ad. 106; 36 R.R. 498. There the plaintiffs sued for the recovery of money paid on account of a purchase of 300 quarters of foreign rye, they having refused to take delivery of 350 quarters, it being insisted upon that they should take the 350 quarters, the purchase being of "about 300 quarters more or less." Lord Tenterden, C.J. at p. 109 said:

> "It is for the Court to put their construction on the contract; and my opinion is, that the excess of quantity in this case was greater than the terms of the agreement warranted."

It is to be observed that it is for the Court to put their construction upon the contract, and in the present case, in my opinion, there can be no difficulty in construing the contract. It was the entire crop, and who could guage the bounty of the potato crop?

In *McConnel* v. *Murphy* (1873), L.R. 5 P.C. 203, the words under consideration were "say about 600 red pine spars," and Sir Montague E. Smith at p. 215 said: "The whole question turns upon the construction of the agreement." And see pp. 217 and 218.

In the present case, adopting the language of Sir Montague E. Smith,

> "to sell, ship and dispose of the entire crop of merchantable potatoes (except a fair and reasonable amount that the said principal may require for seed potatoes . . . . next ensuing season) of the said principal grown during the year 1912 by the said principal on his farm being on the Basque Ranch . . . . and the yield of potatoes being estimated by the said principal at 600 tons more or less,"

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being the words of the agreement, "were really words of expectation and estimate only," but that it was all the potato crop which was being dealt with, in my opinion, there can be no doubt.

In the present case, as in *McConnel* v. *Murphy, supra,* no fraud or intentional deception is charged; in fact, upon the evidence, and upon consideration of all the attendant and surrounding circumstances, that which was contracted for was the entire potato crop. It therefore follows that, in my opinion, the plaintiff is entitled to recover as damages the difference between the contract price and the market or current price at the time of the refusal to accept the 90 tons, which difference is to be arrived at by deducting $5 per ton from $12.33 per ton (as at the time the defendants refused to accept the potatoes in March, 1913, save at $5 per ton, it may be assumed that that was the market price), leaving $7.33, and 90 tons at $7.33 per ton amounts to $659.70, from which is to be deducted the credit given to the defendants in the statement of claim of the plaintiff, *viz.*: $180; the balance that then remains is $479.70. The plaintiff is not entitled to the $225 claimed for storage of the potatoes.

MCPHILLIPS, J.A.

In my opinion the appeal should be allowed, and the plaintiff is entitled to damages against the defendants to the amount of $479.70, and the judgment of the learned trial judge should be set aside and judgment entered for the plaintiff accordingly, with costs here and in the Court below.

Appeal allowed, Macdonald, C.J.A., and Martin, J.A. dissenting.

Solicitor for appellant: *James Murphy.*
Solicitor for respondents: *F. Temple Cornwall.*

MILLER v. MILLER.

MURPHY, J.

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MILLER v. MILLER

Husband and wife—Dissolution of marriage—Alimony—Covenant not to make further claims against husband—Removal of bar—Charge on real estate not producing income.

A wife, while living with her husband, agreed in writing, in consideration of $1,000 in cash, and the transfer of certain furniture, to forego all claims against him as a husband. Subsequently, having discovered that he was guilty of bigamy and adultery, she secured a decree *nisi* for the dissolution of her marriage, and then filed a petition for maintenance.

Held, that the husband's conduct precluded him from setting up the agreement as a bar; and further that as the agreement contained no covenant not to apply for alimony if legal grounds therefor arise, she is entitled to alimony.

Held, further, that when the husband, although possessed of valuable real estate, swears that he has no income from that, or any other source, the Court may, nevertheless, make an order for permanent alimony in favour of the wife, and will secure payment of it by charging the husband's property.

PETITION for maintenance before MURPHY, J. at chambers in Vancouver on the 9th of March, 1914. Before the petitioner's husband had left her he had secured from her a writing in which she had agreed, in consideration of $1,000 in cash and the transfer of certain furniture, to forego all claims against him as a husband. Later, owing to the husband's conduct, the wife applied for, and secured a decree *nisi* for the dissolution of her marriage on the ground of bigamy and adultery. She then filed this petition for maintenance. In his answer the husband claimed that the agreement aforesaid precluded her from claiming maintenance. He also set up that while admitting that he was possessed of real estate worth several thousands of dollars, at the same time, owing to inability to get tenants, etc., he had no income whatever from that or any other source. It was conceded that the respondent was not in receipt of any income at the time of the filing of the petition, nor for some time previous thereto.

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McTaggart, for the petitioner.

Mowat, for the defendant.

14th March, 1914.

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MURPHY, J.: Assuming that the document exhibit 1 is a valid contract, I consider the wife is not precluded thereby from applying for alimony. If the circumstances now existing were not in contemplation of the wife when she signed it, she is not so precluded: *Morrall* v. *Morrall* (1881), 6 P.D. 98.

It is true that in *Gandy* v. *Gandy* (1882), 7 P.D. 168 at p. 172, it was held that subsequent adultery alone is not a reason for relieving a wife from a direct covenant not to seek further alimony, but that was a separation suit, and exhibit 1 in this proceeding contains no such covenant. The wife suspected adultery here at the time she signed this receipt, but was not so sure of it as to cease co-habitation on such signing. In fact, the parties continued for two weeks thereafter to live as man and wife. Now she is subjected to the indignity of seeing her husband live in the same city as herself with another woman who passes as his wife, he having contracted a bigamous alliance with such woman. In my opinion that is sufficient, under *Morrall* v. *Morrall, supra,* as qualified in *Gandy* v. *Gandy, supra,* to preclude the husband from setting up the agreement as a bar. Further, such agreement contains no covenant not to apply for alimony if legal grounds therefor arise, and on this ground also I think the wife succeeds: *Wilkinson* v. *Wilkinson* (1893), 69 L.T.N.S. 459. I take into consideration the payment of the $1,000, and I fix permanent alimony in addition thereto at $30 per month to the wife for the term of her natural life, and I direct that same be secured by a proper charge upon the real property of the defendant, the deed to be drawn by petitioner's solicitor and approved by respondent's solicitor. In case they cannot agree, the matter to be again spoken to before me.

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Order accordingly.

WHITE & CO., LIMITED v. DONKIN.

MURPHY, J.

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WHITE & CO. v. DONKIN

Company law—Extra-provincial company unlicensed—Right to sue—"Carrying on business"—R.S.B.C. 1911, Cap. 39, Sec. 166—Sale of fish unfit for food—Implied warranty of unmerchantable quality—Damages—Measure of.

Section 166 of the Companies Act, which subjects extra-provincial companies to penalties for carrying on in the Province any part of their business without licence or registration, indicates that the Legislature by the phrase "carrying on business" contemplated such conduct on the part of the Company as would, according to the general principles of law, amount to a submission to the jurisdiction of the British Columbia Courts. No company would therefore come within the penalties or disabilities so imposed, unless it had a fixed place of business at which it carried on some part of its own business within the Province.

John Deere Plow Co. v. *Agnew* (1913), 48 S.C.R. 208, followed.

Where, under a contract of sale, fish is supplied to a purchaser that subsequently are found to be unfit for human food, the measure of damages is the amount necessary to place the purchaser in the same position as if at the time of the discovery of the true condition of the fish, he had been furnished with proper fish.

ACTION tried by MURPHY, J. at Vancouver on the 27th of March, 1914. The plaintiff, doing business in Ontario, bought from the defendant, doing business in British Columbia, a quantity of fish, which was shipped from Vancouver to Toronto. When the fish reached the plaintiff, he supplied his customers with a portion of it and placed the rest in cold storage. Complaints as to the condition of the fish were made by the customers, and in consequence of an inspection the plaintiff sued the defendant, alleging that the fish was unfit for food, and claiming as damages the price of the fish, freight paid, the cost of cold storage, and loss of profit. Amongst other defences, the defendant set up that the plaintiff Company was not licensed as an incorporated company in British Columbia, and therefore was incapable of suing on a contract made in whole or in part within the Province in the course of its business.

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Mowat, for plaintiff.

S. S. Taylor, K.C., for defendant.

31st March, 1914.

MURPHY, J.: As to the objection that the action must fail because plaintiff, being an unlicensed extra-provincial company, are precluded by the provisions of the Companies Act from suing in respect of any contract made in whole or in part in the Province, I think, even assuming that the contract here in question was partly made in British Columbia, that such contention must fail because of the interpretation put upon that statute in *John Deere Plow Co.* v. *Agnew* (1913), 48 S.C.R. 208. It is there held that such contracts, to fall within the prohibition, must be made in the course or in connection with some business which the Company in whole or in part "carries on" in British Columbia: *per* Duff, J. at p. 230. The plaintiff Company carries on no business in this Province, particularly if the explanation of the same learned judge, as set out on page 232, of what constitutes "carrying on business" is adopted, as I think it must be by a Court of first instance at any rate. I find on the evidence that the fish in question were not merchantable when they were shipped from Vancouver; that in fact they ought then to have gone to where they finally were sent, *i.e.,* the city dump. I think the plaintiff had opportunity to inspect and that, on the evidence, they must be held to have accepted the goods. That, however, does not prevent them from suing on the implied warranty that the goods were merchantable at any rate where, as is the case here, the plaintiff could only conclude from the correspondence that the defendant was an actual dealer in, and, in fact, a producer of the commodity furnished. The measure of damages is, I consider, that plaintiff ought to be placed in the same position as if at the time of discovery of the true condition of the fish he had been furnished with proper fish. *Graham* v. *Bigelow* (1912), 46 N.S. 116, is the latest case I can find on this point. There can, I think, in this case be no question of loss of profits, as defendants apparently actually replaced the fish, though at a higher price. I think the plaintiff, on this basis, is entitled to a return of all moneys paid for the fish and for its transportation, etc., to Toronto, and,

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in addition, to the difference between what the fish would have cost them laid down in Toronto and what they actually paid for fish to replace the shipment. If counsel cannot agree on the quantum, the matter may be again spoken to.

Judgment for plaintiff.

FLETCHER *ET AL.* v. HOLDEN.

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Vendor and purchaser—Contract—Land-broker—Undertaking by, to make profit or take land—Enforcement of—Void for uncertainty.

A real-estate agent in negotiating a sale of land to the plaintiffs on behalf of the owners, which sale was carried through, promised that he would "make them a profit of $30,000 within sixty days, or take the property himself." In an action to enforce the promise as an agreement:—

Held, that the contract was indivisible; that it was too vague for the Court to enforce, and void for uncertainty.

Held, further, that the action being for specific performance, the plaintiffs should have tendered an agreement or assignment for execution in order to put before the defendant the option to pay the $30,000 or take the property.

Semble, there was consideration for the promise which amounted to an enforceable contract if nothing else stood in the way; and it did not concern an interest in land in such a way as not to be enforceable by reason of the Statute of Frauds.

ACTION for specific performance of an alleged agreement, tried by HUNTER, C.J.B.C. at Victoria on the 2nd of April, 1914. The facts are set out in the head-note and reasons for judgment.

Statement

Bodwell, K.C., for plaintiffs.
S. S. Taylor, K.C., for defendant.

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HUNTER, C.J.B.C.: I am quite satisfied that the facts are in the main as stated by the plaintiffs Fletcher and Shatford. I am quite clear that the promise alleged by them and sworn to by them half a dozen times in their evidence, namely, that Holden was to make them a profit of $30,000 within 60 days, or take the property himself, was made. And in coming to that conclusion of fact, I do not intend to impute any wilful misstatements to either party. It must be clear enough that a transaction of this kind, involving, as it did, possibly, a very large liability, would be likely to be more acutely recollected by Fletcher and Shatford than it would be by Holden, whose only interest in the matter was the securing of a commission. And I can quite readily understand how it is possible that Mr. Holden may not have had any particular recollection of making this promise, as he is a man engaged in a very extensive way in real estate, and no doubt has had transactions amounting to several millions a year. On the other hand, the plaintiffs were obligating themselves to a very large amount, or considering the obligating of themselves to a very large amount, and naturally would have a very much more acute recollection of the transaction, which affected them in a very much more serious way than it did the defendant Holden. However that may be, I have no difficulty in coming to the conclusion that the promise, as repeatedly sworn to by the plaintiffs, was as a matter of fact made, and that that promise was that the defendant Holden would make them a profit of $30,000 within 60 days, or that he would take the property himself.

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Now, the first defence suggested by the statement of defence was that there was no consideration for this promise. I am of opinion that there is nothing in that point. It is elementary law, as I take it, that where the promisee is to expose himself to some possible liability or detriment, that that of itself affords sufficient consideration in English law for the promise. And not only that, but it is common ground that the object of the transaction, so far as Holden himself was concerned, was in order to enable him, Holden, to make a commission out of the sale to the plaintiffs, from the then owner, O'Toole. And not only that, but it was also plainly enough apparent that Holden

was intending to make a profit out of the resale when the property became acquired by the plaintiffs. So that there is no difficulty, so far as I can see, upon the score of consideration.

The next point stated by Mr. *Taylor,* for the defence, was that this promise, so-called, amounted to a mere expression of belief, and that it was to be treated as a mere puffing by a real-estate agent who is exercising his ingenuity in working up a sale. I am unable to put that estimate upon it. I think it is clear from the evidence of the two plaintiffs, that while originally they may have hesitated about accepting this statement as a statement on which they could rely, that there is no doubt that they did finally change their position upon the faith of that statement, and that the promise amounted to an enforceable contract, if no other consideration will prevent that—which I will deal with further on.

The next point raised in connection with the defence is that this contract, if it is a contract, is within the Statute of Frauds. Now, ordinarily speaking, of course, contracts concerning land or interests in land are within the Statute of Frauds, but I take it that such contracts are contracts whereby it is intended that some interest in the land should pass from one party to the other. If that is a true test as to whether or not a contract is within the Statute of Frauds, then I should take it that this contract is not really within the Statute of Frauds, although within the letter of it, because it is not intended, by virtue of the promise itself, that any interest shall pass from one party to the other; neither of the parties at the time of the making of this promise had any interest in the land itself; the bargain related to a possible interest to be acquired in future by one of them.

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However that may be, assuming that the Statute of Frauds is not fatal to the action, I have come to the point which to my mind is fatal to the success of the plaintiffs. The promise, as declared on—at least, as proved in the evidence—was a promise in the alternative, that is to say, it was a promise to do one or other of two things. Mr. *Bodwell* has, in the course of his argument, suggested that it was quite within the right of the plaintiffs to sue on one branch of the promise, and refers to the

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case of *Wood* v. *Benson* (1831), 2 C. & J. 94. *Wood* v. *Benson,* however, was a case where a man promised to do two things, and one of the two things which he promised to do was held to be bad, because it was not in writing. I fail to see what application that case has to this, because here the promise was to do one of two things, and not to do two things. I therefore think that the promise has to be taken as a whole, and if it is enforceable at all, must be enforceable as a whole. As a matter of fact, the action was brought upon one branch of the promise, that is to say, relating to the $30,000 profit. I am willing, however, to assume that the pleadings can be reformed, and have been reformed so as to make the action stand on the promise taken as a whole. I think even if that were to be allowed to the plaintiffs, that it is impossible to enforce the promise, as it was proved, on the ground that it is too vague to enforce—or as it is sometimes put, is void for uncertainty. If we take the first branch of the promise, that is to say, "make you $30,000 profit within 60 days," that of itself might be susceptible of two different constructions. It may be that the $30,000 profit was to be realized in cash within the 60 days, or it may be that the defendant had bound himself to bring into existence a contract by which at some future time the $30,000 was to be realized, but that only the contract itself was to be produced within the 60 days. However that is, if that difficulty can be got over, then I think undoubtedly the latter branch of the promise, that is to say, "take the property myself" or "take it myself," is clearly open to two or three different constructions. It may mean, and in fact it was stated by Mr. Shatford that he so understood it, that the defendant Holden was obligating himself to take over the property, and in addition, to give the $30,000 profit. It may of course mean that he was obligating himself only to take an assignment of the plaintiffs' interest without paying any profit—$30,000 or other profit. Then, again, it may mean that they had a naked promise simply to take an assignment, without necessarily covenanting to indemnify the plaintiffs against the liability which they had assumed. I think that that is a very difficult phase of the matter to come to a conclusion about. "Take it myself" does not necessarily

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mean taking an assignment from you and indemnify you—although a great many persons might think that that is what it did mean—that the instrument by which the title was to pass was also to contain a covenant against the liabilities assumed by the plaintiffs. Then again, "take it myself" may mean: I will indemnify you if you are held or caught on this liability, but not otherwise; or, I will agree to indemnify you afterward, if by any chance the liability becomes a judgment against you, I will agree to indemnify you then. There is nothing stipulated as to the time when the property is to be taken over. It may mean: I will take it myself when I am in a position to take it over, or take it myself immediately, or take it myself within a reasonable time, and either with or without protection to you in the meantime. I think that all these constructions are open to be put upon the expression. With these various constructions open, can anyone say that the parties were *ad idem?*

Then I think, moreover, that the action should have been, as I said, brought upon the promise as it stands with the two alternatives, and as I say, being willing to assume that it was brought that way, and that the pleadings are not now open to any objection on that score, I think there is another difficulty standing in the way of the plaintiffs, that before commencing the action there should have been an agreement or assignment drawn and this agreement tendered to the defendant for execution. That, of course, would have at once brought up the question whether or not the covenant that I have been speaking of should have been inserted in it, or whether Holden could say: I did not undertake to give you any covenant at all. But, however that may be, the action being for specific performance, the ordinary rule of course must prevail, and, therefore, the instrument which it is alleged that Holden had obligated himself to sign should have been presented to him for signature before the action was brought. Of course, I am quite well aware that a man may shew by his conduct that it is not necessary to present him with such a document. At any rate, I think it quite clear that before the plaintiffs are in a proper position to sue they must make it clear to the Court that they did put the option to

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Holden in some form or other, that he should either pay the money, the $30,000, or take an assignment of the property.

Mr. Shatford, in his evidence, says that they finally decided to keep the property. Well, I do not propose to hold Mr. Shatford literally to that language, because it might very well mean that what he was endeavouring to say then was that so far as other people were concerned, the real-estate market having depreciated, we intended to keep the property as against others, but not necessarily as against Holden. And I think that possibly that is the proper construction to put upon his language, that what he meant by that was that he did not intend to say that he intended to hold the property as against Holden.

The short conclusion of the matter is that I do not think this promise, as proved by the evidence, is divisible, and I think not being divisible, that it is too vague for the Court to enforce —in other words, that it is void for uncertainty. And on that ground, if upon no other, I think the action fails.

Judgment for defendant.

ADAMS POWELL RIVER COMPANY v. CANADIAN PUGET SOUND COMPANY.

MURPHY, J.

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April 7.

ADAMS POWELL RIVER CO. v. CANADIAN PUGET SOUND CO.

Trespass—Timber lands—Title—Payment of licence fees and making of surveys—Cutting of timber.

Acts of ownership, such as payment of licence fees and the making of surveys accepted by the government, are sufficient evidence of title to timber lands as against a trespasser.

In the case of a wilful or negligent trespass and wrongful cutting of timber, the trespasser must pay the fair market price of the timber cut, less the cost of felling the trees and fitting them for removal.

Where, owing to the trespass, there is an increase in the cost of logging the timber remaining on the trespassed area, such increased cost is recoverable from the trespasser.

ACTION for trespass tried by MURPHY, J. at Vancouver on the 30th of March, 1914. The facts are set out in the reasons for judgment. Statement

S. S. Taylor, K.C., for plaintiff.
A. H. MacNeill, K.C., for defendant.

7th April, 1914.

MURPHY, J.: On the first point I think the plaintiff has made out a sufficient title against the defendant, who is admittedly a trespasser.

The disputed timber is embraced in surveys by plaintiff accepted by the Government and by Government regulations declared to be the true boundaries of the plaintiff's limits. Plaintiff has been paying licence fees on the limits so determined. Acts of ownership, such as discharge of burdens, are evidence of title: Phipson, 4th Ed., 94. I should think causing surveys to be made under the statutes, which surveys are accepted by the Government would, on the same principle, be also so regarded. Judgment

As to the quantum of damages, in view of the admission of Lutz that the line was clearly marked and was deliberately crossed, I think the more severe rule set out in *Last Chance*

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Mining Co. v. *American Boy Mining Co.* (1904), 2 M.M.C. 151, must be applied.

The suggestion that some arrangement was made with the Government agent cannot, I think, be accepted as true in view of Lutz's letter to plaintiff, that the trespass was the result of the line not being clearly marked. Even if taken, however, in my opinion, the more severe rule would still have to be applied, for defendant must be taken to have known that under the law no Government agent had the shadow of authority to make such an arrangement. At best the defendant was guilty of negligence, which the case cited shews to be the same thing as wilful trespass so far as the rule *re* damages is concerned.

Under the more severe rule, I consider defendant only entitled to be credited with the cost of severence. By that I mean the cost of felling the trees and fitting them for removal, but not to include any cost of moving. To be on the safe side, I fix this at $2.50 per thousand.

I accept Clark's classification of the timber other than cedar removed, *viz.*: 20 per cent. first class; 65 per cent. second class, and 15 per cent. third class. I think the fair market price was $12 for first class; $9 for second class, and $7 for third class, and $8 for cedar, but, if so desired, counsel may speak again to this question. As it is practically admitted that the timber remaining on the trespassed area, which I find to be one-third of what was removed under the northerly trespass, will now cost $5 per thousand more to log than it would have had the trespass not taken place, the plaintiff is entitled to recover this sum also. Any question arising on calculation of damages may be again spoken to.

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Judgment for plaintiff.

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THACKER SINGH v. CANADIAN PACIFIC RAILWAY COMPANY.

Negligence—Statutory duty—Breach of—Blasting by persons without licence—Negligent act of fellow servant—Point Grey Blasting By-law, No. 4, 1912.

By-law No. 4 (1912) of the Corporation of Point Grey provides that no person shall blast with dynamite, gunpowder, or other explosives within the limits of the municipality, unless there has been granted to him by the reeve or engineer thereof a permit so to do. Sundar Singh, a Hindu, while in the employ of the defendant Company, clearing their land within the said municipality, was killed by a stone shot from the blast of a tree stump, charged and set off by an employee of said Company. In the clearing of said land it was the custom to set off blasts at 12 o'clock, noon. About five minutes before 12 o'clock on the day of the accident, the deceased and a number of other Hindus working with him moved off to a spot about 1,000 feet from where the blast was about to be set off. They knew that the blast was about to go off and were facing it at the time. The man who charged and set off the blast had been so employed by the defendant Company for four or five years, and was a competent and proper person to perform the work, but he had not obtained the licence required under the by-law referred to. There was evidence that an unusually large charge of powder had been used in this particular case, as the stump was shattered into fragments. The learned trial judge dismissed an action for damages by the administrator of the estate of the said Sundar Singh, on behalf of his wife and children, holding that a breach of statutory duty does not entail liability in an action for negligence, unless it is the proximate cause of the accident.

Held, on appeal, affirming the decision of MURPHY, J. (MCPHILLIPS, J.A. dissenting), that the plaintiff was not entitled to invoke the by-law so as to avoid the consequences of the negligent act of a fellow servant. There is no class which the by-law is particularly designed to benefit or protect, but simply the public at large, and the infringement of the general prohibition gives no cause of action.

Love v. *Fairview* (1904), 10 B.C. 330, followed.

Statement.

APPEAL by plaintiff from a decision of MURPHY, J. dismissing the action at the trial on the 1st of October, 1913, at Vancouver. The plaintiff's claim was as administrator of the estate of Sundar Singh for damages for the death of the said

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Sundar Singh, caused by injuries sustained through the alleged negligence of the defendant Company. Deceased was an employee of the Company, engaged in clearing land, and was killed by a blast occurring in the operations. The allegation of negligence was in the omission to provide adequate shelter from the blasting work and failure in giving proper warning when the blasts were about to be fired. The action was brought under the common law and the Employers' Liability Act. The defence was a denial generally, and also negligence, *volens,* contributory negligence and common employment. The learned judge, while *dubitante* as to the existence of the dependants suing, did not base his judgment on that view. He came to the conclusion that there had been no negligence proved against the defendant Company; that the deceased was *volens,* and that the allegation of insufficient or no warning was disproved by the evidence.

Steers (*Kappele,* with him), for plaintiff.
McMullen, for defendant.

1st October, 1914.

MURPHY, J.: In this action I have very grave doubt that evidence was adduced sufficient to prove the existence of the dependants who are suing. I do not, however, base my judgment on this view.

The facts, as I find them, are that the deceased was aware that a blast was about to be put off, and, following the usual practice of the camp, he and his companions walked a distance of almost 1,000 feet from the point where the blast was to take place and then turned around to watch it, when he was struck in the forehead by a stone thrown by the blast and killed.

MURPHY, J.

The plaintiff's first ground of negligence, namely, that proper warning was not given to the deceased, must fail on this finding.

The second ground of negligence is defective system, but the only evidence given before me was that of Mr. Cambie, who shewed that the system adopted was probably the safest that could have been pursued. In any event, I think as to this ground the deceased was *volens.* The third ground is that the defendant was guilty of a breach of statutory duty in employing a Hindu to blast who had not been licensed under the by-law

of Point Grey. The by-law is rather difficult of interpretation, but I think it does mean that the individual who actually does the blasting must be licensed. It is not, however, sufficient to have a breach of statutory duty on the part of the defendant to make it liable in an action for negligence. It must be further shewn that such breach was the proximate cause of the accident. It is endeavoured to do this by contending that a too heavy charge was used on the occasion when the deceased was struck. The only evidence in support of this is that of the witness Barrieau. I am unable to give credence to this, first, because he admitted that he was biased against the foreman, and second, because he swore to a very important fact at the trial in direct contradiction to his evidence given at the inquest, and in explanation rather suggested that his inquest evidence was not altogether frank. On the other hand, there is the evidence of the Hindu who did the blasting to the effect that an ordinary charge for the size of the stump was used, and there is also the evidence of Mr. Cambie, for what it is worth, to the same effect.

I hold, therefore, that the plaintiff's action fails, and the case is dismissed, with costs.

The appeal was argued at Victoria on the 15th and 16th of January, 1914, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Martin, K.C., for appellant (plaintiff): The defendant Company took no precautions, and the case is precisely the same as *Smith* v. *Baker & Sons* (1891), A.C. 325. The accident puts the onus on the defendant, in that it being a dangerous business, the onus is on them to shew that everything was done that a careful person would do to avoid accident. The fellow servant doctrine does not apply here. An employer, in the first instance, must provide a safe place for his employees to work and provide proper machinery, then something might arise later through a fellow servant that causes an accident: *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420; Beven on Negligence, 3rd Ed., 611. On the question of *volens*: There is no such thing as *volens,* where a man piles up stumps, and the employer is carrying on other work which, through the employ-

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er's negligence, causes injury to that employee: see *McArthur* v. *Dominion Cartridge Company* (1905), A.C. 72.

McMullen, for respondent (defendant): The powder-man who prepared for the blast has been employed for four or five years; he never had an accident before. Deceased had been working with a clearing gang for over two years. The blast was always at twelve o'clock noon. The only allegation of negligence is that on this particular occasion the powder-man put too much powder in the stump. The plaintiff must go further than shew there were stones there; he must shew that he should have done something to avoid the danger: see *Smith* v. *Great Eastern Railway Co.* (1866), L.R. 2 C.P. 4; Smith on Negligence, 71; *Smith* v. *Baker & Sons* (1891), A.C. 325 at p. 354; Beven on Negligence, 3rd Ed., 624. He wants to shew there was a defective system; that was abandoned on the trial.

Argument

Martin, in reply.

Cur. adv. vult.

17th April, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: I would also dismiss the appeal. It was argued on the assumption that merely because the by-law, which declares generally that blasting operations should not be carried on in the municipality without a permit, has been infringed, that such infringement of that general prohibition gives a cause of action. But an examination of the authorities shews it does not, on the principle laid down in *Love* v. *Fairview* (1904), 10 B.C. 330, and cases therein cited, and the later decisions of *London and West Australian Exploration Co., Ltd.* v. *Ricci* (1906), 4 C.L.R. 617; *David* v. *Britannic Merthyr Coal Co.* (1909), 2 K.B. 146; (1910), A.C. 74; 79 L.J., K.B. 153; *Butler or Black* v. *Fife Coal Company* (1912), A.C. 149; *Watkins* v. *Naval Colliery Company (1897), Limited, ib.* 693; and *cf. Bell* v. *Grand Trunk Railway Co.* (1913), 48 S.C.R. 561 at p. 564. The plaintiff herein is not entitled to invoke this by-law so as to avoid the consequences of the negligent act of a fellow servant, because there is no class which it is particularly designed to benefit or protect, but simply the public

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at large, and therefore the by-law must be excluded from consideration in that respect.

Then there is the question as to whether the learned trial judge was right or not in arriving at the conclusion he did on the facts before him as to the blowing out of the stump. All I need say about this is that after a careful reading of the evidence, I have no doubt that it was abundantly open to the learned judge to take the view he did, bearing in mind the language used by their lordships of the Privy Council in regard to overruling the verdicts of trial judges in *Bryce* v. *Canadian Pacific Railway Co.* (1909), 15 B.C. 510.

So far as the question of system is concerned, it is quite clear to my mind that it cannot be complained of, as it was one which answered the reasonable requirements of the case, and there is no evidence to support the contention that the man who was doing the blasting was not a competent and proper person to whom that duty might be delegated. The case of *Sword* v. *Cameron* (1839), 1 D. 493 (Ct. Sess.), considered in *Bartonshill Coal Company* v. *Reid* (1858), 3 Macq. H.L. 266 at pp. 289-90, is one of a somewhat similar nature, and it is only necessary to read that case to shew how the facts in essential particulars differ from this; there, time was not given for the workmen to get away from the scene of the blasting despite the fact that there had been frequent occasions on which stones from blasts had flown over the heads of the retreating workmen, whereas in this case abundant time was given the deceased, which is shewn by the fact that he went to a place 1,000 feet off, after admittedly ample notice, to a presumably safe distance, but was, unfortunately nevertheless, killed by a small stone which, I should be inclined to infer from the facts, had become in some strange way so lodged in the roots that the effect was that by the unprecedented concentrated force of the explosion it was shot out to a great and wholly unexpected distance almost as though discharged from a gun.

MARTIN, J.A.

The appeal must, therefore, be dismissed.

MCPHILLIPS, J.A.

McPhillips, J.A.: This is an action by the administrator of the estate of Sundar Singh and on behalf of Dhan Kaur, the widow, and two infant children. The deceased, at the time

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when killed, was employed in clearing land for the defendant Company at Shaughnessy Heights, in the Municipality of Point Grey.

The action brought was founded upon acts of negligence of the defendant Company, and the recovery was claimed at common law, or, alternatively, under the Employers' Liability Act, the deceased having been killed by a stone thrown by a blast blowing out a tree stump, when the deceased was at a distance of 1,000 feet from the point where the blast was set off, it also being pleaded (this was an amendment at the trial and it is not apparent that the amendment was actually drafted, but the trial proceeded upon the assumption that the amendment was in fact made) that the defendant Company was guilty of a breach of statutory duty under the by-law regulating blasting, being the Point Grey Blasting By-law, No. 4, 1912, in that the person employed by the defendant Company in actually setting off the blast did not hold a permit for blasting, as required by the by-law.

The learned trial judge doubted whether it was sufficiently established that the relations for whose benefit the action was brought did in fact exist, but did not specifically hold that the evidence was not sufficient. The learned judge held that the deceased was warned that a blast was about to be set off, and as to the defective system alleged, it was probably the safest that could have been pursued and that the deceased was *volens,* and as to the breach of the statutory duty in employing a person not holding a permit, that the breach of the statutory duty was not alone sufficient in an action of negligence, that it must be further shewn that such breach was the proximate cause of the accident.

MCPHILLIPS, J.A.

Neither at the trial, nor in the argument before this Court was any exception taken to the validity of the by-law. It would appear to be within the power of the municipality to pass the by-law, in pursuance of section 53, subsection (135) of the Municipal Act (R.S.B.C. 1911, Cap. 170).

It may be taken as admitted that the blasting, which caused the death of the deceased, was done by an unauthorized person, one without a permit—not being licensed under the by-law.

This person was Suva Singh, a Hindu, indifferently acquainted with the English language.

With all respect to the learned trial judge, I cannot view the evidence as he does, and whilst I know that to give weight to the evidence of witnesses the trial judge has not been favourably impressed with is apparently an extreme course, yet, in the balancing of probabilities, and exercising the power I have, sitting in this Court, to draw inferences of fact, I must say that I am of the opinion that the evidence warrants judgment being entered for the plaintiff, and establishes liability at common law, and the right of the widow and children being given such damages as the Court shall find and direct. I might further say that the evidence would also support the recovery of damages, in my opinion, under the Employers' Liability Act.

Shortly, the evidence may be reviewed as establishing that loose stones surrounded the stump which was blasted out of the earth, that there was a defective system, no proper blasting mats having been supplied by the defendant Company, or what would have been their equivalent, logs or timbers so placed as to prevent the stones or other debris from being thrown to a great distance. There is evidence that the stump was literally blown to infinitesimal parts, and a stone, a little larger than a hen's egg, is driven 1,000 feet, strikes the deceased upon the forehead and kills him. From the evidence of Mr. Cambie, civil engineer for the defendant Company, it is apparent that upon the facts as proved in the case and stated to him, that an excessive charge of explosives was used in blasting out the stump, which was the proximate and effective cause resulting in the death of the deceased, and I cannot agree that Mr. Cambie's evidence establishes that due care, or that an effective system, was being carried out in the blasting operations. It must be remembered that the blasting which was being carried on by the defendant Company was not being carried on in the exercise of any of its statutory powers authorized by Parliament in connection with its great transcontinental line of railway or any of its branches, but was work being carried on as the owner of land, and engaged in the ordinary clearing of the same for occupation as residential sites by purchasers from the defendant Company, and the

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work was being carried on in what may well be termed a more or less settled district, one municipally organized—and, rightly, we find legislation dealing with safeguards to the public where blasting operations are engaged in, and we find the defendant Company proceeding in a plain breach of these provisions and employing a person not authorized to engage in such work. I do not think I overstate the effect of the evidence when I say that it is manifest that Suva Singh would not have been granted a permit under the by-law. However, that after all, is, perhaps, immaterial.

Waugh-Milburn Construction Co. v. *Slater* (1913), 48 S.C.R. 609, was a case where it was held that the failure to sink the post holes to sufficient depth and obtain proper filling to pack the post and ensure the safety of the employee required to climb it was personal negligence on the part of the defendants, the consequences of which they could not avoid by pleading that the accident occurred through the fault of a fellow servant. See the remarks of Duff, J. at p. 621.

Upon the evidence of the present case, as it unfolds itself to me, the defendant Company exposed its employees to the gravest kind of risk, and failed in its duty to see that proper precautions were taken to ensure its employees' safety. In my opinion the action is sustainable, and damages are rightly entitled to be assessed by way of compensation to the widow and children, based upon the breach by the defendant Company of the statutory duty prohibiting blasting by other than a person holding a permit therefor under the Point Grey Blasting By-law, No. 4, 1912. If I should be right in this, and the defendant Company has been guilty of a breach of a statutory duty, then defences otherwise available are not open, such as negligence, acceptance of the risk, and common employment. In the present case the defendant Company pleaded and relied upon the defence of common employment and voluntary acceptance of risk.

MCPHILLIPS, J.A.

In *Groves* v. *Lord Wimborne* (1898), 67 L.J., Q.B. 862, an action founded upon the breach of a statutory duty, the defence of common employment was held to be not applicable. A. L. Smith, L.J. at p. 866 said:

"A limitation was then placed upon the liability of the master by the decision in *Priestley* v. *Fowler* (1837), 7 L.J., Ex. 42; 3 M. & W. 1, which said that, if a servant acting within the scope of his employment by his negligence caused injury to a fellow servant in the same common employment, the master would not be liable."

In *David* v. *Britannic Merthyr Coal Co.* (1909), 78 L.J., K.B. 659, affirmed by the House of Lords, 79 L.J., K.B. 153, it was held that the doctrine of common employment affords no defence in a case where injury has been caused to a servant by the breach of a statutory duty imposed upon the master. See *per* Fletcher Moulton, L.J. at pp. 666, 668, 669-71.

In *McClemont* v. *Kilgour Mfg. Co.* (1911), 27 O.L.R. 305, Garrow, J.A. said at p. 315:

"If a sufficient case is made out under that Act, it will not be necessary to deal with the general question of negligence; a breach of statutory duty being in itself actionable, as it is also evidence of negligence. See *McCloherty* v. *Gale Manufacturing Co.* (1892), 19 A.R. 117.

With respect to the finding of *volens* by the trial judge, Garrow, J.A., at pp. 316-17, deals with this defence and shews its inapplicability in cases of breach of statutory duty.

Groves v. *Lord Wimborne, supra,* and *David* v. *Britannic Merthyr Coal Co. supra,* were considered and approved of by the House of Lords in *Butler or Black* v. *Fife Coal Co.* (1911), 81 L.J., P.C. 97, and it was there held that "the defence of common employment cannot be pleaded to an action for breach of a statutory duty. A miner lost his life in consequence of the presence in the mine of carbon monoxide gas, of which there had been previous indications. The managers, for whose competence the owners are by the Coal Mines Regulation Act, 1887, made responsible, had no special knowledge of this obscure and noxious gas:—Held, that the mine owners were liable in damages at common law for negligence for failure to appoint managers with the requisite knowledge." Lord Kinnear at p. 103 said:

"They are bound by very stringent regulations to appoint certificated managers and under-managers, whose authority completely displaces their own. It is nothing to the purpose to say that employers, and in particular joint-stock companies, must act through their servants, because the point to be established is that the defence of common employment is excluded by reason of a statutory duty imposed on the employers personally, which they cannot throw over upon their servants."

In *Love* v. *Fairview* (1904), 10 B.C. 330, a decision of the

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Full Court, it was held, following *Groves* v. *Lord Wimborne, supra,* and *Baddeley* v. *Earl Granville* (1887), 19 Q.B.D. 423, that the defence arising from the maxim *volenti non fit injuria* is not applicable where the injury arises from breach of a statutory duty.

It is well to notice that the by-law does not admit of any person blasting but the person permitted to do so, *i.e.,* it is a statutory prohibition, which admits of no answer or excuse from the employers, that, notwithstanding the want of a permit the person employed was competent and the work was carried on without negligence. This, in my opinion, is an untenable defence. In *David* v. *Britannic Merthyr Coal Co., supra,* it is to be noted that under section 50 of the Coal Mines Regulation Act there was opportunity for the owner to escape liability for non-compliance with the rules if

"he proves that he has taken all reasonable means, by publishing, and to the best of his power enforcing the said rules and regulations for the working of the mine, to prevent such contravention or non-compliance."

But under the by-law to be considered in the present case it is one of absolute prohibition, a statutory duty and a breach thereof.

MCPHILLIPS, J.A.

Groves v. *Lord Wimborne, supra,* and other cases cited by me, have had very recent consideration by the Judicial Committee of the Privy Council in *Jones* v. *The Canadian Pacific Railway Company* (1913), 29 T.L.R. 773, in which case it was held that the doctrine of common employment does not apply to protect employers where, in violation of a statutory duty, they put in a position a servant not qualified for the particular work and a fellow servant is injured as a direct result of such unqualified servant's acts. It is true that Lord Atkinson there remarked that

"It was not at all the case of a servant of proved and known efficiency for a particular work being selected to do that work without having passed a test which his employers knew or *bona-fide* and reasonably believed, he could pass. The company abstained from giving any evidence to that effect. They took that course, no doubt, for good reason, but they must bear the consequence."

In the present case it may be said that I cannot agree that it has been sufficiently well shewn that there is evidence shewing Suva Singh's fitness for the work of blasting, and it may be

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further contended, although counsel for the defendant did not address himself to the point, that the present case is not one that can be said to come under the rule of law imposing liability for breach of statutory duty. However, as at present advised, I think that it is a case of breach of statutory duty that the defendant Company was subject to and bound to comply with.

It is to be noted that Lord Atkinson, in *Jones* v. *The Canadian Pacific Railway Company, supra,* at p. 774, specially approved of the language of the Master of the Rolls in *Groves* v. *Lord Wimborne, supra,* reading as follows:

> "'But, on the other hand, a master is liable to his servant for the consequence of an accident caused to that servant by the breach of a statutory duty imposed directly and absolutely upon the master, and the master cannot shelter himself behind another servant to whom he has delegated the performance of the duty.'"

I am, therefore, of opinion that the appeal should be allowed, and I presume, unless the parties agree as to damages, the action must go back to the trial judge in order that he may assess the damages upon the ordinary rules of common law liability and as provided in the Families Compensation Act. I would think that as a matter of protection, and there is practice which would admit of a direction, that the amount to be so assessed to the respective relatives be paid into Court, to be paid out only upon proper proof of such relationship. However, that is a matter which, in my opinion, can well be left to the trial judge. The plaintiff will be entitled to the costs of this appeal, the costs of the trial, and the assessment of damages still to be had following the disposition of this appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *A. J. Kappele.*
Solicitor for respondent: *J. E. McMullen.*

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Mines and minerals—Water records—Mining lease—Renewal of—Failure to renew water record—Acts of omission by gold commissioner—Provisions of Placer Mining and Mineral Acts.

The plaintiff Company was the holder of a mining lease acquired in 1890, and after two renewals was finally renewed in 1905 for 20 years; a water record was issued for 1,000 inches of water for use on the mining ground so leased in 1897, which was to continue in force for five years; this record was never renewed. The defendant claimed the water by virtue of a water record obtained by him subsequent to the issue of the water record of 1897. In a dispute as to the right of user to the water in question:—

Held, on appeal (MCPHILLIPS, J.A. dissenting), that the plaintiff's lease did not in itself carry the right to water, and the water record of 1897, not having been renewed, expired at the end of the period for which it was originally issued.

When renewal of the mining lease was applied for by one of the plaintiff's predecessors in title in 1900, he asked the gold commissioner to renew the water record, to which the gold commissioner replied that it was not necessary. Section 14 of the Placer Mining Act (R.S.B.C. 1897, Cap. 135) declares that "a free miner shall have all the rights and privileges granted to free miners by the Mineral Act, 1896," and section 53 of that Act provides that "no free miner shall suffer from any acts of omission or commission or delays on the part of any Government official."

Held (MCPHILLIPS, J.A. dissenting), that the failure of the gold commissioner to direct them how to proceed could not be regarded as an act of omission within the meaning of section 53 of the Mineral Act.

Decision of HUNTER, C.J.B.C. affirmed.

Statement

APPEAL by plaintiff Company from a decision of HUNTER, C.J.B.C., dismissing their action for an injunction and damages, tried at Victoria on the 15th and 16th of October, 1913. Plaintiff Company alleged that under a certain water record obtained in 1897 they were entitled to 1,000 inches of water from Lightning Creek, and that defendant had taken water from the creek above the Company's intake pipe, thus diverting the water, which should have gone to them. The defence was that this record was not in force, having lapsed years before; that it was obtained in 1897, was for five years, was

not renewed, and that the defendant having obtained a record in 1898 for 500 inches, and having kept that record in good standing, was entitled to the use of the water.

W. J. Taylor, K.C., for appellant.
Maclean, K.C., for respondent.

HUNTER, C.J.B.C.: Owing to the fact that an unfortunate feud has existed between these parties and the fact that the Appeal Court will be sitting next month, I think it best for the matter to be disposed of at once.

The first point to be taken was the reference made to the Water Act of 1911 and the board of investigation, which purports to be a special tribunal, and those sections indeed go so far apparently as to empower that board to expunge all the old records and clean them off the slate and start a new list of records. It is not necessary for me to consider on this occasion what conclusion I might have been compelled to come to had the board got seized of the matter in dispute. That water board has not got into action yet in respect of the water records of this district. I have just now been referred to the Gazette under date of August 12th, 1912, which purports to contain a notice under which the comptroller of water rights, one J. R. Armstrong, requires claimants of water rights to hand in their claims. All I need say about that is that that notice has been given at a time subsequent to the inception of this litigation.

I am not prepared to say to what conclusion I might have come had it appeared that this board had been seized of this dispute before this action was commenced. I feel quite clear upon the point that that board not having been seized of the dispute, there is nothing to interfere with the entertaining of the action by the Court. It is obvious, of course, in respect of certain water rights in certain districts, that this board might never sit at all, and it would require very strong argument to convince me that in such circumstances this Court would not have jurisdiction. At any rate, my so holding cannot damage the defendant, because, the question being as to the jurisdiction of the Court over a particular subject-matter, the objection can be taken at any time.

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With reference to the numerous points which have been raised by the defendant in objection to the plaintiff's rights, I do not think it necessary to go through those objections in detail, because I have come to the conclusion that two of them are fatal. Those two points are the points with reference to the requirements of section 14 of 1896 that requires any extension of the water rights to be endorsed upon the lease. I take it that the language in that section clearly means that both the extension of the lease and extension of water grant must be endorsed on the lease. If that language taken by itself had any ambiguity I think it is removed by section 16, which shews plainly enough that the two things are distinctly separate. The fact must be obvious that although the ground may be taken up by way of a lease, that the water may be required for only a short time, and in that event the party wanting the extension of the lease would not need an extension of the water grant.

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It was argued by Mr. *Taylor* that the water right being appurtenant to the lease in effect operated to give his client an extension of the water records because he had an extension of the lease. On his theory it was absolutely necessary to the working of the ground covered by the lease, although it might be that notwithstanding that the water right was required for a number of years, yet it might only be necessary to use it for one or two years. But it was reasonable enough for the Legislature to make it clearly appear that the right to the water should only endure as long as the necessity for its use remained. Then it was urged that the plaintiffs should not suffer by reason of the omission to extend the water rights. But the statute was equally open to be read by them or their predecessors in title, and it was for them to take the usual professional advice or go to the Court for a declaration of their rights.

I would dismiss the action with costs.

The appeal was argued at Victoria on the 26th and 27th of January, 1914, before MACDONALD, C.J.A., IRVING, GALLIHER and MCPHILLIPS, JJ.A.

Argument

W. J. Taylor, K.C., for appellant (plaintiff): The case is

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covered by a mining lease. The original lease included the water right; this lease was renewed in 1905 for 20 years, but the renewal did not include the words "and the water right." The renewal of the mining lease carried with it a renewal of the water right whether it was expressed or not. In 1897 a water record for 1,000 inches was granted as appurtenant to the mining lease. In 1898 the respondent obtained a record higher up the creek. We are raising the point that their water record was issued with respect to placer claims, whereas ours was issued as appurtenant to lease holdings. Our water record was for five years and was not of itself renewed as distinct from the lease, but we contend the water and the lease are two necessary parts of a whole. Hopp's right under his water record is gone, as the record was issued to him as appurtenant to mining claims which ran out, and a new title was obtained by him to the same property (after the placer claims had expired) under a lease. It was a new root of title, and the water records had expired with the old.

Argument

Maclean, K.C., for respondent (defendant): Hopp was there before the plaintiff, and had spent large sums in ditches, etc. After the water record of 1897, which was for five years, had expired and was not renewed, on making a search Hopp had a right to assume no record was in existence. These people had done nothing for ten years; their lease was extended, but the water record was not, and, therefore, their right to the water expired.

Taylor, in reply, referred to Williams on Vendor and Purchaser, 2nd Ed., 637.

Cur. adv. vult.

14th April, 1914.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal.

IRVING, J.A.

IRVING, J.A.: We are dealing with the question of the right to water claimed by both parties under the Placer Mining Acts.

The plaintiffs are the holders of a lease which was acquired by their predecessors in 1890, and which has been renewed from time to time, and they were also at one time the holders

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of a grant of water issued in April, 1897. This grant on its face was to continue in force for five years.

The defendant claims the water in priority to the plaintiff, by virtue of a water grant obtained by him subsequent to the water grant of 1897.

In 1912 plaintiff brought this action for an injunction to restrain the defendant from interfering with the plaintiff's lease and water record, and for damages for the unlawful appropriation of the water. There is no suggestion of trespass on the lands included in the lease; the case turns on the right to the water. The learned Chief Justice of British Columbia, before whom the trial was had, dismissed the plaintiff's action on the ground that the plaintiff had not made out its case. There are certain things which are not disputed, namely: (a) That the plaintiff obtained a five years' lease in 1890, and that it has been renewed in 1895 and 1900, and again in 1905, on the last occasion for 20 years. The regularity of the renewal of 1900 is questioned by the defendant, but, assuming that all renewals were regular, or, if the renewal of 1900 is irregular, that such irregularity has been cured by the renewal of 1905, the lease is alive and will remain in force until 1925. (b) That the only express grant of water ever held by the plaintiff was obtained in April, 1897, and that on its face was limited to five years—that is to say, that unless kept alive by virtue of its being "appurtenant" to the lease, or resuscitated by virtue of a statutory provision to be hereafter mentioned, it expired on the 27th of April, 1902, the end of the five years' term.

IRVING, J.A.

The plaintiff's lease is dated the 3rd of October, 1890, and recites (what has led to the practice of granting leases, *viz.*): that there was a large extent of abandoned mining ground at Lightning Creek, and that such ground could not be worked effectually (that is to say, with advantage) without a very large expenditure of money. This means in effect that if the ground were to be taken up in claims of 100 feet, in the usual way, nothing could be done, therefore it was desirable that the lessee should be permitted to take up the larger area which the part of the Mining Act dealing with leases contemplates being granted in such cases. It then proceeds to grant them the parcel therein

described, and represented on a roughly drawn map a rectangular area half a mile long by 500 feet wide, some 30 acres, spanning Lightning Creek and embracing a portion of ground below the turn of that creek to the south—no doubt the staking was intended to include the old river bed of Lightning Creek. A likely looking piece of ground, particularly that part to the west of the elbow.

The Mineral Act set out in the Consolidated Statutes of 1888, Cap. 82, was then in force. That Act dealt with both placer mining and mineral claims; the first attempt to separate the two classes of claims was made in 1889 (Cap. 16); the work of separation was finally carried out in 1891, when the Mineral Act, 1891, and the Placer Mining Act, 1891, were passed. The Act of 1888 was divided into 18 parts; the fourth part dealt with the size of claims, *i.e.*, ordinary claims. The ninth part with leases, *i.e.*, leases of land which would not be considered available for being worked by free miners as holders of individual claims: see section 137. The tenth part dealt with water and water grants. In the ninth part—"leases"—no mention is made of water.

In 1890 (Cap. 31, Sec. 3) an amendment was passed under which the plaintiff's assignors were able to secure a lease of the lands in question, *viz.*: a lease of bench lands adjoining unworked or abandoned rivers or creeks, an area for hydraulic working not exceeding 160 acres. The map shews that this lease falls within this description, and the gold commissioner's reference to section 124 of the Placer Mining Act, 1891, confirms this opinion.

Mr. *Taylor* claims that the lease carried with it the right to the water necessary to work the lease. If it did, why did the lease not say so? The applicants are very much in the same position as people obtaining a private Act. They for their own benefit and profit were obtaining special privileges, and the rule adopted in construing private statutes and grants from the Crown is to hold that nothing passes except what is included by necessary and unavoidable construction of the terms used. Neither the lease nor Part IX., dealing with the granting of leases, gives any right to use water. On the other hand,

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Part X. does relate to the acquisition of water. The language used in Part X. indicates that the water is to be granted for an ascertained piece of ground already acquired by the applicant, and the water when granted is to be recorded annually. In this Part X. there occurs the expression so much relied upon by Mr. *Taylor* that "the water shall be deemed as appurtenant to the mining claim in respect of which it has been obtained." One other section of the Act should be referred to (section 56), but that can only refer to a creek claim, for it is only with reference to a creek claim that the words "naturally flowing through or past" could be used.

I think on these grounds that it is clear that the lease in itself did not carry the right to water, nor was there any special provision in the statute for water grants for use on leased bench claims. The draftsman of the Placer Mining Act, 1891, seems to have held the same opinion, for in that Act appears a new enactment in Part VII. dealing with leases—authorizing the grant of water for working "leased bench lands adjoining unworked or abandoned rivers or creeks"; such grants were to be for the same term for which the bench land was leased.

These different numbers are somewhat confusing, but as I see no way of simplifying the reference to them, I must therefore set them out with this explanation.

IRVING, J.A.

In the Placer Mining Act of 1891, Part VII. deals with leases, renewals thereof, grants of water for use on leased lands and renewals of such grants. The leases, if over five years, are to be with the sanction of the Lieutenant-Governor in Council, but the water grants are wholly in the discretion of the gold commissioner. Part IV. deals with water rights in respect of placer claims or placer mines held as real estate. The expression "appurtenant to such claim" appears in this Part (section 65), but that word does not appear in connection with the leased lands. This Part IV. remained unaltered until the 1st of June, 1897, when the Water Clauses Consolidation Act, 1897, came into force, notwithstanding that amendments were made as hereinafter mentioned to Part VII. dealing with water for use on leased lands. In 1894, by chapter 33, section 124 was amended by striking out "bench lands" and extending the

operation of the section to "any mining lands on or adjoining unworked or abandoned rivers or creeks held under lease." In 1897, by chapter 29, the power to grant water for leases under this section, and to renew such grants, was taken away from the gold commissioner on the 8th of May, 1897. Thereafter applications for water had to be made under the Water Clauses Consolidation Act, 1897, Cap. 45, Part II.

From the use of the word "appurtenant" in connection with water grants under Part IV. in respect of placer claims and placer mines held as real estate, and from its omission from Part VII., I infer that the argument resting on the use of the expression "such water grants shall be appurtenant to the claims in respect of which they are granted" can have no force when we are considering grants of water acquired for use on leased bench lands under Part VII.

If I am wrong in that opinion, I think the plaintiff's counsel is pressing his argument too far. "Appurtenant" does not necessarily mean that you own the adjunct as long as you own the principal. The word has a narrower meaning and in the mining Acts was intended to convey that when there ceased to be an "agreement of quality" between the water and the claim, so that appropriate use of the water could not be made by or on the claim in respect whereof the water had been granted, then the right to the water was to cease, although the full term of years mentioned in the grant had not expired. It cut the grant down from the period named in the record to only so long as the two could suitably be enjoyed together. It never could be intended to extend the grant beyond the period named in the record.

For the plaintiff it was contended that the renewals of the lease carried on the right to the water, but the renewals do not on their face purport to do so, and the statutes authorizing the renewals say that such renewals shall be on the same terms as the original lease.

The grant of water obtained by the plaintiff in 1897 was made under the authority of the Act of 1896, Cap. 35, Sec. 14, which authorized the gold commissioner to make a grant of water to be used on any leased mining ground "for the same

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period for which the ground is leased." The section also authorized the extension both of the grant of water and the lease of the land for a further period, but this extension had to be approved of by the Lieutenant-Governor in Council, who would direct the gold commissioner to indorse the necessary memorandum on the lease. Section 16 required that every grant of water under that section and every extension should be recorded, but the annual re-record was not necessary.

The right to the water, according to the terms used in the grant, would expire on the 27th of April, 1902—for some reason or other the gold commissioner did not make the water grant terminate with the expiration of the plaintiff's lease, *viz.*: on the 3rd of October, 1900. I think that is what he should have done. No application to renew was made in 1902. Mr. *Taylor's* contention is that as the lease was extended in 1900, the water grant was by implication also extended. The provision in the 16th section that "every extension of a grant of a water right for mining ground leased shall be recorded in the record of water grants," shews conclusively that there could be no extension except by express words: these words would constitute the memorandum which should be indorsed on the lease (section 14).

IRVING, J.A.

This brings me to the question raised as to benevolent provision that no free miner shall suffer by reason of any mistake made by any Government official. The point comes up in this way: Jones says that when he applied for a renewal of his lease in 1900 he asked the gold commissioner to renew the water grant also, but the gold commissioner said it was unnecessary. Mr. *Taylor* draws attention to section 14 of chapter 26, 1891, which declares that a free miner taking a certificate out under the Placer Mining Act shall have all the rights and privileges granted to free miners by the Mineral Act, 1896. This section, he contends, entitles the plaintiff to the benefit of section 53 of the Act, Cap. 34, 1898, which enacts that no free miners shall suffer from any acts of omission or commission or delays on the part of any Government official if such can be proven. How this section can be worked out in practice—or what it includes—is difficult to say; and whether the advantage

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it was supposed to give was a "right or privilege" applicable to placer claims—at any rate prior to 1901—when section 19, Cap. 38, 1901, was passed, is doubtful. But in 1900 the plaintiff's water grant was, by its express words, in force, and the gold commissioner could not renew it, as the Act of 1897, Cap. 29, Secs. 3 and 4, had deprived him on and after the 8th of May, 1897, of the power to extend the water grant. If the gold commissioner told Mr. Jones in 1900 or at any time after the 8th of May, 1897, that he had no longer power to extend the water grant, I think he was right, as Cap. 29 of 1897 left him power to extend leases only.

The plaintiff could only obtain a renewal by making application under the Water Clauses Consolidation Act, 1897. I do not think the failure of the gold commissioner to direct them how to proceed can be regarded as a mistake within the meaning of section 53, Cap. 34 of 1896—if that section is applicable at all.

But in any event the plaintiff failed to raise this matter in his pleadings. When evidence was submitted by the plaintiff, the defendant objected, and no amendment was made.

IRVING, J.A.

The question of jurisdiction which appears to have been argued in the Court below, was not raised in the argument before us. We therefore do not deal with it.

The plaintiff Company has failed to establish its right to the water, and the action fails.

The appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: I agree with the learned trial judge.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This is an appeal by the plaintiff from a decision of HUNTER, C.J.B.C. dismissing the action.

The action was one brought for an injunction restraining the defendant from in any way interfering with the enjoyment of a certain grant of water right for 1,000 inches of water, to be diverted from Lightning Creek in the District of Cariboo, being appurtenant to a lease of certain placer-mining ground held from the Crown by the plaintiff. The grant of water right as originally issued, and which, it is contended by the plaintiff, is still existent by reason of the renewal of the

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lease recording same, and subsequent conduct and representations of officers of the Crown reads as follows:

"Placer Mining Act, 1896.
"Grant of Water Right.

"Granted this twenty-seventh day of April, 1897, to The South Wales Company, one thousand inches of water out of Lightning Creek for the term of five years from the date hereof.

"Such water is to be used for hydraulic mining on South Wales lease and is to be diverted from its source at a point at or near the Milk Ranche.

"Fee $2.50.
"Receipt 94943.

"Jno. Bowron,
"Gold Commissioner.

"Certified a true and correct copy.
"C. W. Grain,
"Gold Commissioner."

The above grant of water right was held in connection with the leases of the New South Wales group situated on Lightning Creek, Cariboo, and entered in the Cariboo Register of Leases as Nos. 11, 936 and 1244.

The leases above referred to and the placer-mining group covered thereby would appear to have been demised to predecessors in title of the plaintiff, *viz.*: Harry Jones, W. C. Prince, George Cowan, Fred J. Treyillus, and Gowen Johns of Cariboo. The lease which specifically covered the placer-mining ground upon which the grant of water right above set forth had relation is one of date the 3rd of October, 1890, from the Crown to Jones *et al.*, whose names are above set forth, being predecessors in title of the plaintiff. The term of demise from the Crown of the lease above referred to was five years, and in 1895 it was renewed for a further term of five years and in 1900 again renewed for five years, and, finally, by order in council of the 2nd of October, 1905, the lease was extended for a term of 20 years from the 3rd of October, 1905.

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On the 13th of June, 1910, the leases above referred to were assigned and transferred, together with all appurtenances, to Leicester A. Bonner of Cariboo, and the consent to the transfer by the proper officer of the Crown was duly given and recorded. Later all of these placer-mining properties covered by the said leases and water rights appurtenant thereto were transferred by

Bonner to Francis William Darch. Finally, on the 8th of February, 1911, Darch duly transferred all of the leases above referred to, together with all the water rights appurtenant thereto, to the plaintiff, and this transfer was duly consented to and recorded by the proper officer of the Crown.

The plaintiff is a Company duly incorporated in England under the Companies Act (Imperial) and duly authorized and licensed to carry on business in British Columbia, having its head office in England at 13 Saint Helen's Place, London, England, with its head office in British Columbia at Barkerville.

The real subject-matter of the contest and litigation herein is the right to the water from and out of Lightning Creek, the plaintiff insisting upon its right thereto originating under the grant of water right above set forth under date the 27th of April, 1897, issued under the Placer Mining Act, the defendant on his part insisting that this water right has expired and that he is entitled to the water as against the plaintiff under that certain water record No. 18, of the 22nd of September, 1898, originating in a grant of water right for mining purposes under the Water Clauses Consolidation Act, 1897, of which the following is a copy:

"Water Clauses Consolidation Act, 1897.

"Grant of water right for mining purposes.

"Granted this 22nd day of September, 1898, to Ernest Brenner, Free Miner's Certificate No. 14669A, five hundred inches of water out of Lightning Creek

"Such water is to be used for hydraulic mining on the following mine or lands, *viz.*: The Pinkerton claim on Lowhee Creek, or such ground as may be acquired to work in connection with that property, and is to be diverted from its source at a point or near the 'Niggers,' and is to be returned at a point into Ella or Blue Lake, thence by ditch and flume to the Pinkerton claim, Lowhee Creek.

"The difference in altitude between the point of diversion and the point where it is returned is about 200 feet. It is intended to store or divert the water by means of a ditch.

"The annual rental, payable on or before the 30th June in each year is $7.00.

Dated the 22nd day of September, 1898.

"Jno. Bowron,
"Commissioner.

"Certified a true copy.
"C. W. Grain,
"G. C."

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It would appear that the grants of water right were numbered as denoting priority, and the grant of water right under which the plaintiff is claiming is No. 12 and that of the defendant No. 18.

It would not appear that either the plaintiff or the defendant or their predecessors in title expended any very large sums of money in constructing ditches, flumes and other works to utilize the water in question until the year 1910, but from that time on to the commencement of the litigation very large sums of money have been expended.

The evidence plainly discloses that the defendant was aware of the previous grant of water right under which the plaintiff is claiming, but contends that it has expired, and claims under the water right above set forth, *viz.*: No. 18, and also under No. 255—a grant of water right for 300 inches, issued on the 27th of November, 1905, and No. 256—a grant of water right for 300 inches issued on the 27th of November, 1905. Both of these latter records being issued to one W. C. Fry.

The water in question is vital in the carrying on of the respective mining operations of the plaintiff and the defendant, and in that the point of diversion of the water from Lightning Creek covered by No. 12 (the grant of water right of the plaintiff) is below that of No. 18 (the grant of water right of the defendant) the user of the water by the defendant would, as the evidence shews, absolutely deprive the plaintiff of the water claimed under No. 12, *i.e.*, 1,000 inches out of Lightning Creek.

MCPHILLIPS, J.A.

As already stated, it is clear upon the evidence that the defendant was fully aware of the leases and water right under which the plaintiff claims and that they were prior in point of time, but the whole contention is that the leases and the water right have expired, not having been properly renewed; further, that the water by non-user became forfeited and became unrecorded water within the meaning of sections 4 and 5 of the Water Clauses Consolidation Act, 1897.

The plaintiff, at great expense, constructed a ditch line and pipe for the utilization of the water covered by grant of water right No. 12, and the defendant actively interfered with the

plaintiff's use of this water in the seasons 1912 and 1913 by diverting the water higher up the stream, to the serious damage and detriment of the plaintiff in its mining operations, the plaintiff not being enabled to clean up, and a loss is mentioned of some £2,000. The evidence shews that the grant of water right No. 12 (although erroneously, it would seem to me, referred to as No. 27, 1897) was obtained by Harry Jones, one of the predecessors in title of the plaintiff, and his evidence is that there was no renewal of the grant of water right, as at the time of the renewal of the lease on the 1st of October, 1900, for five years, John Bowron, the gold commissioner, said it was unnecessary. To quote: "He [meaning John Bowron, the gold commissioner] said it was not necessary to pay for the water record any more; as long as the lease was in good standing the water went with it." Then in 1905 the renewal is by order in council. In my opinion, the gold commissioner, when granting the extension of the lease of the 3rd of October, 1890, then held by Harry Jones, W. C. Prince, George Cowan, Fred J. Treyillus, and Gower Johns, now held by the plaintiff, being duly transferred had authority under section 124 of the Placer Mining Act, 1891, to not only grant an extension of the lease, but make a grant as well of the necessary water to work the same. However at this time, the grant of water right upon which the plaintiff is relying was not then existent, but was issued on the 27th of April, 1897, and was expressed to be for the term of five years. Had the grant of water right existed when the extension of the lease was made in 1895, unquestionably the extension, in my opinion, considering section 124, would have covered the water as well. Did the issuance of the grant of water right at a later date, but appurtenant to the lease, render the situation of matters at all different? In my opinion, it did not. Once the grant of water right was made in 1897, it was appurtenant to and was attached to the lease which had been renewed in 1895, expiring on the 3rd of October, 1900, and when the lease was later renewed on the 1st of October, 1900, to the 3rd of October, 1905, in my opinion, the then existing grant of water right, which, according to the expressed term on the face thereof, had still two

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years to run, was likewise renewed and extended to the 3rd of October, 1905. At the time of the grant of water right No. 12 in 1897, section 55, as amended by section 2 of the Placer Mining Amendment Act, 1894, was in force, and the gold commissioner was empowered to make a grant of a water right in any unappropriated water for any term not exceeding ten years and the free miner was not to be charged any money rental for any such water for mining purposes on his own mining claim.

Further, in 1900, section 124 of the Placer Mining Act, 1891, as amended by section 3 of the Placer Mining Act (1891) Amendment Act, 1897 (not as amended by section 14 of the Placer Mining Act Amendment Act, 1896, as erroneously assumed by the trial judge), was in force, and it is there provided that where placer mining ground is held under lease the gold commissioner was entitled to grant an extension of the lease upon the same conditions as the original lease for a reasonable time, and the gold commissioner may, with the sanction of the Lieutenant-Governor in Council, grant such extension by memorandum endorsed on the lease, but there would not appear to be the requirement as contained in section 14 of the Placer Mining Act Amendment Act, 1896, that any extension of the water right should be endorsed upon the lease or should have the sanction of the Lieutenant-Governor in Council.

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The lease was renewed in 1900. It is true in the memorandum endorsed no mention is made of the sanction of the Lieutenant-Governor in Council, but might this not be presumed as there is no evidence to the contrary? However, I can see no requirement that the extension of the lease should specifically state that it was with the sanction of the Lieutenant-Governor in Council, and that, as endorsed, "Further renewed till 3rd October, 1905," it was sufficient.

Section 125 of the Placer Mining Act, 1891, was, by section 16 of the Placer Mining Act Amendment Act, 1896, repealed and the following inserted in lieu thereof:

"125. Every grant, and every extension of a grant, of a water right for mining grounds leased shall be recorded in the 'Record of Water Grants,' but it shall not be necessary to re-record such grant of extension annually."

It is apparently not disputed that the grant of water right

as claimed by the plaintiff is of record in the "Record of Water Grants." No question of the forfeiture of the lease or forfeiture of the water right which is appurtenant to the lease can be successfully advanced, as no forfeiture ever took place. The procedure to accomplish this is set forth in section 122 of the Placer Mining Act, 1891, as amended by section 13 of the Placer Mining Act Amendment Act, 1896, which reads:

"122. On the non-performance or non-observance of any covenant or condition in any lease, such lease shall be declared forfeited by the gold commissioner, 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 passage of this Act, shall hereafter be declared forfeited, except in accordance with this section."

It is to be observed that in the Placer Mining Act (1891) Amendment Act, 1897, which became law on the 8th of May, 1897, the powers of the gold commissioner with regard to the granting of unappropriated water were withdrawn, but the record in question in the present case, No. 12, was granted on the 27th of April, 1897. Further, section 16 of the Placer Mining Act Amendment Act, 1896, referred to by the trial judge, was repealed by section 6 of the Placer Mining Act (1891) Amendment Act, 1897.

The question that is most important for consideration now is: What were the powers of the gold commissioner on the 1st of October, 1900, when the renewal of that date took place? It is clear that at that date the Placer Mining Act, R.S.B.C. 1897, Cap. 136, had the force of law, the Revised Statutes becoming law on the 4th of March, 1898.

Turning to Part VII. of the last-mentioned Act under the title "Leases," section 101 provides that the gold commissioner may, with the sanction of the Lieutenant-Governor in Council, grant an extension of a lease of placer-mining ground by memorandum endorsed on the lease, but it makes no mention of granting an extension of water rights.

In Part IX., under the title "Gold Commissioner's Powers," section 128, subsection (*l*) it is enacted:

"128. It shall be lawful for the gold commissioner to perform the following acts in accordance with the provisions of this Act:—

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(*l*) He may grant leases of placer mining ground, and he may grant renewals of such leases, and exercise all such powers as are specified in Part VII. of this Act."

It will be noted that under section 128, subsection (*l*), it would not appear that the sanction of the Lieutenant-Governor in Council as to granting renewals of leases is required, and, possibly, that is only necessary where the facts are as set forth in section 101, *i.e.*, part of the ground only still remains to be worked—what the facts in the present case were the evidence does not disclose. It would seem to be an admitted fact—in truth, one that the Court may well take judicial notice of—that in the working of placer-mining ground water is essential, and the extension of time of the lease without an extension of the grant of the water appurtenant to it would be an illusory extension—therefore, in my opinion, the Court should lean most strongly in favour of the support of the view that the renewal of the lease carries an extension of the water right appurtenant thereto.

MCPHILLIPS, J.A.

The defendant claims under a water record, No. 18, granted under the Water Clauses Consolidation Act, 1897, under date the 22nd of September, 1898, and it is urged that from and after the coming into force of that Act, which was the 1st of June, 1897, all unappropriated water was taken to the Crown and that at that date the grant of water right, No. 12, really was ineffective, as the water had never been appropriated or used, or, failing that, the contention is that on the 27th of April, 1902, the grant of water right No. 12 expired and the water then became unrecorded water vested in the Crown.

Before further proceeding with the examination of what (if any) the rights of the plaintiff may be under the grant of water right No. 12, it is well to note that by order in council approved by His Honour the Lieutenant-Governor on the 2nd of October, 1905, the lease of the 3rd of October, 1890, which had previously been extended on two occasions, was extended for a term of 20 years from the 3rd of October, 1905, on the same terms and conditions as the existing lease, *i.e.*, the lease upon which this memorandum, in compliance with the statute, was endorsed of date the 3rd of October, 1890.

Therefore, it is plain that the plaintiff, who is the successor in title of this lease, and the duly recorded assignee thereof, has a good and subsisting lease extending to the year 1925, and, upon the faith of this, the evidence shews the plaintiff has expended very large sums of money and executed very considerable works.

The Water Clauses Consolidation Act, 1897, in my opinion, only impressed itself upon and took to the Crown unrecorded water—and that the water in question in the present action cannot be so called, and the plaintiff is, in my opinion, in the exercise of legal rights in respect to the water in question—being legal rights supported under the provisions of the Placer Mining Act, R.S.B.C. 1897, Cap. 136; R.S.B.C. 1911, Cap. 165.

Further, in my opinion, after the passing of the order in council of the 2nd of October, 1905, the lease and the water grant appurtenant thereto must be deemed to be valid and to be extended for the further period of 20 years.

The defendant in the assertion of his title to the water in question in the present action is confronted with what seems clear to me is a prior and superior right, as, at the time his predecessors in title obtained the water right of the 22nd of September, 1898, under which he claims—the plaintiff's predecessors in title held 1,000 inches of water out of Lightning Creek, under a grant made on the 27th of April, 1897, good for the term of five years therefrom—therefore for five years at least, unless disturbed in title by the Crown, there was the absolute right to the water and certainly the grant of water right to the defendant's predecessor in title made on the 22nd of September, 1898, could not be one that would entitle an invasion of that prior right. That the continuity of right has been preserved and is vested in the plaintiff as against the defendant would appear to me to be the true interpretation and construction of all the statute law.

In my opinion, the plaintiff should not be held to have suffered by the statement of the gold commissioner in 1900 that it was unnecessary to specifically renew the water grant.

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Section 14 of the Placer Mining Act, R.S.B.C. 1897, Cap. 136, then in force, reads as follows:

"14. A free miner shall have all the rights and privileges granted to free miners by the Mineral Act, 1896."

Turning to the Mineral Act, R.S.B.C. 1897, Cap. 135, it reads as follows:

"53. No free miner shall suffer from any acts of omission, or commission, or delays on the part of any Government official, if such can be proven."

In determining the meaning to be attributed to the words "rights and privileges," these words are considered by Duff, J. in *British Columbia Electric Ry. Co.* v. *Crompton* (1910), 43 S.C.R. 1 at pp. 22-5.

In my opinion, therefore, giving effect to the preservation of right, the Crown would not be entitled to claim that the water grant had expired, and the Court, it would seem to me, is called upon to protect the miner and not give effect to the contention of the defendant that the water right has lapsed or expired. In my opinion, apart from applying the enactment above set forth, the water right was extended for the life of the lease by operation of law. I cannot say upon the evidence that the defendant has established any equitable position. He was well aware of the lease and the plaintiff being assignee thereof, and well knew of the prior record, but has relied solely upon the claimed invalidity of the water right of the plaintiff.

MCPHILLIPS, J.A.

When it is considered that the gold commissioner assured the predecessors in title of the plaintiff that the water grant would continue throughout the life of the lease, and the lease being extended for 20 years by order in council in 1905, and the water enjoyed for a very considerable time, in my mind, it cannot be successfully contended that water which would otherwise be the property of the Crown is not the property of the plaintiff as against the defendant. *Carson* v. *Martley* (1885-6) 1 B.C. (Pt. 2), 189, 281; (1889), 20 S.C.R. 634; 2 M.M.C., Appendix D., lv., lvi., in my opinion, supports this view.

Admittedly in the present case the predecessors in title of the plaintiff had a good and sufficient grant of water right before the Water Clauses Consolidation Act, 1897, took effect,

which would not expire, if not duly extended, until 1902, and in 1900 the gold commissioner assures the predecessors in title of the plaintiff that this water right will continue during the life of the lease. Then, later, this same lease is further extended in 1905 for 20 years. The gold commissioner was the statutory officer with full authority in the district to deal with all records of waters in 1900 and 1905 under the Water Clauses Consolidation Act, 1897. I would refer to *Covert* v. *Pettijohn* (1902), 9 B.C. 118 at p. 122, where HUNTER, C.J. said:

"The defendants are not without a remedy if their case is that the water is going to waste, or is being taken for unauthorized purposes, or in excess of the plaintiff's requirements, all they have to do is to read the Water Clauses Consolidation Act, and govern themselves accordingly."

It is evident that the Chief Justice plainly indicates that questions as to the right of user of water are to be determined under the provisions of the Water Clauses Consolidation Act and not, in first instance, in any case by the Court, and an injunction was granted in favour of the holder of a first record as against the second record holder. My opinion is that the defendant must seek his rights (if any) under the existing Water Act (R.S.B.C. 1911, Cap. 239).

The plaintiff should not suffer by any errors of the gold commissioner. MARTIN, J. in *Covert* v. *Pettijohn, supra,* at p. 126, said:

"But the error in the record is that of the 'ministerial officer of the Government authorized by statute to make the grant': *Martley* v. *Carson* (1889), 20 S.C.R. 634 at p. 678."

And at p. 127:

"While it renders it imperative that there must be a record, does not, in my opinion, invalidate it because of any irregularity therein; to hold otherwise would be contrary, I think, to the spirit of *Martley* v. *Carson*."

In the present case the plaintiff has expended large sums of money and constructed a ditch and has done everything to make available the water which stands duly recorded and has been the user thereof. In view of these facts, I would further refer to the language of MARTIN, J. at p. 128 in *Covert* v. *Pettijohn, supra*:

"There is no suggestion that the plaintiff is wasting, improperly using, or does not require the water, in which case the gold commissioner has

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special power under sections 18 and 28 of the Water Clauses Consolidation Act, to cancel or otherwise deal with the record."

Then again, as to the statement of the gold commissioner that the water grant was extended or would continue during the term of the lease, I would refer to the language of MARTIN, J. in *Brown et al.* v. *Spruce Creek Power Co., Ltd.* (1905), 2 M.M.C. 254 at p. 255:

"It was, perhaps, strictly speaking, incorrect for the gold commissioner to say in his decision that the said 300 inches shall be considered as granted in response to the said application of Thomas Storey and others in lieu of a record, and as appurtenant to the individual claims above designated, yet, if the action taken was the proper one on the ground that the individual miners already had statutory grants, it will not be invalidated because the official used inapt language or erred in thinking he had power to make a grant in lieu of record, which is something the statute does not authorize. The point is, that what he did in reducing the two records was lawful, though apparently, and very excusably, he did not appreciate the exact rights or status of the individual free miners in the circumstances."

Upon the facts of the present case, it cannot be contended that there is no record of the water right of the plaintiff. CLEMENT, J. in *Cranbrook Power Co.* v. *East Kootenay Power Co.* (1907), 13 B.C. 275 at p. 277, said:

"This all comports with the idea that the 'record' consists of entries in a book kept for that purpose by the various gold commissioners in the different sections of the Province: section 2 [Water Clauses Consolidation Act, R.S.B.C. 1897, Cap. 190]."

MCPHILLIPS, J.A.

The plaintiff is entitled under section 19 of the Water Clauses Consolidation Act, R.S.B.C. 1897, Cap. 190, to contend, and, in my opinion, successfully, that at the time the Water Clauses Consolidation Act took effect, which was the 1st of June, 1897, the grant of water right was appurtenant to the placer-mining ground and duly passed with the assignment of the lease, and is still existent, and could only thereafter be affected by proceedings had and taken under that Act.

It cannot, in my opinion, be at all contended with any success that the grant of water right, namely, the 100 inches from Lightning Creek, granted to the predecessors in title of the plaintiff, ever became unrecorded water. Section 154, subsection (2), the repealing clause (of the provisions with respect to grants of water as contained in the Placer Mining Act, 1891), reads:

"(2.) Provided that such repeal shall not affect any rights acquired, or any liabilities or penalties incurred, or any act or thing done under any of the said Acts or parts of Acts."

This preserved the rights then existing of the predecessors in title of the plaintiff in the grant of water right.

In *Esquimalt Waterworks Company* v. *City of Victoria* (1907), 12 B.C. 302; 23 T.L.R. 762; (1907), A.C. 499; 2 M.M.C. 480, we have the following stated in the head-note to the report in 2 M.M.C.:

"The term unrecorded water in Sec. 2 of the Water Clauses Consolidation Act, means 'all water which is not held . . . under this Act, or (with a record) under the Acts repealed hereby, or (is not held) under a special grant by public or private Act.' The expression 'and shall include all water . . . . unappropriated or unoccupied or not used for any beneficial purpose' does not refer to water already declared to be outside the definition of unrecorded water."

Section 4 is clearly meant to preserve existing rights of appropriation or diversion under former Acts. In my opinion, it is clear that the grant of water right passed to the plaintiff and was existent when the Water Clauses Consolidation Act, 1897, came into force, and was given validity—if any needed validity was required—by section 19 of the Act, as being appurtenant to the placer-mining property transferred to the plaintiff. Therefore, the plaintiff is entitled to claim the full benefit and advantage of section 20 of the Water Clauses Consolidation Act, and that is that the placer-mining property in respect of which the water was granted not being worked out or abandoned, the water is still available for use. Section 20 reads as follows:

"20. Wherever a mine shall have been worked out or abandoned, or a pre-emption cancelled or abandoned, or whenever the occasion for the use of the water upon the mine or pre-emption shall have permanently ceased, all records appurtenant thereto shall be at an end and determined."

It is manifest that the grant of water right to which the plaintiff is entitled did not require to be renewed or extended in 1902, but was statutorily extended and would only cease when the mine was worked out or abandoned.

Finally, in my opinion, the plaintiff's title to priority of right in the water as against the defendant is established, and it follows that the injunction prayed for should be granted and the plaintiff is entitled to such damages as may be proved to

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have been suffered by the interference of the defendant, the damages to be such as may be found by the registrar of the Supreme Court at Victoria, to whom the assessment thereof is hereby referred; and the judgment of the learned trial judge, in my opinion, should be set aside, with costs to the plaintiff, and the appeal allowed.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *W. J. Taylor.*
Solicitor for respondent: *James Murphy.*

APPENDIX.

Case reported in this volume appealed to the Supreme Court of Canada:

REX v. DAVIS (p. 50).—Affirmed by Supreme Court of Canada, 11th May, 1914.—(Not reported).

Cases reported in 18 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:

CANADIAN COLLIERIES (DUNSMUIR), LIMITED v. DUNSMUIR *et al.* DUNSMUIR v. MACKENZIE *et al.* (p. 583).—Judgment of Court of Appeal varied and cross-appeal dismissed by the Judicial Committee of the Privy Council, 3rd July, 1914. See 29 W.L.R. 28; 20 D.L.R. 877.

MANITOBA LUMBER COMPANY, LIMITED v. EMERSON (p. 96).—Affirmed by Supreme Court of Canada, 1st June, 1914. See 6 W.W.R. 1450.

UPLANDS, LIMITED, THE, v. GOODACRE & SONS (p. 343).—Affirmed by Supreme Court of Canada, 1st June, 1914. See 6 W.W.R. 1460; 20 D.L.R. 68.

Case reported 17 B.C., and since the issue of that volume appealed to the Judicial Committee of the Privy Council:

COOK v. THE CORPORATION OF THE CITY OF VANCOUVER (p. 477).—Affirmed by the Judicial Committee of the Privy Council, 23rd June, 1914. See (1914), A.C. 1077; 83 L.J., P.C. 383; 111 L.T.N.S. 684; 28 W.L.R. 801; 6 W.W.R. 1492; 18 D.L.R. 305.

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ADMIRALTY LAW — *Ship — Foreign fishing vessel within three-mile limit — Seizure outside limit—Customs and Fisheries Act, R.S.C. 1906, Cap. 47, Sec. 10—Can. Stats. 1913, Cap. 14, Sec. 1—Fisheries and Boundaries Convention, 1818—Convention of Commerce and Navigation, 1815.*] The defendant ship, a foreign fishing vessel, was seized by a Canadian fisheries protection officer, because of an alleged infraction of section 10 of the Customs and Fisheries Protection Act. The ship was first sighted within the three-mile limit, and being suspected of poaching, was, after a "hot pursuit," seized about five miles off shore. There was evidence of the dories and skates of gear having the appearance of being just hauled out of the water, also of live halibut being found in the hold. In an action for forfeiture of the vessel after seizure:—*Held*, that the ship had, by entry within the three-mile limt for a purpose not permitted, committed a breach of clause (*b*) of section 10 of the Act, and was liable to seizure and forfeiture, notwithstanding that she was actually seized outside of the three-mile limit. *Held*, further, that the Fisheries and Boundaries Convention of 1818, between Great Britain and the United States, respecting fisheries, etc., does not apply to the coast of British Columbia as far as fisheries are concerned. *Held*, further, that under Article 1 of the Convention of Commerce and Navigation, 1815, between Great Britain and the United States, no liberty or right is given to foreign vessels to carry on fisheries, but simply "to come with their cargoes to all such places, ports and rivers in the territories aforesaid, to which other foreigners are permitted to come, but subject always to the laws and statutes of the two countries respectively." Section 186 of the Canada Customs Act would, therefore, apply, which makes it unlawful for a vessel to enter any place other than a port of entry, unless from stress of weather or other unavoidable cause; as there was no cause justifying the entry of the vessel into the "place" or natural harbour on Cox Island, it was liable to seizure. THE KING v. THE VALIANT. - - - - - - - - **521**

2.——*Ship — Small fishing vessel — Seaman's wages—Responsibility of master for fishing gear — Application to re-open for further evidence.*] The master of a fishing boat entered a claim against the owners for wages, and the owners counter-claimed against him for the value of missing fishing gear. Judgment was reserved at the close of the hearing, and before delivery of judgment the master applied to re-open the case in order to give further evidence as to the missing gear. *Held*, that such an application should only be granted in a very special case, and in circumstances which would not put the other party in an unfair position. The attention of the master was drawn to the point in the pleadings, on the evidence at the trial and during argument. The plaintiff cannot claim that he was taken by surprise in any way, and the application should therefore be refused. *Held*, upon the claim and counter-claim, that the master was entitled to wages, but was responsible for the value of the missing gear not accounted for. In a small vessel of this description the master must personally account for the property of the owner entrusted to his charge whatever may be said as to his responsibility in larger vessels, where property may be entrusted to the custody of various officers. BROWN *et al.* v. THE "ALLIANCE NO. 2." - **529**

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ARBITRATION — *Arbitrator appointed by one party—Action commenced by other—Defendant, after delivering defence, applies for appointment of second arbitrator—Refusal of—Arbitration Act, R.S.B.C. 1911, Cap. 11, Secs. 6; 8, Subsec. (e).*] The plaintiff commenced action upon a contract containing a provision for reference to arbitrators of any dispute arising under the contract, and the defendants, who had appointed one arbitrator under a previous agreement for arbitration of the matters in dispute, made application, after filing their defence in the action, for the appointment of the second arbitrator. *Held*, that the defence having been delivered, the Court has seisin of the dispute, and it is by its decisions alone that the rights of the parties can be settled. The Court should not, under such circumstances, make an order under section 8, subsection (*e*) of the Arbitration Act. *Held*, further, that the rule applies whether such action relates to the whole or a part of the matters in dispute. Order of HUNTER, C.J.B.C. affirmed. *In re* HUDSON'S BAY INSURANCE COMPANY AND WALKER. **87**

2.——*Compensation for injury by municipal improvements — Failure of municipality to appoint arbitrator—Application of Arbitration Act—Unregistered title when damage occurred — Right to compensation.* - - - - - - - - - - **147**
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3.——*Municipal corporation — Street improvements—Damages from—Compensation—Default of municipality in appointing arbitrator — Appointment by Court — R.S.B.C. 1911, Cap. 170, Sec. 394, Cap. 11, Sec. 8.* - - - - - - - - - - **157**
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4.——*Taxation of—Cost of arbitration—Scale of taxation—Party and party costs—R.S.B.C. 1911, Cap. 194, Sec. 58.* - **236**
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BANK—*Security on stock of customer—Action by employees against employer and bank—Liability of bank for wages—Continuance of, after judgment against employer—Practice — Pleading — Defence of judgment against co-defendant—Application to set aside own judgment—The Bank Act, Can. Stats. 1913, Cap. 9, Sec. 88, Subsec. 7.*] The plaintiffs brought action for wages against the defendant Company at common law, and sought also to recover in debt from the defendant Bank under the Bank Act. The defendant Company not having entered an appearance, judgment by default was entered by the plaintiffs against the Company and they proceeded with the action against the Bank. The point was raised by the Bank at the trial that the plaintiffs had elected their remedy by entering judgment against the Company, and were thereby debarred from enforcing their action against the Bank. The plaintiffs thereupon applied for an order vacating their judgment against the Company, which was granted, and they then sought to recover solely from the Bank. *Held*, that assuming the judgment was not properly set aside by the order made at the trial, it nevertheless did not operate as a conclusive election and a bar to the plaintiffs' right to recover. *Held*, further, that the defence that the plaintiffs had elected was open to the Bank without being specially pleaded. *Semble*, that the statute might be construed as placing the Bank in the position of a guarantor, or a surety for the employer, and the employer could be sued and judgment recovered against him without releasing the Bank. EDBORG *et al.* v. IMPERIAL TIMBER AND TRADING COMPANY, LIMITED, AND THE ROYAL BANK OF CANADA. - **514**

BILLS AND NOTES—*Payment of note conditional—Parol evidence to prove same—Credibility of witness.*] In an action upon a promissory note, the maker raised the defence that the note was given to cover a first payment upon an agreement for sale of land and was handed over to the plaintiff on the express condition that if he failed to obtain the money for the first payment which he contemplated raising through the sale of other property, the note was to be

BILLS AND NOTES—*Continued.*

returned or not used. The trial judge held that the condition under which the note was given having failed, the action should be dismissed. *Held*, on appeal (*per* MACDONALD, C.J.A. and MCPHILLIPS, J.A.) that the appeal should be dismissed. *Per* MCPHILLIPS, J.A.: No consideration such as is called for "in the sense of the law" was established. *Per* IRVING and GALLIHER, JJ.A.: That on the law and on the facts the appeal should be allowed. *Per* IRVING, J.A.: The essence of a promissory note is that it is an unconditional promise to pay, and oral evidence is not admissible to vary the instrument. The Court being equally divided, the appeal was dismissed. WEST v. BROWNING *et ux.* - - - - **407**

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COMPANY LAW—*Assignments and preferences—Assignment for benefit of creditors — Company as assignee — Invalidity of — Refusal to substitute creditor as plaintiff—Creditors' Trust Deeds Act, R.S.B.C. 1911, Cap. 13, Secs. 3, 29, 42 and 64.*] In an action brought by an assignee for the benefit of creditors under the Creditors' Trust Deeds Act to set aside as a preference a conveyance of land made by the assignor:—*Held*, on appeal, affirming the judgment of CLEMENT, J. (MCPHILLIPS, J.A. dissenting), that an incorporated company cannot be an assignee for the benefit of creditors under said Act. An application on the hearing of an appeal to substitute the name of a creditor for the present plaintiff, the invalid assignee, was refused. COLONIAL DEVELOPMENT COMPANY v. BEACH *et al.* - **247**

2.——*Extra-provincial company unlicensed—Right to sue—"Carrying on business"—R.S.B.C. 1911, Cap. 39, Sec. 166—Sale of fish unfit for food—Implied warranty of unmerchantable quality—Damages —Measure of.*] Section 166 of the Companies Act, which subjects extra-provincial companies to penalties for carrying on in the Province any part of their business without licence or registration, indicates that the Legislature by the phrase "carrying on business" contemplated such conduct on the part of the Company as would, according to the general principles of law, amount to a submission to the jurisdiction of the British Columbia Courts. No company would therefore come within the penalties or disabilities so imposed, unless it had a fixed place of business at which it carried on some part of its own business within the Province. *John Deere Plow Co.* v. *Agnew* (1913), 48 S.C.R. 208, followed. Where, under a contract of sale, fish is supplied to a purchaser that subsequently are found to be unfit for human food, the measure of damages is the amount necessary to place the purchaser in the same position as if at the time of the discovery of the true condition of the fish, he had been furnished with proper fish. WHITE & CO., LIMITED v. DONKIN. - - - **565**

3.——*Logging operations — Authority of officers to make contracts — Managing director — Logging superintendent.*] The general manager of a lumber company gave written instructions to a logging superintendent to make contracts and hire assistants for cutting and delivering a certain quantity of logs at their mill for the season of 1912. The logging superintendent then contracted with the plaintiff for the cutting and taking out of all lumber in a certain area at a certain daily output, which would involve continuous operations for about three years. The plaintiff worked under the contract for three and one-half months, when the Company shut down their mill and discharged the plaintiff. In an action for damages for being denied the right to complete his contract:—*Held*, on appeal, reversing the decision of MURPHY, J. (MCPHILLIPS, J.A. dissenting), that the instructions received by the logging superintendent from the general manager did not authorize the contract made with the plaintiff, and the logging superintendent as such had no power to make the contract. *Per* GALLIHER, J.A.: Had the plaintiff been dealing with the managing director, in the absence of proof of direct authority, implied authority could be assumed, but to carry the doctrine further and to say that implied authority could be assumed in the case of a subordinate officer is unsound. *Doctor* v. *People's Trust Co.* (1913), 18 B.C. 382, distinguished. HEDICAN v. THE CROW'S NEST PASS LUMBER COMPANY, LIMITED. - - - - - - - - **416**

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4.——*Suit by shareholder on behalf of himself and other shareholders—Purchase of assets of two companies—Payment of debts of old companies—Not authorized by new company—Actual intention of parties at the time of purchase of assets of old companies.*] A new company, formed for the purpose of carrying out a scheme for the amalgamation of two old companies, purchased their assets, there being no provision in the purchase and sale agreements as to the payment of their liabilities. The officers of the new company, without specific instructions from their directors, paid the liabilities of the old companies with the assets of the new, carrying out what they believed was the real intent of the parties at the time the amalgamation scheme was entered into. *Held*, upon the evidence, that all interested, except possibly the plaintiff, who was a shareholder, intended that the liabilities of the dissolving companies were to be assumed and paid by the defendant Company, that there was no wrong in the scheme of amalgamation or in carrying it out, and, therefore, there was no fraud on the part of the defendants. *Held*, further, that assuming there was no authority under the agreements for the payment of the liabilities, the plaintiff cannot bring this action in his own name before asking the Company to proceed to recover the moneys so paid. *Foss* v. *Harbottle* (1843), 2 Hare 461, followed. *Held*, further, that the same principle applies with two companies as in the case of an agreement between two individuals. They may ignore a mutual mistake and carry out their agreement according to their real intention. JOHNSON v. THOMPSON *et al.* - - - - - **105**

5.——*Subscription for shares — Allotment by company—"Payment on call within 18 months after allotment"—Construction of — Forfeited shares — Companies Act, R.S.B.C. 1911, Cap. 39, Secs. 30 (2), 33, 94, 95 and 101.*] Where in an action against an applicant for shares in a company, for specific performance of the contract for their purchase, it appeared that the Company had set aside certain shares for the applicant to be issued to him on payment of the balance of the purchase price, and that these shares had been previously allotted to a former applicant, which allotment was later declared forfeited by the Company, the question of whether or not the Company properly forfeited the shares has no bearing on the question before the Court. Where the balance due on shares is payable "on call within 18 months after allotment," the balance is not payable within 18 months, except upon call, but on the expiry of the 18 months it becomes due and payable without call. GRAHAM ISLAND COLLIERIES v. MCLEOD. - - - **114**

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COMPENSATION—For injury by municipal improvement—Right to. **147**
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CONDITIONAL LIMITATIONS — Executory interests — Supplying omitted words. - - - **447**
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CONSTITUTIONAL LAW—*Succession duty — Property within Province — Tax imposed not indirect taxation — R.S.B.C. 1911, Cap. 217.*] The tax imposed by the Succession Duty Act is not an indirect tax, and is within the powers of the Provincial Legislature. The impost is laid expressly upon the property passing under the will (or the intestacy as the case may be), and there is no legal obligation to pay the duty upon any person or persons other than the beneficiaries; even as to them the liability to pay is inferential, or arises under order of the Court made in the course of the enforcement of the charge upon the property. *Rex* v. *Lovitt* (1912), A.C. 212, followed; *Cotton* v. *Rex* (1914), A.C. 176, distinguished. *Re* DOE. - - - - - - - - - **536**

2.——*Sunday trading—Validity of municipal by-law—Criminal law—British North America Act—Lord's Day Act—29 Car. II., Cap. 7 — R.L.B.C. 1871, No. 46 — R.S.B.C. 1911, Cap. 170, Sec. 53, Subsecs. (129) and (130).*] A by-law prohibiting Sunday trading in the interest of public morals, being a subject of criminal law, cannot be authorized by the Provincial Legislature and is invalid. Subsections (129) and (130) of section 53 of the Municipal Act, authorizing municipalities to pass by-laws "for the regulating of public morals, including the observance of the Lord's Day," are *ultra vires*. Decision of HUNTER, C.J.B.C. affirmed. REX v. WALDEN. - - **539**

CONTRACT — *Carriers — Incomplete delivery of goods — Acceptance of goods delivered — Divisible contract — Pro rata recovery.*] The plaintiff entered into a verbal contract with the defendant Company to freight by pack-train a quantity of supplies, including hydraulic piping, to the defendant's mines (a distance of about 180 miles). While on the trail one of the

CONTRACT—*Continued.*

mules died and the plaintiff was obliged to leave behind 80 feet of hydraulic piping, weighing about 280 pounds. The rest of the freight, about 8,000 pounds, he delivered, and it was accepted by the defendant Company, which made a part payment on the freight charges. The plaintiff sued for the balance, but made no claim for the freight not delivered. The defendant Company alleged that the plaintiff promised to bring in the hydraulic piping as soon as possible, but the plaintiff did not bring it, it having been brought in later by Indians at the instance of the defendant Company, at a cost less than the sum deducted from the plaintiff's contract price. The defendant Company counterclaimed for damages for non-delivery of the hydraulic piping. *Held*, that as the subject-matter of the contract was divisible, the delivery of the entire freight was not a condition precedent to the recovery of the contract price, and that the remedy by the Company for short delivery was by an action for damages. *Ritchie* v. *Atkinson* (1808), 10 East 295, followed. Judgment of GRANT, Co. J. reversed. CHARLESON v. ROYAL STANDARD INVESTMENT COMPANY. - - - - - - - - - **226**

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3.——*Sale of future crop of potatoes—Construction of agreement — Entire crop grown by vendor — Words of expectation and estimate.*] The defendants, acting as commission agents for the sale of the plaintiff's crop of potatoes, agreed to handle and dispose of the whole future crop (except a small amount required for seed purposes for the following year), which the plaintiff, at the time the contract was made (as set forth in the written memorandum of the agrement) estimated at 600 tons more or less. The defendants disposed of 1140 tons out of an actual crop of 1230 tons, and then notified the plaintiff to cease shipping potatoes. The plaintiff brought action to recover $1,000 in damages for the non-acceptance or refusal to take delivery of the remaining 90 tons. *Held*, on appeal (MACDONALD, C.J.A. and MARTIN, J.A. dissenting), that the contract was one for the disposal of the entire crop at the price fixed, and the words "estimated by the principal at 600 tons more or less" were not words of contract, but words of expectation and estimate only. *Per* MACDONALD, C.J.A. and MARTIN, J.A.: The interpretation reasonably to be placed upon the contract was that the estimate of the principal amounted to an undertaking that he would not exceed his estimate by an amount greater than what would be considered a reasonable margin in the circumstances. Decision of CALDER, Co. J. reversed. HAMMOND v. DAYKIN & JACKSON. - - **550**

CONVEYANCE OF LAND—*Given as security for loan—Sale of land by mortgagee—Rights of purchaser—Knowledge of claimant's rights—Assent of administrator of deceased — Rights of heirs — Estoppel—Laches.*] The husband and children of N., deceased, brought action for the redemption of certain land, alleging that an absolute conveyance of the same made by N. in her lifetime, in 1902, to the defendant C. was merely security for a loan, in addition to a mortgage that she had previously given him on the land, and that the defendant B. purchased the land from C., in 1903, with actual knowledge of the plaintiff's rights, N. having died in the interval. On the trial, C. admitted that he held the land as security only, and that B. knew this both from himself and from N.'s husband. He stated at the same time that the sale was made to B. at the husband's request, who was administrator of N.'s estate, and received a portion of the purchase money, equal to his share as one of the heirs-at-law of N. *Held*, that the onus was on the plaintiff to shew that B. purchased the property with express or actual notice that C. was holding the land only as security, that upon the evidence they had satisfied that onus, and B. obtained by his purchase from C. only such rights as C. had. *Held*, further, that the actions of N.'s husband barred his own rights as an heir-at-law of N. by estoppel, but would not defeat the claims of the other heirs-at-law, who were entitled as against B. to a decree for redemption. NELSON *et al.* v. CHARLESON AND BALLINGER. - - - - - - **100**

COSTS—*Arbitration—Taxation of "costs of the arbitration" — Scale of taxation — Party and party costs—R.S.B.C. 1911, Cap. 194, Sec. 58.*] The "costs of the arbitration" mentioned in R.S.B.C. 1911, Cap. 194, Sec. 58, are to be taxed as between party and party, but on a liberal scale. *In re* CANADIAN NORTHERN PACIFIC RAILWAY COMPANY AND BRADSHAW. - - **236**

2.——*Crown Costs Act, R.S.B.C. 1911, Cap. 61, Sec. 2.* - - - - - - - **243**
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CRIMINAL LAW—*Evidence — Indecent assault upon child — Complaint made by child to grandmother — Admissibility — Inducement—Lapse of time—Criminal Code, Secs. 292; 1003, Subsec. (2)—Canada Evidence Act, Sec. 16, Subsec. (2).*] The accused was found guilty of an indecent assault upon a girl six years of age. The child's mother was dead, and she was cared for by her grandmother, who, while bathing her, noticed an inflammation and asked the child if she had hurt herself, to which she replied that she had not. About two weeks after the event, without being asked, the child described to her grandmother an indecent assault upon her by the accused. This was the first complaint she had made. The child testified to the assault and the accused and his wife admitted on examination that the child was at their home on the day on which the offence was alleged to have been committed, and the wife of the accused admitted that the child was, on that day, in and out of the room in which the accused was in bed. The doctor who examined the child testified that the stage of the disease which she had was consistent with having contracted it at the time the offence was alleged to have been committed. The following questions were submitted by the trial judge for the opinion of the Court: "1. Was I right in admitting as evidence the complaint or statement made by the child to the grandmother, charging the accused with the alleged offence? 2. Was I right in holding that there was sufficient corroborative evidence in the case, under section 1003, subsection (2) of the Criminal Code, to justify a conviction of the accused for indecent assault? 3. If I was wrong in holding that there was sufficient corroborative evidence to convict the accused of indecent assault, was there sufficient corroborative evidence under section 16, subsection (2) of the Canada Evidence Act to justify a conviction for common assault?" *Per* MACDONALD, C.J.A. and GALLIHER, J.A.: Questions 1 and 2 should be answered in the affirmative. *Per* IRVING, J.A.: Question 1 in the affirmative and question 2 in the negative. *Per* MARTIN and MCPHILLIPS, JJ.A.: Question 1 in the negative, and, *haesitante*, question 2 in the affirmative. In the result the conviction was upheld. REX v. MCGIVNEY. - - - - - - - **22**

2.——*Indecent assault — Evidence of child not under oath — Corroboration required by statute — Criminal Code, Sec. 1003—Canada Evidence Act, R.S.C. 1906, Cap. 145, Sec. 16.*] As section 16 of the Canada Evidence Act specially requires that a statement taken in Court from a child of tender years, not understanding the nature of an oath, must be corroborated by "some other material evidence," the testimony so taken from one child of tender years cannot constitute the kind of corroboration required by this section of the testimony similarly taken from another child of tender years. *Per* MACDONALD, C.J.A.: The unsworn testimony, whether of one child or of several children, is not to be acted upon unless fortified by other material evidence corroborating it of a different character, *i.e.*, evidence which is legal evidence apart from this section. A similar construction is placed upon section 1003 of the Criminal Code. *Rex* v. *Iman Din* (1910), 15 B.C. 476, considered. REX v. MCINULTY. **109**

3.——*Motion—Criminal Code, Sec. 1015 —Refusal of trial judge to reserve certain questions—Admissibility at trial of deposition taken at preliminary hearing—Absence from Canada—Facts from which absence can be reasonably inferred — Variance between judge's notes and the official transcript of evidence—Criminal Code, Secs. 999 and 1017.*] Upon leave to appeal being granted on motion under section 1015 of the Criminal Code owing to the refusal of the Court below to reserve a question, the Court will not thereupon hear and deal with the question upon the agreement of counsel and the evidence before the Court as though the case had been stated by the Court below. The Court cannot substitute itself for the tribunal nominated by statute to discharge that duty. *Rex* v. *Armstrong* (1907), 15 O.L.R. 47, not followed. The official stenographer's transcript of the evidence should not be taken as the only evidence of what took place at the trial; reference may be made to the judge's notes appearing in the stated case in which he stated that the stenographic notes were imperfect. The evidence of the chief constable at Nanaimo that a constable in his district, who had given evidence in the preliminary examination of one of several prisoners charged with rioting and from whom he had last heard within Canada from Vancouver, and later from Seattle, Washington, had failed to report for duty and had absconded, were sufficient facts on which the trial judge could reasonably infer that the witness was absent from Canada

CRIMINAL LAW—*Continued.*

at the date of the trial a month later. REX v. ANGELO. - - - - - - - **261**

4.——*Murder — Joint trial of two accused—Refusal of separate trial—Admission of statement in writing made before trial of one accused — Not admissible as against the other — Failure of judge to caution jury—No substantial miscarriage—Criminal Code, Secs. 1017, Subsec. 3, and 1019.*] The defendant and one C. were tried jointly on a charge of murder. C. had made a statement in writing, with respect to the crime, before trial. The Crown did not offer it in evidence, but, in the cross-examination of C., who testified on his own behalf, counsel for the Crown asked him if he had made a statement and he said that he had, but the contents of the statement were not disclosed. Counsel for the defendant then cross-examined C. to some length on the statement, and, on re-examination, C.'s counsel put the statement in, after objection by counsel for the Crown, but without objection by counsel for the defendant (he stating his reason for not objecting being that he did not wish to prejudice his client's case). There was nothing in the statement which had not already been brought out in the examination and cross-examination of C. *Held* (MCPHILLIPS, J.A. dissenting), that the trial judge properly exercised his discretion in refusing a separate trial. *Per* MARTIN, J.A.: Defendant's counsel not having availed himself (after leave granted) of the right to renew his application for a separate trial after the admission of the evidence, excusing himself on the ground that he did not wish to prejudice his client's case with the jury, has precluded himself from a similar application to this Court. *Held*, further (MARTIN and MCPHILLIPS, JJ.A. dissenting), that it would not be useful to send the case back to have question five restated; all that can be said upon it has already been said by counsel, and all the evidence bearing upon it has been brought to the attention of the Court, and in the circumstances, it is not a serious error not to have cautioned the jury that any admission or confession made by one of the accused, not in the presence of the other, is only evidence against the one making such confession or admission, and in any case it is manifest that there has been no wrong or miscarriage by reason of such warning not having been given. *Per* MARTIN, J.A.: The Court should take advantage of the remedy provided by section 1017, subsection 3 of the Criminal Code, and send the case back to the learned judge below to have question five restated so as to raise the real point involved. *Per* MCPHILLIPS, J.A.: As the written statement of C., admitted in evidence, was illegal evidence as against Davis, and may have influenced the verdict of the jury and caused him substantial wrong, a new trial should be granted. REX v. DAVIS. - - - - - - - - - - **50**

5.——*Murder — Stated case — Postponement of trial—Application for—Absence of witnesses—Question of law—Cross-examination of prisoner — Questions as to former offences — Admissibility of prisoner's evidence at inquest—Cross-examination on, in absence of depositions—Criminal Code, Sec. 1014.*] The exercise of judicial discretion by a judge in granting or refusing the postponement of a trial is not a "question of law" upon which a case may be reserved under section 1014 of the Criminal Code (MARTIN and MCPHILLIPS, JJ.A. dissenting). On an application to grant a postponement of a trial on the ground of absence of witnesses, the Court must be satisfied by affidavit, firstly, that the persons are material witnesses, which must be sworn to positively and not merely on belief; secondly, that there has been no neglect in omitting to apply to them and endeavouring to procure their attendance; and, thirdly, that there is reasonable expectation of counsel being able to procure their attendance at the future date, if granted. *Rex* v. *D'Eon* (1764), 1 W. Bl. 510; 3 Burr. 1513, applied. Counsel for the Crown may ask the prisoner who testifies on his own behalf if he had been charged with or committed certain offences in the past, but unless there is evidence to warrant the imputation being made, counsel should not make it by question. A prisoner charged with murder, who testifies on his own behalf may be cross-examined on his alleged testimony at the inquest in the absence of the original depositions. REX v. MULVIHILL. - - - - - - - - - - **197**

6.——*Proceeding before police magistrate—Attorney-General as witness—Subpoena—Discretion of magistrate as to issue of—Criminal Code, Secs. 671 and 711.*] A minister of the Crown may be summoned as a witness. The power of compelling attendance given by sections 671 and 711 of the Criminal Code should be exercised only when the magistrate has reason to believe that any person can give relevant

CRIMINAL LAW—*Continued.*

and material evidence in a matter pending before him. REX v. ALLERTON. - **493**

7.——*Procedure—Change in statute governing selection of jury—Jury summoned before change—Trial after—Extradition—Trial on different charge—Want of evidence of extradition—Stated case—R.S.B.C. 1911, Cap. 121—B.C. Stats. 1913, Cap. 34, Sec. 70.*] The jury for an Assize was selected and summoned in the month of June, 1913; this trial commenced on the 14th of July following. The statute law governing the selection and summoning of jurymen was amended by a statute which came into force on the 1st of July of the same year. *Held* (GALLIHER, J.A. *dubitante*), upon a case stated, that the objection to the jury panel was properly overruled by the trial judge. Four questions were grounded upon the suggestion that the prisoner was indicted and tried on a charge other than the charge or charges on which he was said to have been extradited:—*Held*, that as there was no evidence, except vague allusions, to shew that the prisoner was brought to trial after extradition from a foreign country, no warrant having been put in evidence, and even assuming him to have been extradited, as there was no evidence that he was tried on a charge other than that upon which he was extradited, there is nothing on the material submitted to shew that mistake in law was made in the Court below. REX v. MCNAMARA. (No. 2). - - - **193**

8.——*Sunday trading—Validity of municipal by-law.* - - - - - - - **539**
See CONSTITUTIONAL LAW. 2.

CROWN GRANT—*Error in survey—Establishment of true line — Powers of officials of Crown lands department—Chief commissioner of lands—Jurisdiction—Official Surveys Act, R.S.B.C. 1911, Cap. 220, Sec. 2—Land Act, R.S.B.C. 1911, Cap. 129.*] Where the description of land in a Crown grant gives a point of commencement, the position of which is not disputed, and from which the true boundaries of the land granted can be ascertained by a proper survey according to the description in the Crown grant, it is not within the power of the officials of the Crown lands department to establish as the true line one erroneously run by a neglient or incompetent surveyor. Section 2 of the Official Surveys Act deals only with boundaries that are surveyed and run under the authority of the Government, and does not apply to a survey run at the

CROWN GRANT—*Continued.*

instance of the land owner, the notes of which are received by the proper officials in the Crown lands department. The chief commissioner of lands has no jurisdiction under the Land Act to determine a dispute concerning lands already Crown granted. SEIPPEL LUMBER COMPANY v. HERCHMER *et al.* - - - - - - - - - **436**

CROWN LANDS — Pre-emption of — Death of pre-emptor after pre-emption duties partially completed — Completed by brother who obtains Crown grant — Rights of second brother — Abandonment — Acquiescence. - - - - - **311**
See TRUSTS AND TRUSTEES.

DAMAGES—Measure of. - - - **565**
See COMPANY LAW. 2.

DECEIT—Action for, through fraudulent misrepresentation — Action fails when associated with illegal transaction. - - - - - - **532**
See LAND ACT.

DENTISTRY — *Unlawful practising — Work by unqualified assistant — Action by employer for services so rendered—Dentistry Act, R.S.B.C. 1911, Cap. 64, Secs. 59, 60, 63, 64, 70 and 71.*] In an action by a qualified dental surgeon for a balance due for professional services, when in fact, the work was performed by an unqualified assistant, whose remuneration under arrangement with his principal was a percentage of the price of the work he did:—*Held* (MARTIN, J.A. dissenting), that there was a violation of the Dentistry Act, and the plaintiff was not entitled to recover. *Held*, further, on the defendant's counterclaim, for the return of moneys paid on account of the services so rendered, that as the defendant was not, at the time of payment, aware that the plaintiff was violating the law, he should recover the amount so paid. Decision of LAMPMAN, Co. J. reversed. BURGESS v. ZIMMERLI. - - - - - - **428**

ESTOPPEL—Laches. - - - **100**
See CONVEYANCE OF LAND.

EVIDENCE — *At inquest—Admissibility of—Cross-examination, in absence of depositions.*] A prisoner charged with murder, who testifies on his own behalf, may be cross-examined on his alleged testimony at the inquest in the absence of the original depositions. REX v. MULVIHILL. - **197**

EVIDENCE—*Continued.*

2.——*Indecent assault upon child—Complaint made by child to grandmother—Admissibility — Inducement — Lapse of time.* - - - - - - - - - - **22**
See CRIMINAL LAW.

3.——*Survey—Line dividing two lots of land—Testimony of surveyors—Not admissible when survey made by articled clerks—Mistrial.*] In an action to determine the boundary line between two lots, two surveyors were called as witnesses, neither of whom had personally surveyed the lots in question, but testified from the plans and field notes of surveys made by their articled clerks, who ran the lines. The trial judge, after having a view of the ground, decided in favour of the plaintiff. *Held,* on appeal, that the evidence of the two surveyors was improperly admitted, and there should be a new trial. ANTICKNAP v. SCOTT. - **81**

EXTRADITION — Trial on different charge—Want of evidence of extradition—Stated case. - - **193**
See CRIMINAL LAW. 7.

FIRE INSURANCE.
See under INSURANCE, FIRE.

FISHERIES AND BOUNDARIES CONVENTION, 1818. - **521**
See ADMIRALTY LAW.

FIXTURES—Goods purchased under an individual agreement for sale. **381**
See LANDLORD AND TENANT.

HUSBAND AND WIFE—*Dissolution of marriage—Alimony—Covenant not to make further claims against husband—Removal of bar—Charge on real estate not producing income.*] A wife, while living with her husband, agreed in writing, in consideration of $1,000 in cash, and the transfer of certain furniture, to forego all claims against him as a husband. Subsequently, having discovered that he was guilty of bigamy and adultery, she secured a decree *nisi* for the dissolution of her marriage, and then filed a petition for maintenance. *Held,* that the husband's conduct precluded him from setting up the agreement as a bar; and further that as the agreement contained no covenant not to apply for alimony if legal grounds therefor arise, she is entitled to alimony. *Held,* further, that when the husband, although possessed of valuable real estate, swears that he has no income from that, or any other source, the Court may, nevertheless, make an order for permanent alimony in favour of the wife, and will secure payment

HUSBAND AND WIFE—*Continued.*

of it by charging the husband's property. MILLER v. MILLER. - - - - **563**

2.——*Oral agreement to become jointly interested in land with right of survivorship—Carried out by conveyance to wife, who makes will in favour of husband.* **495**
See TRUSTS AND TRUSTEES. 2.

INFANT — Conveyance by — Action to recover after majority—Knowledge of illegality of conveyance—Concealment of age — Refusal of Court's assistance to gain benefits through fraudulent acts. - **240**
See SALE OF LAND. 3.

INSURANCE, FIRE—*Variations of statutory conditions—Forest fires—Unoccupied buildings—"Just and reasonable"—R.S.B.C. 1911, Cap. 114, Secs. 5, 6 and 7—Practice—Raising new point on appeal—Printing of variations — Conspicuous type — Different coloured ink.*] The defendant Company insured the plaintiffs' buildings situated about the entrance to a mine in heavily-wooded country. The policy contained two conditions varying the statutory conditions, whereby they would not be responsible, first, for loss occurring through forest fires and, secondly, for loss if the insured premises should become vacant or unoccupied. The property was partially destroyed by a forest fire. In an action for the recovery of amount of the loss it was held by the trial judge that the variations from the statutory conditions inserted in the policy were just and reasonable, but that upon the evidence there was no justification for an allegation by the defendant Company that the policy was cancelled under the authority of an employee of the plaintiffs prior to the fire. The action was dismissed without costs. *Held,* on appeal (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the plaintiffs' appeal should be dismissed. *Held,* further (IRVING and GALLIHER, JJ.A. dissenting), that the defendant Company's cross-appeal be dismissed. *Per* MACDONALD, C.J.A.: A condition as to vacancy must be judged with reference to the facts of the particular case under consideration. In the circumstances here the variation was a just and reasonable one, and the defendant Company was entitled to succeed upon the defence that the buildings insured were vacant when destroyed. *Per* IRVING, J.A.: The defendant Company is entitled to succeed on the defence that the loss was caused by a forest fire, which, by one of the varied conditions, was excepted from the risk, and it was just

INSURANCE, FIRE—*Continued.*

and reasonable that it should be. PRATT *et al.* v. CONNECTICUT FIRE INSURANCE COMPANY. - - - - - - - **449**

INSURANCE, MARINE — *Constructive total loss—Repairs undertaken by insurer—Sufficiency of—Insured must shew insufficiency of repairs before refusing to accept.*] In determining whether a damaged ship can be treated as a constructive total loss, the test is, would a prudent uninsured owner repair her, having regard to all the surrounding circumstances? Where an insurance company, having insured a boat, is entitled to take possession for repairing, and has substantially made the repairs within a reasonable time, the insured is not justified in refusing to accept the boat, without having objected to the sufficiency of the repairs and pointed out the deficiencies, so that the same may be made good. CUNNINGHAM v. ST. PAUL FIRE AND MARINE INSURANCE COMPANY. - - - - - **33**

JURY—Change in statute governing selection of jury — Jury summoned before trial—Trial after. - **193**
See CRIMINAL LAW. 7.

2.——*Trial by—Application for.* - **46**
See PRACTICE. 5.

LACHES. - - - - - - - - **100**
See CONVEYANCE OF LAND.

2.——*Acquiescence.* - - - **311**
See TRUSTS AND TRUSTEES.

LAND ACT—*Scheme by one person to purchase more sections than one—Use of names of pretended purchasers—Fraudulent evasion of Act—Deceit—Action for, through fraudulent misrepresentation of staker—Action fails when associated with illegal transaction.*] The plaintiff employed B. to stake a large quantity of Crown lands under the Land Act, for purchase from the Provincial Government. B., in turn, employed the defendant and, acting under the plaintiff's instructions, supplied the defendant with the names of certain persons as ostensible purchasers. It was the intention of the plaintiff to purchase the lands from the government and sell for agricultural purposes; of this the defendant was aware. The defendant staked certain sections of land, using the names given by the plaintiff, and later reported to the plaintiff that they were good bottom lands which would cost from $20 to $30 to clear, and were first-class agricultural and fruit lands. These statements turned out to be untrue. On the strength of the report the plaintiff

LAND ACT—*Continued.*

paid the defendant for his services, became the purchaser of the property staked, using the names that were supplied the defendant for staking to satisfy the Act, paid the Government a large amount on account of the purchase price of the property, and also expended money in advertising and surveys. The plaintiff, discovering that the defendant's representations were untrue, brought this action for damages. *Held*, that the transaction was a fraud on the Land Act, and no right of action against the staker for fraudulent misrepresentation in his report can spring therefrom; nor will the Court assist in the recovery of moneys paid to the staker in such circumstances. *Brownlee* v. *McIntosh* (1913), 48 S.C.R. 588, followed. CLARK v. SWAN. - - - **532**

LANDLORD AND TENANT—*Sale of goods — Fixtures — Goods purchased under an individual agreement for sale—Sale of Goods Act, R.S.B.C. 1911, Cap. 203, Secs. 28 and 29.*] Grill and kitchen fixtures were supplied and installed by their owners in a hotel, under a conditional sale agreement with the lessee of the hotel, whereby they were to remain the property of the owner until they were paid for. The agreement was not filed under the Sale of Goods Act. The landlord allowed the lessee to attach the said fixtures to the premises upon the understanding that the articles were to remain attached to the freehold and become the landlord's property. *Held*, in an action by the vendors for the recovery of the articles that they had no title to them as against the landlord. Decision of MURPHY, J. affirmed. HAYWARD & DODDS v. LIM BANG *et al.* - - - - - **381**

LAND REGISTRY ACT — *Subdivision of parcel of land — Refusal of municipal council to approve of plan—Agreement for sale of lot within parcel — Plan of lot attached—Application to register as charge —Duty of registrar — R.S.B.C. 1911, Cap. 127, Secs. 29, 90, 92, 100; B.C. Stats. 1912, Cap. 15, Secs. 7, 19, 21 and 26.*] The owner of a parcel of land subdivided into lots and applied for the approval of the plan of the subdivision by the municipal council of the municipality in which it lay, pursuant to section 92 of the Land Registry Act. The council refused to approve of the subdivision, as sufficient allowance had not been made for streets, and the registrar of titles then refused to accept the plan. Subsequently the petitioners, who purchased lots within the subdivision, applied to register as charges their agreements of sale, in

LAND REGISTRY ACT—*Continued.*

which each lot was described by metes and bounds, and attached thereto was a plan of the lot. The lots were identical with certain lots shewn on the plan of the subdivision that had been rejected, but no reference was made to the rejected plan in the description of the lots. The registrar refused to register the agreements as charges affecting the original parcel. *Held*, on appeal (GALLIHER and MCPHILLIPS, JJ.A. dissenting), that the applications for registration were wrongfully rejected. *Per* MACDONALD, C.J.A.: The sole duty of the registrar is to satisfy himself, after examination of the title deeds or other evidence produced, that a *prima-facie* title has been made out, and then register the charges. The registrar is given no mandate to inquire beyond the question of the sufficiency of the title. *Per* GALLIHER and MCPHILLIPS, JJ.A.: It is the duty of the Court to read the statutes as a whole and together. It is plain what the intention of the Legislature is, and what is attempted here is a clear evasion of the statute law. Judgment of MORRISON, J. reversed. *In re* RYAN AND THE DISTRICT REGISTRAR OF TITLES. - - - - - - - - - **165**

LOCAL IMPROVEMENTS—Lowering grade of highway—Adjoining property injuriously affected — Compensation — Allowance for local improvement rate refused. **121**
See MUNICIPAL LAW. 4.

LORD'S DAY ACT. - - - **539**
See CONSTITUTIONAL LAW. 2.

MARINE INSURANCE.
See under INSURANCE, MARINE.

MASTER AND SERVANT—*Action at common law and under Employers' Liability Act — Injury to servant — Defective condition of machinery—Damages recoverable under Employers' Liability Act—Verdict for excessive amount—New trial—Jury —Questions to.*] Plaintiff, a fire-boss in a mine, was directed by the mine foreman to start a pumping-engine, in doing which he was injured. In an action claiming damages, at common law or under the Employers' Liability Act, the jury brought in a general verdict for $7,500. *Held* (IRVING, J.A. dissenting), that the plaintiff having failed to make out a case at common law, the appeal from the verdict should be allowed and a new trial ordered. Remarks as to questions put to juries to answer. SHEARER v. CANADIAN COLLIERIES (DUNSMUIR), LIMITED. - - - - - - **277**

MASTER AND SERVANT—*Continued.*

2.——*Death of servant — Workmen's Compensation Act, R.S.B.C. 1911, Cap. 244 — Employed as fan-tender — Coal mine — Snowslide—Abnormal conditions—Accident arising out of employment — Findings of arbitrator—Stated case.*] While deceased, employed as a fan-tender for a colliery company, was attending to his duties within a shelter house built on the side of a gulch under a cliff for the protection of the workmen, a snowslide coming down in an unusual direction and under abnormal conditions, smashed in the shelter house and killed him. *Held*, on appeal (MARTIN, J.A. dissenting), that in the situation in which he was placed in the course of his employment, he was exposed to risk not common to others in the locality not so employed, and the applicants were entitled to compensation. The fact that there were abnormal conditions of weather does not affect the liability. Judgment of MURPHY, J. affirmed. CULSHAW v. CROW'S NEST COAL COMPANY. - - - - - - **13**

3.——*Workman—Injury to—Liability at common law only — Defective system — Common employment.*] The plaintiff was injured by falling from false work on a wall in course of construction owing to the tipping of a loose plank on which he stood. The defendant was in the course of constructing a concrete refuse burner in connection with its mill, which was to be about 20 feet in diameter, with a concrete wall six feet thick. Skeleton walls made of planks were erected six feet apart for the reception of the cement, and false work was erected outside with an inclined runway up which the cement was carried in wheelbarrows. At the top of the inclined runway 2 x 4 scantling was placed across the top of the skeleton walls, upon which rested two two-inch planks close together, forming a runway on which the wheelbarrows were run from the inclined runway and from which the cement was dumped into the centre. These planks were moved from time to time as the wall grew in height. At first the planks were nailed to the scantling, but on their last removal, when about six feet from the ground, they were not nailed. At the time of the accident the plaintiff was standing on the planks, tamping the cement and cleaning out the wheelbarrows. *Held*, on appeal (IRVING and MCPHILLIPS, JJ.A. dissenting), that the employer was not liable at common law, as the runway did not form part of a system, being something which the employer must of necessity have left to the care of the

MASTER AND SERVANT—*Continued.*

foreman. *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326, followed. Decision of MACDONALD, J. reversed. LISET v. THE BRITISH CANADIAN LUMBER CORPORATION, LIMITED. - - - - - - - - **480**

MECHANIC'S LIEN — *Deliveries of material under contract — Subsequent deliveries under subsidiary contract — Enforcement of lien—Unity of contract—Date of filing.*] F. contracted to supply the hardware for the construction of the defendant Company's building in accordance with the drawings and specifications of the architect at a contract price, subject to additions or deductions for alterations made by the architect's written order during the work. F. delivered the last of the material for which the fixed price in the contract was payable on the 2nd of November, 1912, but before such delivery a verbal arrangement was entered into between the parties for the purchase and delivery of additional goods in January, the last of which was delivered on the 15th of January, 1913. On the 14th of February following a lien was filed, to secure not only the amount due for the material supplied under the verbal arrangement, but for the balance due under the original contract. *Held, per* MARTIN and MCPHILLIPS, JJ.A.: That the whole transaction was so linked together as to constitute a single cause of action, and the lien was filed in time for the balance due for the supply of materials in respect of the whole bill. *Per* MACDONALD, C.J.A. and GALLIHER, J.A.: That the later deliveries of material were not embraced in the contract, which was not a continuing one, and the time for registration of the claim for lien in respect of the goods actually delivered under the contract ran from the last delivery made thereunder. The Court being equally divided, the appeal was dismissed. J. A. FLETT, LIMITED v. WORLD BUILDING, LIMITED, AND JOHN COUGHLAN & SONS. - - - - - **73**

2.——*Mechanics' Lien Act, R.S.B.C. 1911, Cap. 154, Secs. 25 and 26—Cancellation of liens thereunder without security—Jurisdiction of judge.*] A judge has no jurisdiction upon a summary application under sections 25 and 26 of the Mechanics' Lien Act to order the cancellation of a lien without the giving of security, because he thinks the lien is unsustainable. The giving of security is a condition precedent to the making of the order. WALSH v. MASON. STEVENS v. MASON. - - - - - - - - - **48**

MINES AND MINERALS — *Water records—Mining lease—Renewal of—Failure to renew water record—Acts of omission by gold commissioner — Provisions of Placer Mining and Mineral Acts.*] The plaintiff Company was the holder of a mining lease acquired in 1890, and after two renewals was finally renewed in 1905 for 20 years; a water record was issued for 1,000 inches of water for use on the mining ground so leased in 1897, which was to continue in force for five years; this record was never renewed. The defendant claimed the water by virtue of a water record obtained by him subsequent to the issue of the water record of 1897. In a dispute as to the right of user to the water in question:—*Held*, on appeal (MCPHILLIPS, J.A. dissenting), that the plaintiff's lease did not in itself carry the right to water, and the water record of 1897, not having been renewed, expired at the end of the period for which it was originally issued. When renewal of the mining lease was applied for by one of the plaintiff's predecessors in title in 1900, he asked the gold commissioner to renew the water record, to which the gold commissioner replied that it was not necessary. Section 14 of the Placer Mining Act (R.S.B.C. 1897, Cap. 135) declares that "a free miner shall have all the rights and privileges granted to free miners by the Mineral Act, 1896," and section 53 of that Act provides that "no free miner shall suffer from any acts of omission or commission or delays on the part of any Government official." *Held* (MCPHILLIPS, J.A. dissenting), that the failure of the gold commissioner to direct them how to proceed could not be regarded as an act of omission within the meaning of section 53 of the Mineral Act. Decision of HUNTER, C.J.B.C. affirmed. LIGHTNING CREEK MINING COMPANY v. HOPP. - - - - - - - **586**

MISREPRESENTATION — As to ownership of land—Fiduciary relationship—Secret profits. **127**
See PRINCIPAL AND AGENT.

MORTGAGE—*Deed absolute in form—Contemporaneous agreement — Evidence of surrounding circumstances — Redemption—Costs.*] A. assigned to B. by instrument in writing under seal, absolute in form, all his interest in certain mineral claims. By contemporaneous memorandum they further agreed that B. might dispose of the property if $500 due him from A. was not paid within 30 days. In an action by A.'s heirs for a declaration that the instruments were given as security by way of mortgage:

MORTGAGE—*Continued.*

—*Held*, on appeal, affirming the judgment of MORRISON, J., that the assignment and the contemporaneous agreement must be read together, from which it is clear that the transaction was one of mortgage and not of sale. CLEARY *et al.* v. AITKEN *et al.* - - - - - - - - - **369**

MUNICIPAL BY-LAW — Validity of. - - - - - - - **539**
See CONSTITUTIONAL LAW. 2.

MUNICIPAL LAW—*Arbitration—Compensation for injury by municipal improvements—Failure of Municipality to appoint arbitrator—Application of Arbitration Act —Unregistered title when damage occurred —Right to compensation—Municipal Act, R.S.B.C. 1911, Cap. 170, Sec. 394—Arbitration Act, R.S.B.C. 1911, Cap. 11, Sec. 8—Land Registry Act, R.S.B.C. 1911, Cap. 127, Sec. 104.*] Where, in an arbitration to assess damages under section 394 of the Municipal Act, a municipality fails to appoint an arbitrator, the provisions of the Arbitration Act in respect thereto apply, IRVING and MARTIN, JJ.A. dissenting. Where a purchaser merely holds property under an agreement for sale when damaged through the lowering of the grade of the street on which it fronts, but completes his title by a registered conveyance before commencing arbitration proceedings under the Municipal Act to recover compensation for the damages so caused, he is not thereby debarred by section 104 of the Land Registry Act. *In re* JACKSON AND THE CORPORATION OF NORTH VANCOUVER. - - - - **147**

2.——*Arbitration — Municipal corporation—Street improvements—Damages from —Compensation — Default of municipality in appointing arbitrator—Appointment by Court—R.S.B.C. 1911, Cap. 170, Sec. 394; Cap. 11, Sec. 8.*] Where, upon a Corporation failing to appoint an arbitrator to ascertain the compensation payable for damages arising from municipal improvements, under section 394 of the Municipal Act, an order is made by a judge, under section 8 of the Arbitration Act, upon the application of a party suffering damage, in terms ordering the Corporation to appoint an arbitrator:—*Held*, on appeal, that the order was made without jurisdiction, and should be set aside. *In re* NORTH VANCOUVER AND LOUTET. - - - - **157**

3.——*Building by-law — Permit of engineer—Application therefor and refusal — Erection of building without permit —*

MUNICIPAL LAW—*Continued.*

Right of action for injunction to remove building—Necessity for joining Attorney-General as party.] A municipal corporation applied for a mandatory injunction requiring the defendant to pull down a wooden building he had erected on his land within the municipality without a certificate from the corporation's engineer and contrary to the provisions of the building by-law. The defendant had previously applied for and been refused a certificate on the ground that a wooden building would be a nuisance and increased the danger of fire. *Held* (MCPHILLIPS, J.A. dissenting), that although a municipal corporation may bring an action for an injunction respecting its own property or where a statute gives it a special protection and breaches thereof are being committed; all actions in respect of public nuisances must be brought in the name of the Attorney-General. CORPORATION OF THE DISTRICT OF OAK BAY v. GARDNER. - - - - **391**

4.——*Local improvements — Lowering grade of highway — Adjoining property injuriously affected—Compensation—Allowance for local improvement rate refused.*] On appeal from the award of arbitrators on the assessment of compensation for damages owing to the grade of a city street in front of the claimant's property having been lowered in the course of work done by the Corporation under local improvement by-laws:—*Held*, that the arbitrators properly refused to include in damages an allowance equivalent to the rates charged against the property by said by-laws. *Re Macdonald and City of Toronto* (1912), 27 O.L.R. 179, followed. *In re* OKELL AND THE CORPORATION OF THE CITY OF VICTORIA. - **121**

MURDER—Joint trial of two accused—Refusal of separate trial—Admission of statement in writing made before trial of one accused—Not admissible as against the other—Failure of judge to caution jury—No substantial miscarriage — Criminal Code, Secs. 1017, Subsec. 3; and 1019. - - - - **50**
See CRIMINAL LAW. 4.

2.——*Stated case — Postponement of trial — Application for — Absence of witnesses—Question of law—Cross-examination of prisoner—Questions as to former offences — Admissibility of prisoner's evidence at inquest—Cross-examination on, in absence of depositions — Criminal Code, Sec. 1014.* - - - - - - - - - **197**
See CRIMINAL LAW. 5.

NEGLIGENCE—*Application for nonsuit —Contributory negligence—Legal evidence to go to jury.*] At about eight o'clock on the evening of the 8th of January, 1912, during a slight fall of snow, the plaintiff started across Main street (on which was a double track street-car line running north and south) from the south-west corner of Main and Dufferin streets in Vancouver. A team of horses, with waggon, coming out of Dufferin street, east, was to his left, crossing the tracks and turning north on the west side of Main street. Plaintiff crossed the west track and, on reaching the west rail of the east track, looked to his left, past the rear of the waggon as it cleared the track, and saw a car coming south on the east track, about 30 feet away. He stopped and turned, and on taking two or three steps back, was struck by a car going north on the west track and was knocked about 13 feet across the east track, sustaining a broken leg and other injuries. There was a conflict of evidence as to the speed at which the car that struck the plaintiff was going, ranging from six to 30 miles an hour, and the witnesses who saw the accident testified that they saw no car going south on the east track, as stated by the plaintiff. On the trial the jury disagreed, and the motion for judgment by way of nonsuit was dismissed. *Held*, on appeal (MCPHILLIPS, J.A. dissenting), affirming the trial judge, that there was evidence upon which the jury must pass, and there must be a retrial. MACKENZIE v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. - - - - - - **1**

2.——*Contractor erecting fire-escape—Foreman in charge of construction—Fall of floor—Negligence of foreman—Employers' Liability Act, R.S.B.C. 1911, Cap. 74, Sec. 3, Subsec. (3).*] The defendant had under construction the erection of a fire-escape on the wall of a theatre, his foreman superintending the construction. The plaintiff and a fellow-workman, F., were working on one of the floors or landings of the fire-escape, which consisted of an iron grating in two parts, supported at the ends by two bars of angle iron, the ends of which were imbedded in and supported by the east and west walls of the enclosure in which the fire-escape was constructed, one two inches wide touching the wall to the north for its full length, and the other three inches wide supporting the grating at its outside edge. Riveted to the outside of the latter were upright posts of angle iron of smaller size supporting and forming part of the railing guarding the outside edge of the platform.

NEGLIGENCE—*Continued.*

While these upright posts remained in place the grating was held secure. The foreman ordered the plaintiff and F. to drive out two rivets that held the upright post to the outside of the three-inch bar on the fifth floor, and put in their place two stove bolts. Upon F. driving out the rivets, the upright post being loose and no longer holding the grating in place, the grating slipped off the bar along the wall and fell with the two men to the floor below, injuring the plaintiff. In an action for damages under the Employers' Liability Act the jury brought in a verdict for the plaintiff. *Held*, on appeal (GALLIHER, J.A. dissenting), that the jury might reasonably conclude that the release of the upright post brought about the fall of the grating, and that there was, therefore, evidence upon which to find the defendant negligent through his foreman not seeing that the platform was properly secured. *Per* IRVING, J.A.: Buildings in the course of erection are "the works" of the person erecting them within the meaning of the Employers' Liability Act. MCGRAW v. HALL. - - **441**

3.——*Contributory negligence—Ultimate negligence — Street railway — Defective brakes — Responsibility of passenger for negligence of driver of waggon.*] Where, in an action under Lord Campbell's Act, a jury finds that the defendant was guilty of negligence and the deceased guilty of contributory negligence, but also finds that the defendant's motorman could have avoided the accident, notwithstanding the deceased's negligence, if the brake on the car had been in an effective condition, failure to provide a proper brake is "ultimate negligence" as distinguished from "original negligence," and the plaintiff was entitled to recover. (MACDONALD, C.J.A., and MCPHILLIPS, J.A. dissenting). *Per* MACDONALD, C.J.A., and MCPHILLIPS, J.A.: The term "ultimate negligence" is inapt unless it is confined to an act or omission subsequent in point of time to the negligence of the other party, and cannot cover the negligent omission of a railway company to supply proper brake equipment, anterior though continued right up to the time of collision. A person receiving a lift from a driver on a vehicle and sitting beside him is not so identified with the driver as to make the driver's negligence his negligence. *Per* IRVING, J.A.: If a jury finds a plaintiff guilty of negligence which contributed to the accident owing to his not taking extraordinary precautions, and

NEGLIGENCE—*Continued.*

later in their findings they distinguish between ordinary and extraordinary negligence, the finding is not one of contributory negligence. Judgment of MURPHY, J. reversed. LOACH v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. **177**

4.——*Statutory duty—Breach of—Blasting by persons without licence—Negligent act of fellow servant—Point Grey Blasting By-law, No. 4, 1912.*] By-law No. 4 (1912) of the Corporation of Point Grey provides that no person shall blast with dynamite, gunpowder, or other explosives within the limits of the municipality, unless there has been granted to him by the reeve or engineer thereof a permit so to do. Sundar Singh, a Hindu, while in the employ of the defendant Company, clearing their land within the said municipality, was killed by a stone shot from the blast of a tree stump, charged and set off by an employee of said Company. In the clearing of said land it was the custom to set off blasts at 12 o'clock, noon. About five minutes before 12 o'clock on the day of the accident, the deceased and a number of other Hindus working with him moved off to a spot about 1,000 feet from where the blast was about to be set off. They knew that the blast was about to go off and were facing it at the time. The man who charged and set off the blast had been so employed by the defendant Company for four or five years, and was a competent and proper person to perform the work, but he had not obtained the licence required under the by-law referred to. There was evidence that an unusually large charge of powder had been used in this particular case, as the stump was shattered into fragments. The learned trial judge dismissed an action for damages by the administrator of the estate of the said Sundar Singh, on behalf of his wife and children, holding that a breach of statutory duty does not entail liability in an action for negligence, unless it is the proximate cause of the accident. *Held*, on appeal, affirming the decision of MURPHY, J. (MCPHILLIPS, J.A. dissenting), that the plaintiff was not entitled to invoke the by-law so as to avoid the consequences of the negligent act of a fellow servant. There is no class which the by-law is particularly designed to benefit or protect, but simply the public at large, and the infringement of the general prohibition gives no cause of action. *Love* v. *Fairview* (1904), 10 B.C. 330, followed. THACKER SINGH v. CANADIAN PACIFIC RAILWAY COMPANY. **575**

OPTION—Renewal — Alternative agreement — Termination of option — Inference as to intention of parties. - - - - - - **341**
See VENDOR AND PURCHASER. 4.

PARTNERSHIP—*Agreement drawn up and signed—Evidence of actual intention of parties—Admissibility of—Finding of trial judge.*] The defendant S., desiring to buy out his partner B. in the stationery business in North Vancouver, received an advance from the defendant D. of $2,150 for that purpose, and the sale went through. A year later, the $2,150 being still owing, S. and D. signed a partnership agreement in duplicate, each retaining one. S. shewed his (according to his own evidence) to his banker, who was not called as a witness. Later D. indorsed notes from time to time to assist in carrying on the business. Eventually the business failed and D. claimed the $2,150 he had advanced as a creditor, although this amount had been treated in the partnership agreement as his contribution to the capital. Both defendants testified that the agreement was never made operative, but was made solely for the purpose of protecting D. for his advance. *Held* (MACDONALD, C.J.A. dissenting), that notwithstanding a partnership agreement having been drawn up and signed, the evidence shewed there was no intention that there should be a partnership. D., therefore, was not liable as a partner, and was entitled to claim as a creditor. Judgment of MCINNES, Co. J. affirmed. KELLY, DOUGLAS & COMPANY, LIMITED v. SAYLE *et al.* - - - - **93**

PLEADING — Defence of judgment against co-defendant. - - **514**
See BANK.

PRACTICE—*Notice of appeal — Style of cause headed "In the Court of Appeal"—Notice sufficient to give Court of Appeal jurisdiction to amend.*] On an application to the Court of Appeal to amend the notice of appeal regularly filed and served, but which was intituled "In the Court of Appeal":—*Held* (GALLIHER, J.A. *dubitante*), that the notice of appeal was sufficient to give the Court jurisdiction to deal with any defect in it. Notice amended on payment of costs incurred through error. *Hepburn* v. *Beattie* (1911), 16 B.C. 209, distinguished. WILSON v. HENDERSON *et al.* (No. 1). - - - - - - - **45**

2.——*Pleading — Defence of judgment against co-defendant — Application to set aside own judgment.* - - - - **514**
See BANK.

PRACTICE—*Continued.*

3.——*Raising new point on appeal—Printing of variations—Conspicuous type—Different coloured ink.*] Upon an application by the plaintiffs to amend the pleadings in order to raise the objection that the variations of statutory conditions were not printed in the policy in conspicuous type or with a different coloured ink, as required by the Fire Insurance Policy Act: —*Held* (MCPHILLIPS, J.A. dissenting), that the application must be refused as the objection had not been raised at the trial and was a question of fact which might be elucidated by oral evidence. PRATT *et al.* v. CONNECTICUT FIRE INSURANCE COMPANY. **449**

4.——*Stated case — Court of Appeal — Motion to amend — Disposition of — To be heard before stated case — Charge upon which prisoner was extradited — Evidence of.*] A motion to the Court of Appeal to amend a stated case must be disposed of before the hearing of the stated case. An objection to a conviction on a charge other than that upon which a prisoner is extradited cannot be entertained without evidence of what the charge was upon which the extradition was effected. REX v. MCNAMARA. (No. 1). - - - **175**

5.——*Trial by jury — Application for—Common law action—Prolonged examination of documents—Marginal rules 429 and 430—Schedule to affidavit for discovery—Not included in record on appeal—Effect of.*] The defendants applied for an order for a trial with a jury on the ground that the pleadings shewed a common law action. The plaintiffs relied upon their affidavit for discovery in answer, the schedule of documents setting forth 900 documents. The application was dismissed. On appeal, the schedule of documents was not included in the record. *Held*, that as it might appear from the schedule that the trial would involve a prolonged examination of documents, the Court cannot review the order in its absence. WILSON v. HENDERSON *et al.* (No. 2). - - - - - - - **46**

6.—*Writ of habeas corpus—Obtained by suppression of material facts—Application to reverse order for issue of—Grounds for reversal.*] Where an order is obtained *ex parte* for a writ of *habeas corpus*, granted through the suppression or omission of a material fact, it will, on application, be reversed. *Re* BHAGWAN SINGH. - **97**

PRINCIPAL AND AGENT — *Sale of land—Misrepresentation as to ownership—Fiduciary relationship—Secret profits.*] Z., a broker, purchased six acres of land in the name of W. at $500 an acre, later advising R. that he could purchase the property from W. at $750 an acre net. The two purchased the property jointly at that price, R. paying Z. $60 in addition for his services. Later they divided the property, each taking three acres, and R. then exchanged his three acres for a motor-car before it was disclosed to him that W. held the property for Z., when they made their joint purchase. On appeal from the judgment of LAMPMAN, Co. J. in an action for the recovery of secret profits made on the joint purchase:—*Held*, affirming the decision of LAMPMAN, Co. J. (MCPHILLIPS, J.A. dissenting), that the relationship of principal and agent was established and that the difference in the prices paid for the land in the two sales could be recovered by R. as secret profit. RICHES v. ZIMMERLI. **127**

2.——*Secret profit — Establishment of agency—Misstatement as to price of land fixed by owners.*] If an agent, employed to find the lowest price at which property can be purchased, induces his principal to pay a larger amount than the owners will accept, he is liable to the principal for the difference. The defendant was instructed to offer certain lots for sale by one of the two owners, who were brothers, the one who gave the instructions living near Vancouver and the other in England. The defendant then listed the lots with one A. H., who shortly afterwards offered them for sale to one C. H., who was acting for the plaintiffs. C. H. asked A. H. to cable the English owner for his lowest price. A. H. stated he would do so if a deposit were made. C. H. then gave A. H. a cheque for $25 as a deposit. Shortly afterwards A. H. saw the defendant, gave him the cheque and explained what had taken place. The defendant then saw the owner in Vancouver, the result of which was that he telegraphed his brother that he was offered $75 a foot for the property, and advised acceptance. The next day a reply accepting the offer was received. On the following day the defendant was introduced to C. H. (plaintiff's agent) and he told him he had received a telegram and that the owners wanted $90 per foot, at the same time giving him a receipt for the $25 deposit, which read: "*Re* your deposit of $25 on Lots . . . ., I have received a letter and cable regarding same and am able to

PRINCIPAL AND AGENT—*Continued.*

sell for $90 per foot," etc. In an action to recover secret profit, it was held by the trial judge that on the evidence he found as a fact that the defendant agreed to act as agent for the plaintiffs in ascertaining the lowest price at which the property could be bought, and the plaintiffs should recover. *Held*, on appeal (MACDONALD, C.J.A., and MARTIN, J.A. dissenting), that the appeal should be dismissed. *Hutchinson* v. *Fleming* (1908), 40 S.C.R. 134, followed. *Per* MACDONALD, C.J.A.: Where a person enters into an agreement with the owners to purchase land at a certain price, with the intention of selling to others who would give a higher price, but while negotiating he misstates to intending purchasers the price which the owners would take, he may be liable for fraud, but not as an agent for secret profits. FRY *et al.* v. YATES. - - - - - - - - **355**

REDEMPTION—Costs. - - - **369**
See MORTGAGE.

RETAINER — Conflict of evidence between solicitor and client. **241**
See SOLICITOR.

SALE OF GOODS—*Acceptance of first instalment—Cancellation of order for balance—Passing of property—Appropriation—Proper action for damages—Sale of Goods Act, R.S.B.C. 1911, Cap. 203, Sec. 26.*] A bookseller relying on an advertisement in a newspaper of a certain book, ordered 25 copies from a publisher. Upon receipt of twelve copies (for which the bookseller paid) he immediately cabled a cancellation of the balance of the order. The publisher had not sent the 13 remaining copies, nor had he appropriated them to the bookseller prior to the receipt of the cable, but he persisted in forwarding them, and the bookseller refused to accept them. In an action to recover the price of the books, judgment was given by the trial judge in favour of the plaintiff. *Held*, on appeal (reversing the decision of MCINNES, Co. J.), that the cancellation operated to prevent any appropriation by the publisher effective to pass the property in the books to the bookseller. *Held*, further, that an action for damages for breach of contract could not be maintained as no alternative claim to that effect had been made. SELLS, LIMITED v. THOMSON STATIONERY COMPANY, LIMITED LIABILITY. - - - - - - - - **400**

2.—*Fixtures—Goods purchased under an individual agreement for sale — Sale of*

SALE OF GOODS—*Continued.*

Goods Act, R.S.B.C. 1911, Cap. 203, Secs. 28 and 29. - - - - - - - - **381**
See LANDLORD AND TENANT.

SALE OF LAND—Agreement for—Payment by instalments—Purchaser's failure to complete payments—Abandonment by purchaser—Forfeiture of payments made. - **40**
See VENDOR AND PURCHASER.

2.——*Agreement for—Subsequent sale of land subject to agreement—Parol assignment of agreement for sale — Right of assignor to sue.* - - - - - - **500**
See VENDOR AND PURCHASER. 2.

3.——*Infant—Conveyance by—Action to recover after majority — Knowledge of illegality of conveyance — Concealment of age—Refusal of Court's assistance to gain benefits through fraudulent acts.*] The plaintiff, an infant, conveyed certain land to the defendant Law, who had no knowledge of her minority. She made an acknowledgment representing herself to be of full age, knowing that she was not, and was aware of the legal effect of a minor attempting to convey land. *Held*, that she could not be assisted in obtaining advantages based entirely on her own fraudulent act. GREGSON v. LAW AND BARRY. - **240**

4.——*Misrepresentation as to ownership — Fiduciary relationship — Secret profits.* **127**
See PRINCIPAL AND AGENT.

SECRET PROFIT — Establishment of agency—Misstatement as to price of land fixed by owners. - **355**
See PRINCIPAL AND AGENT. 2.

2.——*Fiduciary relationship.* - **127**
See PRINCIPAL AND AGENT.

SHARES—Subscription for — Allotment by Company — "Payment on call within 18 months after allotment." **114**
See COMPANY LAW. 5.

SHIPPING—Foreign fishing vessel within three-mile limit — Seizure outside limit. - - - - - - - **521**
See ADMIRALTY LAW.

2.——*Small fishing vessel — Seaman's wages.* - - - - - - - - - **529**
See ADMIRALTY LAW. 2.

SOLICITOR—*Retainer — Conflict of evidence between solicitor and client.*] On all

SOLICITOR—*Continued.*

questions as to the retainer of a solicitor, where there is no written retainer and there is a conflict of evidence as to the authority between the solicitor and the client without further circumstances, weight must be given to the denial of the party sought to be charged rather than to the affirmation of the solicitor. MACGILL & GRANT v. CHIN YOW YOU. - - - - - - - - **241**

STATED CASE—Change in statute governing selection of jury — Jury summoned before change — Trial after—Extradition — Trial on different charge—Want of evidence of extradition. - - - **193**
See CRIMINAL LAW. 7.

2.——*Motion to Court of Appeal to amend—Disposition of—To be heard before stated case.* - - - - - - - **175**
See PRACTICE. 4.

3.——*Postponement of trial — Application for.*] The exercise of judicial discretion by a judge in granting or refusing the postponement of a trial is not a "question of law" upon which a case may be reserved under section 1014 of the Criminal Code (MARTIN and MCPHILLIPS, JJ.A. dissenting). REX v. MULVIHILL. **197**

STATUTE, CONSTRUCTION OF—*Forest Act, B.C. Stats. 1912, Cap. 17, Secs. 100, 102—Restriction on export of lumber —Cedar blocks for manufacture of shingles — "Other sawn lumber" — Meaning of — Application of rule "ejusdem generis."*] Under section 100 of the Forest Act "all timber cut on certain areas shall be used in this Province or be manufactured in this Province into boards, deal, joists, lath, shingles, or other sawn lumber." The plaintiff Company manufactured in their mill cedar blocks for export to the United States, where they were made into shingles. The blocks were 16 and 24 inches long, consisting of a section of a tree or log sawn squarely at each end and also sawn longitudinally so as to present a number of even surfaces of varying widths, a small arc only of the original circumference of the log being in evidence. These blocks were seized by the officers of the Department of Lands in course of transit out of the Province in contravention of the Act. On appeal from the order of CLEMENT, J. dismissing the plaintiff's application for a writ of replevin:—*Held* (MARTIN, J.A. dissenting), that the *ejusdem generis* rule of construction should be applied in this case

STATUTE, CONSTRUCTION OF —*Continued.*

as the particular items, "boards, deal, joists, lath, shingles," fall within the class or category of "finished product." The term "finished product" is the category within which the general phrase "or other sawn lumber" must be confined. The cedar blocks, not being a "finished product," did not fall within the general phrase. The seizure, therefore, was justified. *Foss Lumber Co.* v. *The King* (1912), 47 S.C.R. 130, followed. Judgment of CLEMENT, J. affirmed. THE EXCELSIOR LUMBER COMPANY, LIMITED, v. ROSS *et al.* - - **289**

2.——*Land Registry Act, R.S.B.C. 1911, Cap. 127—Submission of title for registration—Bed of lakes or rivers—Powers of registrar to refuse registration—Rights of Crown—Costs—Crown Costs Act, R.S.B.C. 1911, Cap. 61, Sec. 2.*] Upon an application to register the title deeds to certain lands which included within its boundaries a portion of the bed of a river and of a lake, the registrar refused to register on the ground that the map and deeds lodged in support of the application required amendment to exclude the beds of lakes and rivers. *Held*, on appeal (MACDONALD, C.J.A. *dubitante*), that every certificate of title must be read as being issued subject to the reservations and limitations expressed in the original grant from the Crown, and a registrar has no authority to refuse to register a title unless the applicant amends his application so as to exclude the beds of the lake and river. *Per* IRVING, J.A.: Such a request is an usurpation of authority. Under the provisions of the Crown Costs Act the appeal was dismissed without costs. Judgment of MURPHY, J. affirmed. *In re* GARDINER AND DISTRICT REGISTRAR OF TITLES. - - - - **243**

STATUTE OF FRAUDS—Cannot be set up as a cloak to a fraud. - **495**
See TRUSTS AND TRUSTEES. 2.

STATUTES—29 Car. II., Cap. 7. **539**
See CONSTITUTIONAL LAW. 2.

30 & 31 Vict., Cap. 3. - - - - **539**
See CONSTITUTIONAL LAW. 2.

B.C. Stats. 1912, Cap. 15, Secs. 7, 19, 21 and 26. - - - - - - - **165**
See LAND REGISTRY ACT.

B.C. Stats. 1912, Cap. 17, Secs. 100, 102. **289**
See STATUTE, CONSTRUCTION OF.

STATUTES—*Continued.*

B.C. Stats. 1913, Cap. 34, Sec. 70. - **193**
See CRIMINAL LAW. 7.

Canadian Stats. 1913, Cap. 9, Sec. 88, Subsec. 7. - - - - - - - - **514**
See BANK.

Canadian Stats. 1913, Cap. 14, Sec. 1. **521**
See ADMIRALTY LAW.

Criminal Code, Secs. 292; 1003, Subsec. (2). - - - - - - - - - **22**
See CRIMINAL LAW.

Criminal Code, Secs. 671 and 711. - **493**
See CRIMINAL LAW. 6.

Criminal Code, Secs. 999, 1015, 1017. **261**
See CRIMINAL LAW. 3.

Criminal Code, Sec. 1003. - - - **109**
See CRIMINAL LAW. 2.

Criminal Code, Sec. 1014. - - - **197**
See CRIMINAL LAW. 5.

Criminal Code, Secs. 1017, Subsec. 3, and 1019. - - - - - - - - - **50**
See CRIMINAL LAW. 4.

R.L.B.C. 1871, No. 46. - - - - - **539**
See CONSTITUTIONAL LAW. 2.

R.S.B.C. 1911, Cap. 11, Secs. 6; 8, Subsec. (*e*). - - - - - - - - **87**
See ARBITRATION.

R.S.B.C. 1911, Cap. 11, Sec. 8. - - **147**
See MUNICIPAL LAW.

R.S.B.C. 1911, Cap. 11, Sec. 8. - - **157**
See MUNICIPAL LAW. 2.

R.S.B.C. 1911, Cap. 13, Secs. 3, 29, 42 and 64. - - - - - - - - - - **247**
See COMPANY LAW.

R.S.B.C. 1911, Cap. 36, Sec. 166. - **565**
See COMPANY LAW. 2.

R.S.B.C. 1911, Cap. 39, Secs. 30 (2), 33, 94, 95 and 101. - - - - - **114**
See COMPANY LAW. 5.

R.S.B.C. 1911, Cap. 61, Sec. 2. - - **243**
See STATUTE, CONSTRUCTION OF. 2.

R.S.B.C. 1911, Cap. 64, Secs. 59, 60, 63, 64, 70 and 71. - - - - - - **428**
See DENTISTRY.

R.S.B.C. 1911, Cap. 74, Sec. 3, Subsec. (3). **441**
See NEGLIGENCE. 2.

STATUTES—*Continued.*

R.S.B.C. 1911, Cap. 114, Secs. 5, 6 and 7. **449**
See INSURANCE, FIRE.

R.S.B.C. 1911, Cap. 121. - - - - **193**
See CRIMINAL LAW. 7.

R.S.B.C. 1911, Cap. 127, Secs. 29, 90, 92, 100. - - - - - - - - - **165**
See LAND REGISTRY ACT.

R.S.B.C. 1911, Cap. 127. - - - - **243**
See STATUTE, CONSTRUCTION OF. 2.

R.S.B.C. 1911, Cap. 127, Sec. 104. - **147**
See MUNICIPAL LAW.

R.S.B.C. 1911, Cap. 129. - - - - **436**
See CROWN GRANT.

R.S.B.C. 1911, Cap. 133, Sec. 2, Subsec. (25). - - - - - - - - - **500**
See VENDOR AND PURCHASER. 2.

R.S.B.C. 1911, Cap. 154, Secs. 25 and 26. **48**
See MECHANIC'S LIENS. 2.

R.S.B.C. 1911, Cap. 170, Sec. 53, Subsecs. (129) and (130). - - - - - **539**
See CONSTITUTIONAL LAW. 2.

R.S.B.C. 1911, Cap. 170, Sec. 394. - **147**
See MUNICIPAL LAW.

R.S.B.C. 1911, Cap. 170, Sec. 394. - **157**
See MUNICIPAL LAW. 2.

R.S.B.C. 1911, Cap. 194, Sec. 58. - **236**
See COSTS.

R.S.B.C. 1911, Cap. 203, Sec. 26. - **400**
See SALE OF GOODS.

R.S.B.C. 1911, Cap. 203, Secs. 28 and 29. **381**
See LANDLORD AND TENANT.

R.S.B.C. 1911, Cap. 217. - - - - **536**
See CONSTITUTIONAL LAW.

R.S.B.C. 1911, Cap. 220, Sec. 2. - **436**
See CROWN GRANT.

R.S.B.C. 1911, Cap. 244. - - - - **13**
See MASTER AND SERVANT. 2.

R.S.C. 1906, Cap. 47, Sec. 10. - - **521**
See ADMIRALTY LAW.

R.S.C. 1906, Cap. 145, Sec. 16. - - **109**
See CRIMINAL LAW. 2.

R.S.C. 1906, Cap. 145, Sec. 16, Subsec. (2). **22**
See CRIMINAL LAW.

SUBPOENA — Attorney-General as witness—Discretion of magistrate as to issue of. - - - - - **493**
See CRIMINAL LAW. 6.

SUCCESSION DUTY—Property within Province — Tax imposed not indirect taxation — R.S.B.C. 1911, Cap. 217. - - - - - - **536**
See CONSTITUTIONAL LAW.

SUNDAY TRADING—Validity of municipal by-law. - - - - - **539**
See CONSTITUTIONAL LAW. 2.

SURVEY—Line dividing two lots of land — Testimony of surveyors — Not admissible when survey made by articled clerks. - - - - - **81**
See EVIDENCE. 3.

TIMBER LANDS — Title — Payment of licence fees and making of surveys —Cutting of timber. - - **573**
See TRESPASS. 2.

TITLE—Timber lands—Payment of licence fees and making of surveys sufficient evidence of title to, as against a trespasser. - - **573**
See TRESPASS. 2.

TRESPASS — *Allowing decayed tree to stand within falling distance of neighbour's house — Fall of tree in storm — Injury to house.*] S. owned unimproved land adjoining R.'s house and lot, on which were a number of cedar trees in a state of semi-decay. R. warned S. of the dangerous condition of one of the trees, that was within falling distance of his house, S. replying that R. was at liberty to cut the tree down if he wished to do so. The tree fell on R.'s house during a high wind and damaged it. *Held* (reversing the judgment of MCINNES, Co. J.), that there was no cause of action. *Giles* v. *Walker* (1890), 24 Q.B.D. 656, followed. REED v. SMITH. - - - **139**

2.——*Timber lands—Title—Payment of licence fees and making of surveys—Cutting of timber.*] Acts of ownership, such as payment of licence fees and the making of surveys accepted by the government, are sufficient evidence of title to timber lands as against a trespasser. In the case of a wilful or negligent trespass and wrongful cutting of timber, the trespasser must pay the fair market price of the timber cut, less the cost of felling the trees and fitting them for removal. Where, owing to the trespass, there is an increase in the cost of logging the timber remaining on the trespassed area, such increased cost is recoverable from the trespasser. ADAMS POWELL RIVER COMPANY v. CANADIAN PUGET SOUND COMPANY. - - - - - - - **573**

TRIAL — *Postponement of — Application for—Absence of witnesses.*] On an application to grant a postponement of a trial on the ground of absence of witnesses, the Court must be satisfied by affidavit, firstly, that the persons are material witnesses, which must be sworn to positively and not merely on belief; secondly, that there has been no neglect in omitting to apply to them and endeavouring to procure their attendance; and, thirdly, that there is reasonable expectation of counsel being able to procure their attendance at the future date, if granted. REX v. MULVIHILL. **197**

TRUSTS AND TRUSTEES — *Crown lands—Pre-emption of—Death of pre-emptor after pre-emption duties partially completed—Completed by brother who obtains Crown grant—Rights of second brother—Abandonment — Laches — Acquiescence — Appeal books—Compilation of.*] One Cook pre-empted certain Crown lands in British Columbia and, after doing some work on the property, died in 1900, unmarried and intestate, leaving heirs his mother and two brothers. The older brother, the defendant, completed the pre-emption duties and wrote his mother and brother, asking them for quit-claim deeds, in order to facilitate his obtaining a Crown grant. The mother complied with the request, but the brother (the plaintiff) refused, and on the strength of the mother's quit-claim deed he succeeded in obtaining the Crown grant in his name in December, 1892. The mother died in 1900. In 1901 the plaintiff and defendant met, when, according to the defendant, he offered to transfer to the plaintiff his half interest in the property if he would pay his share of the expense incurred, which the plaintiff refused to do, and in this he was corroborated by his wife and another witness. The plaintiff, on the other hand, denied this and said he offered to pay his share of the expense if he would make up his account. In an action for a declaration that the plaintiff was entitled to a half interest in the property, it was held by the trial judge that the defendant took the fee from the Crown as trustee for the heirs, but that the plaintiff had abandoned his interest, and he dismissed the action. *Held*, on appeal, reversing the decision of CLEMENT, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that abandonment of a clear right cannot properly be inferred

TRUSTS AND TRUSTEES—*Continued.*

except upon very convincing evidence, and the evidence in this case fell far short of that, even giving the testimony of the defendant the greater credence. *Held*, further, that the plaintiff was not barred by laches, delay or acquiescence. *Prendergast* v. *Turton* (1843), 13 L.J., Ch. 268, distinguished. Remarks *per* IRVING, J.A. as to the compilation of appeal books. COOK v. COOK. - - - - - - - - **311**

2.——*Husband and wife—Oral agreement to become jointly interested in land with right of survivorship—Carried out by conveyance to wife, who makes will in favour of husband—New will revoking former and leaving half estate to daughter — Will inoperative as to trust estate—Statute of Frauds—Cannot be set up as a cloak to a fraud.*] The plaintiff, having acquired an interest in land, entered into an oral agreement with his wife whereby they were to become jointly interested in the land, with the right of survivorship. The arrangement was carried out by a conveyance to the wife, and a will made by her in the plaintiff's favour. Later the wife made a new will revoking the former will, and leaving half her property to the plaintiff and half to a daughter by a former marriage. *Held*, that the property was received by the wife subject to a trust in favour of the plaintiff, which continued up to the time of her death, whereupon the plaintiff became the sole owner. *Held*, further, that the interest of the wife having been acquired subject to a trust in favour of the plaintiff, the Statute of Frauds cannot be set up as a cloak to a fraud. BREITENSTEIN v. MUNSON *et al.* - - - - - - - **495**

VENDOR AND PURCHASER—*Agreement for sale of land—Payment by instalments — Purchaser's failure to complete payments — Abandonment by purchaser — Forfeiture of payments made.*] Where, a purchaser being in default, the vendor sues upon a covenant to pay the balance due under an agreement for the sale of land, and in the event of failure to pay, for cancellation of the agreement and forfeiture of the payments made, and it appears that the purchaser has abandoned the agreement, the Court will order cancellation of the agreement, and forfeiture of the payments made. THE VANCOUVER LAND AND IMPROVEMENT COMPANY, LIMITED v. PILLSBURY MILLING COMPANY, LIMITED. - - - **40**

2.——*Agreement for sale of land—Subsequent sale of land subject to agreement—*

VENDOR AND PURCHASER—*Cont'd.*

Parol assignment of agreement for sale—Right of assignor to sue—Assignment of legal chose in action — Laws Declaratory Act, R.S.B.C. 1911, Cap. 133, Sec. 2, Subsec. 25.] By instrument in writing B. agreed to sell land to S., who paid some cash and agreed to pay the balance in four equal instalments at intervals of six months. B. then sold the property to D., subject to the agreement. There was no written assignment to D. of the agreement, or of the moneys payable by S. under it; but there was evidence of a parol assignment of it; and in a conveyance of another lot from B. to D. it was recited that the agreement had been assigned to D. Upon the first instalment coming due under the agreement S. failed to pay, and D. sued S. for the amount so due in his own name. *Held*, on appeal (MCPHILLIPS, J.A. dissenting), that the assignment of the benefit of the covenant for payment in an agreement of sale must be in writing to enable the assignee to sue upon the covenant in his own name. *Per* MACDONALD, C.J.A.: Legal choses in action could have been recovered by suit in the name of the assignor. It is here that that law has been changed. The Laws Declaratory Act, R.S.B.C. 1911, Cap. 133, Sec. 2, Subsec. (25), gives the assignee of a legal chose in action who complies with its provisions the right to sue in his own name, but when a legal chose in action is assigned otherwise than in conformity to the Act, he must still sue in the name of his assignor. Decision of MCINNES, Co. J. reversed. DELL v. SAUNDERS. - - - - - **500**

3.——*Contract — Land-broker — Undertaking by, to make profit or take land—Enforcement of—Void for uncertainty.*] A real-estate agent in negotiating a sale of land to the plaintiffs on behalf of the owners, which sale was carried through, promised that he would "make them a profit of $30,000 within sixty days, or take the property himself." In an action to enforce the promise as an agreement:—*Held*, that the contract was indivisible; that it was too vague for the Court to enforce, and void for uncertainty. *Held*, further, that the action being for specific performance, the plaintiffs should have tendered an agreement or assignment for execution in order to put before the defendant the option to pay the $30,000 or take the property. *Semble*, there was consideration for the promise which amounted to an enforceable contract if nothing else stood in the way; and it did not concern an interest in land in such a way as not to be enforceable by

VENDOR AND PURCHASER—*Cont'd.*

reason of the Statute of Frauds. FLETCHER *et al.* v. HOLDEN. - - - - - - **567**

4.——*Option — Renewal — Alternative agreement — Termination of option—Inference as to intention of parties.*] Upon the payment of $6,000 on account of the purchase price, on the 2nd of September, 1910, B. obtained an exclusive option for 20 days to purchase A.'s mill and timber rights, A. agreeing that in the event of B.'s failure to make a sale, and in the event of one being concluded by himself, he would, in consideration of B.'s assistance and of the use of cruise reports obtained by B., refund him the $6,000. No sale was effected, and on October 5th the parties entered into a further agreement, B. paying A. $20,000 for a renewal of the option until November 22nd, or until B. declared that a deal he had under way with parties in London was off. Under a further clause it was agreed that in the event of the London sale being so declared off, if either party could sell for the price agreed upon, in the case of B. selling the $26,000 already paid would be applied on the purchase price, and in the case of A. selling, the $26,000 was to be refunded and considered as a loan. In order that the property could be offered for sale as a running concern, B. advanced A. three further sums upon the terms set out in the agreement of the 5th of October, namely: $5,000 on the 21st of November, $5,000 on the 9th of December, and $2,500 on the 24th of April, 1911. On June 11th, 1911, B. notified A. that the London negotiations were at an end. On June 19th, B. wrote A., proposing another disposition of the property, from which there was an intimation that he regarded the agreement of October 5th as still subsisting, and on July 3rd A. answered this letter and took no exception to that assumption. A. sold the property in December, 1912. In an action by B. for the return of the sums advanced A. as moneys loaned:—*Held*, that the contents of the letters of the 19th of June and the 3rd of July, 1911, shewed that, while the exclusive option to B. was at an end, yet the alternative arrangement set forth in the agreement of October 5th was recognized by the parties as still subsisting and was subsisting when A. sold the property. Judgment of GREGORY, J. reversed. NEBRASKA INVESTMENT COMPANY *et al.* v. MORESBY ISLAND LUMBER COMPANY, LIMITED. - - - - - - - - **341**

WATER RECORDS. - - - **586**
See MINES AND MINERALS.

WILL—*Conditional limitations—Executory interests — Supplying omitted words.*] The testator by his last will provided, *inter alia*, as follows: "I devise and bequeath all my real and personal property to my wife, Jane Taylor, as long as she remains unmarried. In the event of my said wife marrying at any time after my death, I devise and bequeath all my said real and personal property unto my daughter." *Held*, that as to the real estate these provisions constituted a conditional limitation, conferring on the wife a fee determinable on her marrying again, and as to the personal estate, these provisions conferred an absolute interest subject to an executory bequest in favour of the daughter, contingent on the wife's re-marriage. *In re* G. O. TAYLOR, DECEASED. - - - - - - - **447**

2.——*Subsequent codicil properly executed — Will referred to in codicil — Parol evidence admitted to identify will.*] Where a codicil was legally executed and the will (imperfectly attested) was identified by parol evidence to be the document referred to in the codicil as the last will of the testator, the will and codicil will be admitted to probate. *Allen* v. *Maddock* (1858), 11 Moore, P.C. 427; 117 R.R. 62, followed. LAFOND v. LAFOND. - - **287**

WITNESS—Attorney-General as. **493**
See CRIMINAL LAW. 6.

WORDS AND PHRASES—*"Carrying on business."* - - - - **565**
See COMPANY LAW. 2.

2.——*"Costs of the arbitration," taxation of.* - - - - - - **236**
See COSTS.

3.——*"Ejusdem generis"—Application of rule.* - - - - - - - **289**
See STATUTE, CONSTRUCTION OF.

4.——*"Just and reasonable."* - **449**
See INSURANCE, FIRE.

5.——*"Other sawn lumber"—Meaning of.* **289**
See STATUTE, CONSTRUCTION OF.

6.——*"Payment on call within 18 months after allotment."* - **114**
See COMPANY LAW. 5.