THE
BRITISH COLUMBIA REPORTS

BEING

REPORTS OF CASES

DETERMINED IN THE

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

WITH

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

AND

A DIGEST OF THE PRINCIPAL MATTERS

REPORTED UNDER THE AUTHORITY OF

THE LAW SOCIETY OF BRITISH COLUMBIA

BY

E. C. SENKLER, K. C.

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JUDGES

OF THE

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

During the period of this Volume.

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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

REX v. BAKER.
REX v. SOWASH.

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Criminal Law—Murder—Conviction—Application for traverse of trial—Material witness not available—Credibility of evidence of accused—Evidence in rebuttal in contradiction allowed in—Corroboration—Accomplices—Joint trial—Criminal Code, Secs. 263, 858 and 901.

Baker and Sowash were convicted of the murder of the captain of the boat Beryl G. containing a cargo of liquor for illegal transportation into the United States. They, with two accomplices, left Victoria for Sidney Island on a boat called the Denman II. for the purpose of taking from the Beryl G. her stock of liquor. According to the story of Sowash and one accomplice (one Strompkins) after seizure of the Beryl G. she was towed by the Denman II. to deep water where the bodies of the captain and his son were fastened together by a pair of handcuffs and attached to the bow anchor of the Beryl G. and thrown overboard. The evidence disclosed that Baker had bought a yachtman's cap with white top and surrounded with gold braid to give himself the appearance of a revenue officer, and this cap with two revolvers, handcuffs, and a flashlight he brought on board the Denman II. The case for the Crown as disclosed by the evidence was that in concert with the others, Baker attacked the crew of the Beryl G. under the pretence that they were revenue officers, he being disguised as aforesaid, and the party being equipped with and displaying arms and such articles as officers might be expected to use in dealing with those in possession

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of contraband liquor. In giving evidence on his own behalf Baker swore he had not used a revolver for a number of years, that he had never owned handcuffs and that he had never used a flashlight. Evidence was adduced by the Crown in rebuttal that Baker on one occasion recently and on another about three years previously, had employed similar equipment and the same ruse for the purpose of deceiving and disarming the opposition of rumrunners while he took possession of their stock of liquors.

Held, on appeal, affirming the decision of MORRISON, J. (MCPHILLIPS, J. A. dissenting), that the evidence was properly admitted as shewing the falsity of the appellant's statements on the direct issue, moreover the trial judge put it to the jury merely as evidence affecting the credibility of the appellant.

On the trial counsel for accused moved for a postponement of the trial on the ground that Morris (one of the four accomplices) was a necessary and material witness on their behalf, that Morris was under order for extradition to this country from the State of Washington, but had appealed from said order and the appeal was then pending. The motion was denied.

Held, on appeal (MCPHILLIPS, J.A. dissenting), that a postponement would involve a delay of the trial and in view of the general circumstances it could not be said that there was lack of material to support the denial of the motion.

Mulvihill v. *The King* (1914), 49 S.C.R. 587 followed.

A motion by counsel for Sowash for a separate trial was refused.

Held, on appeal (MCPHILLIPS, J.A. dissenting), that there was no warrant for saying that the learned judge below did not exercise a proper discretion on the material before him. Moreover accused was in no way prejudiced by a joint trial.

[Affirmed by Supreme Court of Canada.]

Statement

APPEAL by accused from the decision of MORRISON, J. of the 19th of June, 1925, and the verdict of a jury, on a charge of the murder of one William Gillis. The facts are that in the beginning of September, 1924, a rumrunner named Marinoff purchased 350 cases of Scotch whisky from one Willis who kept a stock of liquor in a boat-house near Barclay on the west coast of Vancouver Island. By arrangement the liquor was to be taken from the boat-house by one William Gillis who owned a boat called the Beryl G. (manned by Gillis and his son) to an anchorage in a cove at Sidney Island just west of the boundary line between Canada and the United States. On the 15th of September, 110 cases of whisky were taken from the Beryl G. by Marinoff's agents, they intending to come back later for the balance of the cargo, but two days later the Beryl G. was found

adrift, Gillis and his son had disappeared, the cargo was gone, and there was unmistakable evidence of a struggle having taken place on board. In the early part of September, four men named Baker, Sowash, Morris and Strompkins came to Victoria from Seattle and the evidence shews they had in view the searching of the west coast of Vancouver Island for liquor that was cached in different spots by rumrunners. Strompkins owned a boat called the Denman II. and on the 12th and 13th of September they travelled the west coast of the island without any result and returned to Victoria where they remained until the night of the 15th of September, when according to the evidence of Sowash and Strompkins, at Baker's instigation, the four of them went in the Denman II. to Sidney Island with the intention of hyjacking the Beryl G. This was carried out. Gillis and his son were killed and the liquor was taken and cached in various places on the islands between Vancouver Island and the mainland. According to the evidence of Strompkins and Sowash, Baker had a yachtsman's cap with white top and gold braid on the night of the 15th of September when they started for Sidney Island on the Denman II. He also had two revolvers, handcuffs and a flashlight. Baker denied that he had ever owned revolvers, handcuffs or a flashlight and in rebuttal the evidence of two men named Johnston and Marinoff was allowed in to shew that on previous occasions each of them had been held up in the same manner by Baker pretending he was a revenue officer and on both occasions revolvers, handcuffs and flashlights were used. When the trial took place Morris was held in custody in the State of Washington, pending extradition proceedings, and the defence applied for a postponement of the trial in order to obtain his evidence which was refused. Sowash also applied for a separate trial which was refused.

Statement

The appeal was argued at Vancouver on the 6th and 7th of October, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Lowe, for appellant Baker: There was a joint charge against Baker and Sowash. As to the Sowash confession in the nature of a document there was failure to direct the jury that this could only be used as evidence against Sowash and not against Baker:

Argument

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see *Rex* v. *Murray & Mahoney* (*No. 3*) (1917), 11 Alta. L.R. 502; English & Empire Digest, Vol. 14, pp. 298 to 301; *Rex* v. *Twigg* (1919), 14 Cr. App. R. 71. Calling attention to an omission after the summing up is not sufficient: see *Rex* v. *Willett* (1922), 16 Cr. App. R. 146. The learned judge in his charge treated as proved facts which were not proved and appeared to remove from the jury the right to find on essential facts: see *Rex* v. *Beeby* (1911), 6 Cr. App. R. 138; *Rex* v. *West* (1910), 4 Cr. App. R. 179; Bowen-Rowlands on Criminal Proceedings on Indictment and Information, 2nd Ed., 256; *Rex* v. *De Marco* (1906), 7 O.W.R. 387; 17 Can. C.C. 497; *Rex* v. *Hislop* (1925), 1 W.W.R. 887; *Rex* v. *Swityk* (1925), 1 D.L.R. 1015 at p. 1017; *Rex* v. *Dutchak* (1924), 4 D.L.R. 973. On the examination of witnesses as to irrelevant matters see *Rex v. Mulvihill* (1914), 19 B.C. 197; *Rex* v. *Davison* (1808), 31 St. Tri. 99 at pp. 187 and 217; *Spenceley qui tam, &c.* v. *De Willott* (1806), 7 East 108; *Rex* v. *Morrison* (1923), 33 B.C. 244. On the fairness of the charge see *Lucas* v. *Ministerial Union* (1916), 23 B.C. 257; *Morton* v. *Vancouver General Hospital* (1923), 31 B.C. 546; *Rex* v. *Hurd* (1913), 6 Alta. L.R. 112; *Rex* v. *Varey* (1924), 18 Cr. App. R. 122; *Rex* v. *Phillips, ib.* 115; *Rex* v. *Hayton* (1925), *ib.* 169; *Rex* v. *Wong On and Wong Gow* (1904), 10 B.C. 555. You cannot give evidence of another crime: see *Rex* v. *Ball* (1911), A.C. 47 at p. 71; *Rex* v. *Mulvihill, supra,* 197 at p. 213; 43 S.C.R. 587. On the question of a postponement see *Rex* v. *Palmer* (1834), 6 Car. & P. 652. Further on the charge see *Rex* v. *Beauchamp* (1909), 73 J.P. 223; *Rex* v. *Swityk, supra.* There was error in the charge as to accepting the evidence of an accomplice: see *Rex* v. *Betchel* (1912), 4 Alta. L.R. 402; *Rex* v. *McInulty* (1914), 19 B.C. 109. That corroboration is required see *Ledingham* v. *Skinner* (1915), 21 B.C. 41; *Rex* v. *Jagat Singh, ib.* 545; *Rex* v. *Warren* (1909), 2 Cr. App. R. 194; *Rex* v. *Baskerville* (1916), 2 K.B. 658. Whether a witness tells the truth is for the jury to decide: see *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1155 at p. 1201. There has been substantial wrong: see *Rex* v. *Chin Chong* (1921), 29 B.C. 527; *Rex* v. *Tyman and Carson*

(1923), 17 Sask. L.R. 38; *Allen* v. *The King* (1911), 44 S.C.R. 331; *Rex* v. *Biggin* (1919), 89 L.J., K.B. 90; *Rex* v. *Deal* (1923), 32 B.C. 279; *Rex* v. *Elsie Simmons, ib.* 455.

Johnson, K.C., for the Crown: There are only two points that need be referred to, first as to the rebuttal evidence of Johnston and Marinoff that Baker had recently used revolvers and handcuffs. My submission is that this was properly admitted to shew the falsity of Baker's statement that he had not used a revolver or handcuffs for years; further, it was referred to by the trial judge merely as evidence affecting the credibility of accused. Secondly, as to the denial of the motion to postpone the trial in order to obtain the evidence of one Morris, an alleged accomplice who was under order for extradition from Washington State. The Crown offered to assist in procuring Morris's evidence on commission but this was refused by accused. In the circumstances the motion was properly refused.

Argument

Lowe, replied.

Cur. adv. vult.

20th October, 1925.

MACDONALD, C.J.A.: Counsel for the appellant moved the Court for leave to appeal from the denial of the trial judge of a postponement of the trial. In my opinion, it would be idle to grant such leave, since, even if it were granted, we could not interfere with the discretion exercised. The evidence submitted to him was to the effect that one Morris, an alleged accomplice of the appellant, was a necessary and material witness on the appellant's behalf. Morris was then under order for extradition to this country but had appealed against that order which appeal was then still pending. The Crown had offered to facilitate and assist the appellant in procuring the evidence of Morris on commission but this offer was not accepted. Postponement would also involve a delay of the trial and in view of these several circumstances I think it cannot be said that there was lack of material to support the denial of the motion. The case I think falls within *Mulvihill* v. *The King* (1914), 49 S.C.R. 587. The motion should therefore be refused.

MACDONALD, C.J.A.

As regards the appeal on questions of law only, the only

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ground which I think worthy of consideration is that relating to the admission of the evidence of Johnston and Marinoff in rebuttal. I had some slight doubt about its admissibility during the argument but upon further consideration I am convinced that there was no error in this regard. The appellant gave evidence on his own behalf and in cross-examination stated that he had never used a revolver for a number of years past; that he had never owned handcuffs and that he had never used a flashlight. All these instruments were said to have been used by him in the commission of the alleged murder. In rebuttal of these statements Johnston and Marinoff were called to contradict him. Johnston deposed that in August, 1924, the appellant, representing himself as an officer of the law, held him up using a revolver, handcuffs, and a flashlight. Marinoff said he was held up by appellant and others in 1921 in a similar manner and on similar pretences and that revolvers, handcuffs and a flashlight were used on that occasion. The prisoner's counsel contended that the evidence of these two witnesses was evidence of the bad character of his client, but I think, on the contrary, that it was evidence going to the credibility of his client. It was properly admitted as shewing the falsity of the appellant's statements upon the direct issue. If the appellant's statements were true then he could not have been convicted having regard to the Crown's theory of how the crime was committed. Moreover, the learned judge put it to the jury merely as evidence affecting the credibility of the appellant.

I therefore think that the appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A.: This is an appeal from the conviction of the appellant at the Victoria Assizes in June, 1925, for the murder of William J. Gillis on the 15th of September, 1924.

Several grounds in support of the appeal have been argued and though I have given due consideration to all of them I think it is not necessary to discuss in detail more than the following, *viz.*:

First: as to the refusal to postpone the trial: in the light of our decision in *Rex* v. *Mulvihill* (1916), 19 B.C. 197, affirmed by the Supreme Court of Canada 49 S.C.R. 587, it is only in the "most extraordinary circumstances" there specified that we

would be justified in interfering with the direction of the trial judge when materials exist for its exercise, as they unquestionably do here, and so I am of opinion that on the facts herein, no case for interference has been made out; I refer particularly to the language of Mr. Justice Anglin, at p. 592.

Second: as to the admission as Exhibit 1 of the Crown's notice to the accused's counsel of its intention to call certain witnesses to prove certain facts therein set out, which notice was later given with the other exhibits to the jury to take into their room in considering their verdict, thereby to a certain extent at least giving said notice and its contents an evidentiary character. It is conceded, as it must have been by the Crown counsel before us that this was a mistake in procedure by inadvertence, but it is submitted that "no substantial wrong or miscarriage of justice has actually occurred" thereby (Criminal Code, Sec. 1014(2)) because all the material evidence mentioned in the notice was in fact given, in substance, by the said witnesses. To ascertain if this is the case I have carefully examined the evidence and find it to be so, and therefore I am of opinion that this objection, which otherwise would have been a weighty one, cannot prevail.

MARTIN, J.A.

Third: as to the adequacy of the direction to the jury respecting the application of Sowash's confession, prison statement and testimony to himself alone (he being jointly indicted and tried with Baker), I have reached the conclusion, not without hesitation, that the instruction was sufficient in law though not as satisfactory as it should have been and therefore as it did not amount to "actual misdirection" the objection falls—*Rex* v. *Syers* (1910), 4 Cr. App. R. 42-3.

Fourth: as to the rebuttal evidence: That depends upon the question as to whether or no the statements of Baker sought to be contradicted form part of the *res gestæ,* and in my opinion the contradictions complained of were upon facts which, in the circumstances, were relevant to the issue and therefore were properly put in evidence—the subject is well discussed in Taylor on Evidence, 11th Ed., Vol. I., p. 401 *et seq.,* and Vol. II., 985 *et seq.,* and the authorities there cited.

Fifth: As to the meaning of reasonable doubt and non-direc-

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tion as to the benefit of the doubt: this subject has lately been considered by this Court in *Rex* v. *Payette* (1925), 35 B.C. 81, and I am of opinion that the instruction was sufficient.

As to the remaining grounds, though they have received my careful consideration, as befits the solemn occasion, all that I feel called upon to say is that they either are insubstantial or of such light substance as to make it impossible for me to hold that any "substantial wrong or miscarriage of justice has actually occurred," and I see no ground for granting the motion to appeal on the question of fact going to the weight of evidence but I would grant the motions for leave to appeal on such questions of mixed law and fact as may be necessary to determine.

MARTIN, J.A.

The appeal therefore should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A. would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The prisoners Baker and Sowash, were charged with the killing of one William J. Gillis and were found guilty of murder, being tried jointly. A motion was made for a postponement of the trial upon the ground that one Morris, who was present at all material times, was a necessary witness for the defence, he (Morris) was then being held for extradition in the State of Washington, but was, at the time of the trial, appealing from the order for extradition to British Columbia, since which time his appeal has been denied and he has now been for sometime in gaol in British Columbia and is soon, in fact today (20th October) to be put on trial for the same murder, *i.e.*, the killing of William J. Gillis. The Crown opposed the motion and the application was denied by the learned trial judge, and in my opinion, with great respect to the learned trial judge, wrongly denied. The proceedings at the trial would indicate that the denial of the motion for postponement was very summarily disposed of and again, with great respect to the learned trial judge, there was an absence of the exercise of what, upon the facts, may be said to be a proper judicial discretion. In this connection I would refer to what Lord Buckmaster said in *Lew* v. *Wing Lee* (1925), 3 D.L.R. 1009 at p. 1011:

"It is perfectly true that when it is said, as it was in *Watt v. Watt* (1905), A.C. 115, that the right to a new trial is a right which is based upon discretion, it none the less follows that the discretion being judicial must be based on sound principles and cannot be arbitrarily exercised; but if the exercise of the discretion without control or limitation may produce what appears to be a manifest injustice, it is well within the power of the Court in exercising such a right to take steps to prevent that injustice arising."

Grave injustice was worked in this case by the refusal of the postponement, as Morris was shewn to be a material witness for the defence, it being sworn to that he would prove that Baker was not at the scene of the murder.

A further injustice to the accused was the leave given by the Crown to the sale of the boat Denman II., and to its structural alteration before the trial, the Denman II. was the boat of Strompkins, being the boat upon which Strompkins was and from which he says he saw the happenings on the Beryl G. at the time of the murder it being alleged by the defence that owing to the structural condition, Strompkins could not see the happenings on the Beryl G. which he recounts in his evidence. This was the working of irreparable wrong to the accused.

A further, and most terrible wrong and injustice, was worked against the accused—a substantial wrong of the most startling and glaring character, especially in a capital case—in that the notice of the Crown counsel advising of the intention to adduce new evidence at the trial, setting the evidence out in precise detail was made an exhibit and went before the jury, being handed to them and in their hands when they retired to consider their verdict. I venture to say that never in the annals of criminal trials is it recorded that anything of the like ever occurred; having occurred it is ground sufficient in itself to warrant the granting of a new trial.

There was a complete absence of material admitting of the learned trial judge arriving at a proper exercise of judicial discretion relative to the application for postponement of trial as everything pointed to the early opportunity for the production of the witness at no later date than six months, *i.e.*, the trial could proceed at the Fall rather than the Spring Assize. The evidence shews that the Crown opposing the application for the postponement and succeeding in obtaining a denial of the

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motion deliberately, it would appear, elicited evidence illegal in its nature of statements made by Morris implicating the accused. One signal illustration of this is to be found in the examination of the witness Strompkins, an accomplice in the crime who gave evidence for the Crown being given as stated at this Bar by the learned counsel for the Crown, immunity from prosecution for the murder. The piece of evidence I have reference to reads as follows, being questions put to Strompkins by counsel for the Crown being in examination in chief:

"Well, did you have any conversation with Morris? Not with Morris not then.

"Later on before you got to Anacortes? Before Morris—that was quite a while before when the time that Baker and Sowash was killing the man and tying him and one thing and another Morris was getting in my boat, just in front of the door and turned to me and said: 'The cold blooded murderers.'"

It was not shewn that this was said in the hearing of Baker or Sowash and unquestionably it was not, and upon this point of the introduction of illegal evidence, I would refer to what is said in Archbold's Criminal Practice, 26th Ed., 349:

MCPHILLIPS, J.A.

"Caution is necessary as to the evidence adduced for the prosecution, because in criminal cases, if any evidence not legally admissible against the prisoner is left to the jury, and they find him guilty, the Court of Criminal Appeal may feel constrained to quash the conviction, notwithstanding that there was other evidence before the jury properly admitted and sufficient in itself to warrant conviction. See *R. v. Dyson* (1908), 2 K.B. 454; 77 L.J., K.B. 813; *R.* v. *Stoddart* [(1909)], 73 J.P. 348; 3 Cr. App. R. 217; *R.* v. *Fisher* (1909), 79 L.J., K.B. 187; (1910), 1 K.B. 149; *R.* v. *Norton* (1910), 2 K.B. 496; 79 L.J., K.B. 756; *R.* v. *Westfall* [(1912)], 76 J.P. 335, 107 L.T. 463; and other cases cited *ante*. p. 335."

And p. 335:

"*Wrongful admission of evidence.*—Where it is established that evidence has been wrongfully admitted the Court will quash the conviction unless it holds that the evidence so admitted cannot reasonably be said to have affected the minds of the jury in arriving at their verdict, and that they would have arrived at the same verdict if the evidence had not been admitted. In considering this question the nature of the evidence so admitted and the direction with regard to it in the summing-up are the most material matters."

Here, the learned judge said nothing in his summing up at all, about this being illegal evidence—it went to the jury without caution of any nature or kind. That there was substantial wrong there can be no question. Then in charging the jury the learned trial judge evidently had this evidence in mind of what

Morris had told Strompkins, *i.e.*, "The cold-blooded murderers." The jury would so interpret the judge's language when he said to the jury: "and that is where you have to eliminate all these extraneous feelings, sentiment either for or against them, and deal with the matter in a cold-blooded way." This language would lead the jury to believe that he had in mind the evidence given by Strompkins—"the cold-blooded murderers," and that Baker and Sowash were to receive no consideration at the hands of the jury, that is, they also were to be treated "in a cold-blooded way," indicating that the learned judge placed reliance upon this illegal evidence and in this way recalled it to the recollection of the jury and that the jury should proceed upon this illegal evidence given by Strompkins of what Morris said to him against the accused. It is manifest that this prejudiced the jury.

It is to be remembered in this connection and throughout, that the evidence upon which the condemned men were convicted was the evidence of accomplices. The conviction of murder had in this case was obtained upon the evidence solely of accomplices and when it is considered that there is the absence of the *corpus delicti* it is plain that it was a case for the greatest care to be exercised to ensure a fair trial, and that no substantial wrong would be occasioned by any of the proceedings had. Now, as the evidence was that of accomplices, was the judge right in his summing up in the very scant way he called attention to this vital matter? This is said with the greatest respect to the learned trial judge who, no doubt, felt he did full justice in the reference made by him to this point, and I must admit that the subject-matter of the caution that should be given has been none too clearly defined. In a very recent case in England before the Court of Criminal Appeal, *Rex* v. *Beebe* (1925), 41 T.L.R. 635, the head-note reads:

"Where the evidence against a prisoner is the uncorroborated evidence of an accomplice the judge must warn the jury that, while they may convict on such evidence, it is always, not generally, dangerous to do so. It is wrong for the judge to tell the jury that if they are quite certain in such a case that the accomplice is telling the truth they ought to act on it."

Now, in the present case, the learned trial judge said:

"So even in a case of this kind, a verdict of conviction based solely on the uncorroborated evidence of an accomplice has been held to be good."

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With great respect, this was a plain direction as a matter of law to the jury that they might and would be justified in bringing in a verdict of murder against the accused upon the evidence in this case, which direction, in my opinion, was erroneous in law. The Lord Chief Justice (Lord Hewart), in the *Beebe* case, at pp. 636-7 said, referring to the controlling cases:

"The first case is *Reg.* v. *Stubbs* (*supra*), in which Chief Justice Jervis said: 'It is not a rule of law that an accomplice must be confirmed in order to render a conviction valid; and it is the duty of the judge to tell the jury that they may, if they please, act on the unconfirmed testimony of an accomplice. It is a rule of practice, and that only, and it is usual in practice for the judge to advise the jury not to convict on the testimony of an accomplice alone, and juries generally attend to the direction of the judge and require confirmation.' I read that passage not least because Baron Parke was a member of that Court, and added these words: 'During the time that I have been upon the Bench, now more than a quarter of a century'—so that carries us back to the year 1830 at least—'I have uniformly laid down the rule of practice as it has been stated by the Lord Chief Justice. I have told the jury that it was competent for them to find a prisoner guilty upon the unsupported testimony of an accomplice; but that great caution should be exercised, and I have advised them—and juries have acted on that advice—not to find a prisoner guilty on such testimony unless it was confirmed.' Similar language is to be found in *Meunier's* case (*supra*) and that law is compendiously recited in the short passage in the judgment in *Baskerville's* case (*supra*) that I have already read.

MCPHILLIPS, J.A.

"Now what does that judgment say? A clear distinction is drawn, although it is drawn in very few words and without any elaboration or explanation, between three things; one is telling the jury that it is within their legal province to convict upon such unconfirmed evidence; the second is—and this is a rule of universal application in such cases, not a rule to be neglected in some cases and observed in others, but a rule of general application—the duty of the judge to warn the jury of the danger of convicting a person on the uncorrborated testimony of an accomplice or accomplices; the third is, that the learned judge in the exercise of his discretion may advise them not to convict upon such evidence. One reads that passage side by side with the passages referred to, where it appears that, so far as Baron Parke was concerned, he always advised the jury in such circumstances not to find a person guilty. But, however that may be, there is a distinction drawn between the three different things which the jury are to be told—that it is within their legal province to convict; that in all cases it is dangerous to convict; and they may be advised not to convict. It is quite clear when one looks at that enumeration of the various courses, that nowhere is to be found directly or indirectly any reference to a case in which it may be the duty of the learned judge to advise the jury in such a case that they ought to convict. What happened here? First of all, has the warning itself been clearly and sufficiently given?

The important words are 'So far as that matter is concerned, I tell you that it is generally dangerous to convict on the evidence of an accomplice.' With great respect to the learned judge, that is not the warning referred to. That warning may well convey to the minds of the jury that, although as a rule it is dangerous to convict on the evidence of an accomplice, that rule is by no means of universal application, and that there may be cases in which it is quite safe to convict upon the evidence of an accomplice without corroboration, and, by implication, that this case is one of such cases. And then one finds that passage followed by this passage: 'If you are quite certain that that girl is telling the truth and nothing but the truth so that you are satisfied in your heart and conscience although it is uncorroborated, you ought to act upon it.' Those words are not only not a warning of the danger of so acting, and not only are they not a refraining from advising the jury not to act, but they are quite clearly an affirmative and express direction to the jury that in that event they ought so to act. In the opinion of this Court that direction is not such a direction as should, according to the law laid down in *Baskerville's* case (*supra*), be given. It may very well have led the jury to think that upon the particular facts of this case the general warning had no real application, or might be disregarded.

"In those circumstances as this case is argued, as it must be argued, upon the footing that here there was no corroboration at all, we think that the doubts entertained by the learned judge about the adequacy of his direction were well founded, and this appeal therefore ought to succeed, and this conviction ought to be quashed. The appeal is allowed."

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Here we have no caution whatever given by the learned judge to the jury that while they might convict on the uncorroborated evidence of the accomplices that it is always dangerous to do so. On the contrary, in this case the jury were told, as before quoted, "so even in a case of this kind a verdict of conviction based solely on the uncorroborated evidence of an accomplice has been held good." That amounted unquestionably to a direction to the jury to convict upon the evidence in the present case. This direction, in my opinion, was clearly contrary to the governing law upon the point which has been so clearly brought out by the judgment of the Lord Chief Justice in the *Beebe* case when delivering the judgment of the Court of Criminal Appeal; therefore upon this point alone a plain miscarriage took place at the trial and substantial wrong was occasioned to the accused. The leading case in the Supreme Court of Canada, upon the question of substantial wrong or miscarriage is *Rex* v. *Allen* (1911), 44 S.C.R. 331. The head-note reads as follows:

"By section 1019 of the Criminal Code it is provided that 'no conviction

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shall be set aside or any new trial directed, although it appears that some evidence was improperly admitted or rejected or, that something not according to law was done at the trial, . . . unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial.'

"*Held*, reversing the judgment appealed from (16 B.C. 9), Davies and Idington, JJ. dissenting, that where evidence has been improperly admitted or something not according to law has been done at the trial which may have operated prejudicially to the accused upon a material issue, although it has not been and cannot be shewn that it did, in fact, so operate, and although the evidence which was properly admitted at the trial warranted the conviction, the Court of Appeal may order a new trial."

The Chief Justice of Canada, then Sir Chas. Fitzpatrick, at p. 341, said:

"On the whole I am of opinion that the appeal must be allowed, the conviction quashed and a new trial directed, on the ground that important evidence, which, in the circumstances, was inadmissible, was put in by the Crown and this evidence may have influenced the verdict of the jury and caused the accused substantial wrong, and that is the opinion of the majority."

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Here there was not only the introduction of illegal evidence, but the essential evidence to establish the crime was the uncorroborated evidence alone of accomplices in the crime, and the learned judge stated to the jury (although he just before, it is true, said: "I am cautioning you that it would not be safe for you to convict on the evidence of an accomplice unless it is corroborated in some material respect") in the present case as before quoted, "so even in a case of this kind" (implying and meaning the evidence adduced in the case) "a verdict of conviction based solely on the uncorroborated evidence of an accomplice has been held good." This was equivalent to telling the jury that upon the evidence, such as it was in this case, without corroboration, they would be justified in convicting the accused.

Now it must be assumed that the Crown intended to introduce this evidence, *i.e.*, the statement said to have been made by Morris to Strompkins, and nevertheless strenuously objected to the motion for the postponement. I do not propose to in detail refer to the many points of evidence that could be referred to which still further accentuated the necessity in the interests of justice for the postponement of the trial. Why the necessity for such undue haste? There was nothing advanced by the

Crown to shew that there would be any miscarriage of justice—the accused men were asking for the postponement. They were in gaol and there was the almost absolute certainty that Morris would be extradited and at the time the order for his extradition had been granted. It was not suggested even that there was any fear that the order would not be confirmed by the Appellate Court. Why such haste? The accused men were to be tried for murder, with the risk to them of capital punishment. It would perhaps be unfitting for me to further enlarge upon this episode which clearly, in my opinion, worked substantial wrong to the accused men. If the refusal of postponement of trial was wrong, which I am unhesitatingly of the view it was, that really requires the allowance of this appeal as substantial wrong was occasioned the accused at the trial. I do not, however, rest upon this alone as entitling the granting of a new trial. The learned counsel for the Crown at this Bar stated that the Crown did not really press the point at the trial that the condemned men actually murdered William J. Gillis as charged, but that they were engaged in a common purpose; that was the theft of the liquor on the Beryl G. and that it was within the law such a common purpose; that if the killing of William J. Gillis resulted in the course of the unlawful venture, that Baker and Sowash being participators in the unlawful common purpose were guilty of murder and were rightly convicted. Now in this connection care must be taken to examine the facts in all their detail relative to the inception of the undertaking. This is clear, that the search for liquor by Baker and Sowash and other associates, was with the approval and assent of the Crown, the British Columbia police and Dominion customs officials at Victoria giving them information of the likely places where liquor would be found, which liquor was subject to forfeiture by the Crown as being liquor illegally brought into the Province without being passed through the customs and further, so far as the Provincial law was concerned, was being sold in British Columbia contrary to law. The learned counsel for the Crown at this Bar did not dispute this situation at all but said the connection of the Crown with the condemned men ended with the West Coast expedition, *i.e.*, the search made upon the West Coast of Van-

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couver Island the points for search being indicated to Baker by the Crown officials. Now was this extenuating factor laid before the jury by the learned judge? Not at all. Further, with great respect, the effect of the learned judge's charge was such as to withdraw this matter wholly from the jury as notwithstanding the overwhelming evidence appearing in the appeal book substantiating this position the learned judge charged the jury that from the inception of things, even in Seattle, the common purpose was settled upon to steal liquor with the likely consequences the destruction of lives in the doing of it. I may further say, not only were the Canadian authorities acting with the condemned men in an attempt to ferret out the perpetrators of the alleged breaches of the law of Canada and the United States but a police officer of the State of Washington was also acting in the matter and giving information to the condemned men and both authorities, Canadian and American, were profiting by and accepting the services of the condemned men and it would not appear that either Government had engaged to pay them for their services, services which meant a great expenditure of time and money. Therefore, was it at all unreasonable that the understanding was that Baker and Sowash were to receive their remuneration by being allowed to take any liquor that might be found? There would be the right of forfeiture by both Governments as with responsible officers of both Governments, *i.e.*, Canadian and American acting and approving in the search it was not at all unreasonable for Baker and Sowash to assume that they would be entitled to pay themselves by taking any liquor found, no other payment was agreed upon. Certainly, whatever Baker may have known to the contrary, Sowash was advised by Baker who was in personal contact with the officers of both Governments that they were to be entitled to the liquor. The case for the Crown as presented at this Bar was that the connection of the Crown with Baker and Sowash in some way ended on the 15th of September, on the night of which the Beryl G. was boarded and the murder committed, and the liquor taken—it could only be then that upon this day the common purpose was formed. I fail to see how this was accomplished—that is what brought about the severance of the connection.

That it was decided to stage the taking of the liquor by seeming force arranged with Gillis senior, the man afterwards murdered, so as to over-awe and silence the son Gillis junior, might well have been with the reasonably delegated authority of the accused men from the Crown as the whole intent of the Canadian and American authorities was to obtain the liquor and prevent its illegal sale and entry into the United States, in truth, to bring about its complete loss to the owners thereof so as to discourage the illegal traffic and practices which appeared to be almost impossible of being prevented save by the exercise of the greatest ingenuity. Could it be said that, in view of all these circumstances that Baker and Sowash were acting outside an authority that they might rightly assume? They had been left apparently to act upon their own initiative when coming in contact with what might be called contraband or illegal stores of liquor. However this may be viewed, it at least was the right of the condemned men to have these facts presented to the jury with a proper instruction thereon, but this was not done; nowhere in the charge are these facts placed before the jury and thereby a grave and substantial wrong was occasioned the condemned men. Further, the killing of William J. Gillis may not have been in the carrying out of any agreed upon common and unlawful purpose, viewed as I have suggested, but the killing may have suddenly resulted from or by reason of circumstances arising at the time such as William J. Gillis changing his mind. This would, if not justifiable homicide, might well be manslaughter, not murder. The non-direction upon this essential feature of the evidence cannot be considered other than a grave miscarriage of justice and substantial wrong was occasioned the accused and a mistrial was had. There is the further substantial wrong that was occasioned the condemned man Sowash, in that when charged with the murder of William J. Gillis evidence was given that he was guilty of the murder of the son Gillis junior. This was prejudice of the gravest kind, and substantial wrong was thereby worked against Sowash. There is the further point Sowash was under the direction and control of Baker, a mere employee and even if it could be said that Sowash should have known at Cadboro Bay on the 15th of September that Baker

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was about to embark upon a criminal adventure Sowash was in such a position that his life was in danger and if there had been any attempt upon his part to withdraw at that juncture his life might well have been taken. The introduction of this evidence, as to the killing of Gillis junior by Sowash was wholly unwarranted. If the Crown desired to introduce this evidence in the trial of Sowash, then it was a proper case for Sowash being given a separate trial and upon this ground alone Sowash is entitled to a new trial.

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I would therefore upon the whole appeal, quash the convictions as against both of the condemned men Baker and Sowash and would direct that new trials be had.

MACDONALD, J.A.: We were asked for leave to appeal from the refusal of the trial judge to postpone the trial.

It was urged that the accused was entitled to a postponement to enable him to secure the attendance of a witness Morris then confined in the Seattle county gaol. Morris, at the time, was contesting extradition proceedings launched by the Provincial authorities to bring him to this jurisdiction to stand trial for the same crime charged against the accused. The Crown expressed willingness before the trial, when a postponement was requested, to agree to an order without delay to take his evidence in Seattle. This was not acceptable to counsel for the accused. Naturally, he would prefer his personal attendance. Where, however, the learned trial judge, on sufficient material, exercised a judicial discretion, it should not be interfered with by an Appellate Court. Because I feel satisfied that discretion should not be questioned I would refuse leave to appeal on this ground.

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It was further objected that the evidence of Johnston and Marinoff, who deposed that on a previous occasion they were held up by the accused, and that a revolver, flashlight and handcuffs were used in the operation, was not admissible in rebuttal after the accused denied in cross-examination that he ever had any such articles in his possession, at all events for some years. Similar weapons and appliances were used by the accused in committing the crime charged against him. That was the

method resorted to in committing the crime. The Crown relied upon circumstantial evidence implicating the accused and it became an issue in the case to prove the use by the accused of these weapons and instruments. It was, therefore, not a collateral matter. When the accused stated he never, for a period *ante*-dating the incident referred to by these two witnesses, had such articles in his possession, he challenged one of the elements in the Crown's case and it was open to the Crown, after laying a proper foundation, to prove that these instruments were used on a former occasion. They were means by which it was hoped to impress the party attacked that the accused was an official of the Government, armed as police officials usually are with a revolver, handcuffs and flashlight, and thus by a ruse overcome resistance. It was open to the Crown to meet the denial of the accused with evidence shewing that similar methods were employed to overcome resistance under somewhat similar circumstances on another occasion. If, for example, a crime was committed by means of a poisoned arrow or by some special contrivance, it would be permissible to shew, upon the accused denying that he ever used such contrivances, that he had on other occasions, used them for a similar purpose. I think the trial judge was justified in admitting this evidence and in calling it to the attention of the jury for consideration on the question of the truthfulness or otherwise of the defence of the accused. In any event, I would find that no substantial wrong or injustice occurred by reason of its admission.

MACDONALD, J.A.

On the question of alleged misdirection: alleged failure to fairly place before the jury the defence of the accused, distinct and apart from the defence of Sowash, and as to properly instructing the jury in reference to the evidence of accomplices, I am satisfied, after careful consideration of the charge and the evidence, that these objections are not well founded.

I would dismiss the appeal.

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Statement

The appeal was argued at Vancouver on the 7th, 8th and 9th of October, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

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Argument

R. O. D. Harvey, for appellant: That counsel for the prisoner did not call the judge's attention to an important omission from the charge makes no difference: see *Reg.* v. *Theriault* (1894), 2 Can. C.C. 444. There is no common purpose shewn here: see *Rex* v. *Dinnick* (1909), 3 Cr. App. R. 77. The judge must put the defence to the jury no matter how weak it is: see *Rex* v. *Deal* (1923), 32 B.C. 279. He did not charge the jury properly on the question of common purpose: see *Rex* v. *Rice* (1902), 5 Can. C.C. 509; 4 O.L.R. 223; *Regina* v. *Luck* (1862), 3 F. & F. 483 at p. 488; *Reg.* v. *Tyler* (1838), 8 Car. & P. 616; *Rex* v. *Hyder* (1917), 29 Can. C.C. 172; *Rex* v. *Baugh* (1917), 28 Can. C.C. 146. As to the mere presence see *Mohun's Case* (1692), Holt, K.B. 479; 90 E.R. 1164; *Reg.* v. *Curtley* (1868), 27 U.C.Q.B. 613; *Reg.* v. *Graham* (1898), 2 Can. C.C. 388; *Rex* v. *Gallagher* (1924), 4 D.L.R. 1059; *Rex* v. *Pariseault* (1917), 28 Can. C.C. 112; *Reg.* v. *Chasson* (1876), 16 N.B.R. 546; *Rex* v. *Collison* (1831), 4 Car. & P. 565; Strompkins's evidence of killing the boy should not have been allowed in: see *Rex* v. *Paul* (1912), 19 Can. C.C. 339. When admitted the judge should have warned the jury: see *Rex* v. *Labrie* (1919), 34 Can. C.C. 407; *Rex* v. *Doyle* (1916), 26 Can. C.C. 197; 28 D.L.R. 649; *Graves* v. *The King* (*No. 4*) (1913), 21 Can. C.C. 44 at p. 53; *Rex* v. *Hopper* (1915), 11 Cr. App. R. 136; *Rex* v. *Blackson* (1837), 8 Car. & P. 43; *Rex* v. *Rice* (1902), 4 O.L.R. 223 at pp. 234-5; *Rex* v. *Finch* (1916), 25 Cox, C.C. 537 at pp. 538-9; *Rex* v. *Steele* (1923), 33 B.C. 197; *Rex* v. *Iman Din* (1910), 15 B.C. 476. As to the corroboration required see *Rex* v. *Baskerville* (1916), 2 K.B. 658; *Rex* v. *Tate* (1908), 2 K.B. 680; 1 Cr. App. R. 39; *Reg.* v. *Stubbs* (1855), 7 Cox, C.C. 48 at p. 49; *Rex* v. *Ross* (1924), 18 Cr. App. R. 141.

Johnson, K.C., for the Crown: In addition to what I have already submitted in the Baker case the only question is the refusal of the learned trial judge to grant a separate trial to Sowash. The learned trial judge has used his discretion in the matter and there is nothing to shew that accused was in any way prejudiced by a joint trial.

Harvey, replied.

Cur. adv. vult

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MACDONALD, C.J.A.: There was a motion for leave to appeal on questions involving fact of this case also. I have given my reasons for refusing leave on a motion for postponement in *Rex* v. *Baker,* and need not repeat them here. This appellant however, moves also for leave to appeal from the order of the learned judge refusing him a separate trial. That was an order within the discretion of the trial judge. There is no warrant for saying that he did not exercise a proper discretion on the material before him. Whatever warrant there was for separate trials, and I do not say there was any, was in respect of Baker, not of this appellant, who was in no way prejudiced by the joint trial.

With respect to the appeal upon questions of law only, I have no hesitation in saying that the grounds thereof are without substantial merit. The statements of the appellant, coupled with the other evidence in the case, were ample to sustain the conviction. It was contended that the learned judge had not sufficiently placed the evidence in the appellant's favour before the jury and that there was misdirection as well, but reading the charge as a whole, I think the jury were correctly and sufficiently instructed. The appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A.: This is an appeal from the conviction of the appellant at the Victoria Assizes in June, 1925, for the murder of William J. Gillis on the 15th of September, 1924.

This appellant was jointly indicted and convicted with Owen Baker, as set out in my reasons for judgment in that case, and it is not necessary to add much to said reasons. The principal additional grounds of appeal advanced herein are the following:

First: That the appellant's defence was not put to the jury. I am unable to take this view of the result of his confession, prison statement and testimony, because to my mind whatever may have been his original belief and intention as to the nature of the occupation or adventure in British Columbian waters that he embarked upon, it is clear on his own shewing that he later deliberately engaged in the separate and distinct criminal enterprise of plundering the cargo of liquor from the vessel Beryl G. and sharing in the proceeds thereof, and to that end

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acted in concert with Baker in the unlawful prosecution of their common purpose—Sec. 69—in the course of which William Gillis was murdered, and also his son, but no one has been charged with the latter offence: I am satisfied that no valid objection exists to the way in which his defence was put to the jury.

Second: As to the absence of warning respecting the testimony of Strompkins as being that of an accomplice of Sowash as well as of Baker. Doubtless the charge is deficient in this respect but the complete answer to the defect is that upon the accused's own confession, statement and testimony as aforesaid there is abundant evidence upon which the jury could justly have convicted him, wholly apart from Strompkins's evidence and therefore "no substantial wrong or miscarriage of justice has actually occurred."

Third: As to the objection that the evidence of the killing of the son of Gillis by Sowash should not have been admitted, the answer is that it was, in the most unusual circumstances, part of the *res gestæ* it being the duty of the Crown to inform the jury fully and exactly, if possible, how the body of the murdered father was disposed of and as it happened that it had been taken up from below, tied to the dead body of his son lying on the deck (he was killed shortly after his father upon the same vessel while the cargo was being removed or immediately thereafter) and both weighted together to an anchor and thrown overboard after being ripped up to prevent subsequent floating) it was impossible to avoid reference to the disposition of bodies so joined together after death.

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Fourth: As to the refusal of the learned trial judge of the application for a separate trial under sections 857-8, I am of opinion that it has not been shewn that the Court in such refusal adopted a course which, in the circumstances, was not "conducive to the ends of justice," even assuming that we have the power to review the exercise of that discretion; moreover, there was nothing to prevent the appellant's counsel from renewing his application as the trial proceeded and the fact that he did not do so is at least an indication that it did not appear to him that "in the course of the trial" (section 858) his client was

being prejudiced, and, likewise, I am unable to say that he was —*Cf. Rex* v. *Davis* (1914), 19 B.C. 50.

The motions for leave to appeal on mixed law and fact so as to raise this ground and also that of improper refusal to postpone the trial should, I think, be granted, but as to postponement I simply repeat what I said in *Baker's* case. As to the other grounds, they, likewise, do not necessitate special discussion in these reasons and I need only say that upon the whole case I think the appeal should be dismissed because no substantial wrong or miscarriage of justice has actually occurred.

MARTIN, J.A.

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

GALLIHER, J.A.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: [See *ante*, p. 8.]

MACDONALD, J.A.

MACDONALD, J.A.: I would refuse leave to appeal on the facts, feeling satisfied that the verdict was fully justified by the evidence. Nor would I grant leave to appeal from the learned trial judge's refusal to grant the accused a separate trial.

I was unable, during the argument, to find any merit in any of the questions of law raised on behalf of the accused. Further careful consideration only confirms that view.

I would dismiss the appeal.

Appeals dismissed, McPhillips, J.A. dissenting.

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JORGENSEN v. THE CHASINA.

Admiralty law—Rigger and watchman on ship—Lien for wages—Writ and warrant of arrest—Motion to set aside—R.S.C. 1906, Cap. 113, Sec. 191.

JORGENSEN v. THE CHASINA

A claim for a lien for wages as a rigger on a ship which is below the sum of $200 is excluded from the jurisdiction of the Court under section 191 of the Canada Shipping Act.

Cowan v. *The St. Alice* (1915), 21 B.C. 540 followed.

The caretaker of a ship not in commission is not a "seaman" and has no lien for wages.

Brown v. *The Ship Flora* (1898), 6 Ex. C.R. 133 followed.

Statement

MOTION to set aside a writ and warrant of arrest to answer the plaintiff's claim for a lien for wages as a rigger and watchman. Heard by MARTIN, Lo. J.A. in Victoria on the 6th of November, 1925.

Mayers, for the motion.
J. A. Russell, contra.

27th November, 1925.

Judgment

MARTIN, Lo. J.A.: This is a motion to set aside the writ and warrant of arrest to answer the plaintiff's claim for a lien for wages as a rigger and also a watchman, but as to the claim in the first capacity it fails because it is below $200 and therefore excluded from the jurisdiction of this Court. Section 191, Canada Shipping Act in *Cowan* v. *The St. Alice* (1915), 21 B.C. 540. As to the claim in the second capacity it is beyond question that the services of a mere watchman are not maritime service—*Brown* v. *The Ship Flora* (1898), 6 Ex. C.R. 133, wherein the services claimed were at a time when the vessel was dismantled at the dock in the winter and, in addition to a daily visit, "the duties performed were keeping the vessel clear of snow and pumping out any water that accumulated in the hull"; the vessel was not in commission or even preparing for a voyage. A number of American authorities are cited to which may be added *The Brig E. A. Barnard* (1880), 2 Fed. 712, wherein a claim for services as "watchman and shipkeeper" was disallowed as not giving a maritime lien.

In the *Jane and Matilda* (1823), 1 Hag. Adm. 187, the claim of a woman as cook and steward on board that vessel was allowed by Lord Stowell, she "having been shipped and hired" in those capacities for the voyage in question even though it was unusual to employ a woman for that work, yet nevertheless she was under the captain's orders as a mariner and employed by him, and had in fact upon occasion creditably discharged some of the ordinary duties as a seaman. She also made a claim in another capacity, p. 190:

"That of shipkeeper for a long space of time, in which the vessel remained in dock or harbour, during all which time she had the business of keeping the ship clean by frequent washing, and of looking to the safe custody of the stores left on board."

And it appeared this was based upon a hiring by the captain for wages "so long as she should remain on board" (p. 191) as cook and steward, and during the time the vessel was in the London Docks, being seized when upon the point of sailing for Spain, the captain visited it occasionally, and it would appear that at all times he had employed her on behalf of the owners in the usual way—195: in these special circumstances her claim was allowed in both capacities and I see no reason for questioning that decision, Lord Stowell saying, p. 195:

Judgment

"It was said that the co-owners were ignorant of all this employment of a female. That may be their fault, or their misfortune, in giving their confidence to an unworthy person; but be it one or the other, it would not destroy the legal claim of a third person, who has acquired it."

I note that there is an error in the judgment of Wills, J. in *The Queen* v. *Judge of City of London Court and Owners of S.S. Michigan* (1890), 25 Q.B.D. 339 at p. 342, wherein he says that the claimant in the *Jane* case "acted as caretaker" only, instead of in the conjoint capacities which are carefully set out by Lord Stowell and hereinbefore indicated, and this oversight has unfortunately created some misunderstanding, because it is clear from the whole case that the claimant was at all times upon the ship's articles, or if not at least a member of the crew, however small. In *The Queen* v. *Judge of City of London Court and Owners of S.S. Michigan* case the claim of a mate was, after consulting the judge of the Admiralty Court, allowed, it appearing that after the vessel reached port and the crew was paid off the mate by direction of the owner and upon the same

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sea wages, with an addition for victualling money, remained on board superintending the discharge of the inward cargo and the loading of a fresh cargo for the outward voyage, and also to superintend repairs, Wills, J., observing, p. 343:

"It is, of course, matter of common knowledge that one of the most essential parts of the chief mate's duty is to look after the cargo, and see that proper care is taken of it. I am of opinion that the services rendered by the plaintiff were maritime services, although the vessel was actually in harbour at the time."

The same element exists in *Connor* v. *The Ship Flora* (1898), 6 Ex. C.R. 131, wherein the claimant was hired and shipped by the owner direct to take charge of a confectionery stand on board an excursion and passenger vessel and as such the owner "had to employ persons in various capacities to enable the ship to successfully carry on the line of business she had entered upon," and she was, for the ship's purposes and in the circumstances, just as necessary as, *e.g.*, a stewardess: the learned judge concludes:

"There appears, therefore, to be no reason why this young woman should not rightfully claim a maritime lien for any wages due her. She was engaged by the owner of the boat to perform these services on board the boat, and to the extent of a just amount will be entitled to rank along with the other members of the crew."

Judgment

On the other hand the House of Lords decided in *Macbeth* v. *Chislett* (1910), A.C. 220 that a dock labourer who had formerly been a seaman but was not on the articles or employed on board as one of the crew, but merely assisted while on board in the performance of a casual and temporary employment in working a vessel by external power from one berth to another in a large dock, was not a seaman because he happened to be a "person employed on board a ship" at the time he was injured. Lord Chancellor Loreburn said, p. 223:

"I think the Court must see, first, whether he is by vocation a seafaring man, and, secondly, whether he is doing work connected with his duties or vocation of a seafaring man. Both of these elements are to be considered. If it were otherwise, then on the one hand a painter painting a ship in a dock or a mechanic called in to mend a valve in a dock or in a harbour would be a seaman, which he obviously is not; but we should have to say he was a seaman, for the duties he was discharging are duties often discharged by sailors and by engineers on board ship. On the other hand, if we did not regard both these elements, a seafaring man employed for some work, such as erecting a flagstaff on shore, would have to be regarded as a

seaman, for that is his vocation. The truth is you have to regard all the circumstances, particularly those two to which I have adverted.

"I think it is impossible to say as regards this man, who was a rigger and had not been to sea for five years, that his vocation was that of a seaman."

The latest decision is one in this Court, in its Quebec District, in *McCullough* v. *S.S. Samuel Marshall* (1923), Ex. C.R. 110, and it was held therein that a person not on the articles nor a member of the crew but who lived on shore and acted there as shore agent of the owners in collecting freights, ordering supplies and performing the usual duties of a managing owner or ship's husband, had no right to proceed against the ship *in rem* as a seaman, and the Court said, p. 112:

"The claimant does not pretend that he had been engaged by the master of the ship one of whose duties is to enter into an agreement with every seaman whom he carries as one of his crew: Canada Shipping Act, s. 328. Calling himself purser employed by the owners does not give him the *status* of a seaman."

In the light of these authorities I have considered the evidence in the very conflicting affidavits before me with the result that in the circumstances I am of opinion he cannot properly be deemed a seaman though he sets up useful services as watchman and caretaker, but on his own affidavit, which is loose and unsatisfactory, at most he was one who was on board of her in the said capacity as a part owner on behalf of "my associate owners to care for her and to oversee the reconditioning of the ship while she was being made ready as a freighter for coastwise service" by the Marine Repair Co., Ltd., the manager of which, however, flatly denies this and deposes that during practically all the times in question his company was in full control of the repair and reconditioning work and "did provide all necessary protection and watching" for the vessel while she was in their possession at their dock in an unseaworthy condition. Such being the case I am of opinion that upon the plaintiff's own shewing the motion should be allowed with costs.

Judgment

Motion granted.

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STOVER *ET AL.* v. DRYSDALE *ET AL.*

Church union—Election on question of union—Voters' lists—Drawn up and ratified by session of congregation—Right of appeal—Jurisdiction of church tribunals—Can. Stats. 1924, Cap. 100—B.C. Stats. 1924, Cap. 50.

A voters' list to be used at the January, 1925, election as to whether the congregation should enter The United Church of Canada was drawn up by the Session of St. Andrew's Presbyterian Church of Nanaimo which excluded most of the persons on the communion roll opposite whose names were pencil annotations on said roll. The result of the voting was a majority of ten against union. An appeal was forwarded to the Presbytery by eight members of the Session raising the question of disqualification of voters and a further appeal signed by 134 persons claiming to be members of St. Andrew's Church was later filed raising the same question. The Presbytery gave no decision but stated it would place no obstacle in the way of action in the civil Courts. On appeal to the Synod from the Presbytery's decision the Synod decided that every person whose name was on the communion roll on the 19th of July, 1924, was entitled to vote and on appeal this decision was upheld by the General Assembly of the church. In an action by the plaintiffs on behalf of themselves and all other members and adherents who desired to enter the Union against the defendants represented by those who did not desire to enter the Union, the trustees and the Session of the church, for a declaration that the vote taken was not in accordance with the provisions of The United Church of Canada Acts (Dominion and Provincial), that the congregation had gone into the Union, and for an injunction restraining the trustees from holding the church's property:—

Held, that at least all those persons whose names appear on the communion roll and whose names were not put on the voters' list because pencil annotations appear opposite their names on the communion roll, which pencil annotations were made at the alleged purgings of the roll in 1921, 1923 and 1924 were legally entitled to vote under the provisions of said Acts and should have had their names on the voters' list. As the anti-union majority at the election was ten and the names of a far greater number than ten persons entitled to vote were not put on the list because of said pencil annotations on the communion roll, the outcome of the election might have been different had the names of said persons been on the voters' list. There was therefore no valid election such as is called for by both the Dominion and Provincial Acts.

Although there is some difference in the phraseology of the relevant sections of the two Acts as to the qualification of voters, as the ownership of property is affected by the election the provisions of the Provincial Act would govern.

Held, further, that the church tribunals are the proper tribunals to decide

whether the persons whose names were on the communion roll on the 19th of July, 1924, were entitled to vote on the question of Church Union.

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ACTION by plaintiffs who sued on behalf of themselves and all other members and adherents of St. Andrew's Presbyterian Church in Nanaimo who desired to enter The United Church of Canada, for a declaration that the vote that was taken according to the provisions of The United Church of Canada Acts and that the congregation of said St. Andrew's Church had gone into the Union and for an injunction restraining the trustees from holding the property contrary to the provisions of The United Church of Canada Acts. The defendants represent those who do not desire to enter The United Church and the trustees and the Session of the church were added as party defendants. The facts are as follow: Pursuant to The United Church of Canada Act, Can. Stats. 1924, Cap. 100 and The United Church of Canada Act, B.C. Stats. 1924, Cap. 50, a congregational meeting was held by St. Andrew's Presbyterian Church of Nanaimo in order to decide whether or not the congregation should enter The United Church of Canada.

Statement

The Session of the congregation held a meeting and authorized the minister of the church and the clerk of the session to draw up a voters' list of those who were entitled to vote at the congregational meeting pursuant to the Acts. Those entitled to vote, according to the British Columbia Act, were those persons who were in full membership and whose names were on the roll of the church on the 19th of July, 1924, or who, by the constitution of the congregation, if so provided, or by the practice of the church with which they were connected, would have been entitled to vote at a meeting of the congregation on matters affecting the disposal of property on the 19th of July, 1924. Those entitled to vote according to the Act of Canada were those who were in full membership and whose names were on the roll of the church on the 19th of July, 1924, and who were entitled to vote at a meeting of the congregation on matters affecting the disposal of property.

The list was drawn up and was ratified by the Session and posted in the church for the information of the members of the church.

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On the communion roll there were a large number of members who were marked with a lead pencil notation: "Ap." "Ap?", "App Oct. 23/23" and "App 15/1/24." Only two of these names were at first placed on the voters' list. A large number of the others omitted claimed they had a right to vote, and protested. The Session then held a meeting and decided to give to those a right to vote who should make application to them and prove their *status*. A later Session meeting was held, and sixteen names were added to the list of voters, most of whom had a mark as above referred to after their names, and some did not even have their names on the communion roll nor had their names been passed by the Session as members.

A congregational meeting was held on January 5th, and it was adjourned until January 19th to allow a secret vote by ballot to be taken in the church at specified times. The ballot was accordingly taken. During the progress of the vote, a number of people whose names were marked as being transferred to an appendix demanded the right to vote and were refused as their names had not been put on the list by the Session.

Statement

These people protested. The vote as finally taken shewed that the congregation had decided not to enter The United Church by a majority of ten only.

The vote was immediately protested as irregular, to the Presbytery of Victoria, the first church Court above that of the Session. The Presbytery refused to decide the question as it considered it a matter for the civil Courts. It was then appealed to the Synod of British Columbia, the next highest church Court, which decided that all those whose names were on the communion roll had a right to vote, and as the list used in voting did not contain all these names the voters' list was not a proper one, and that the vote taken was therefore irregular and null and void. This was then appealed to the General Assembly, the highest Court of the Presbyterian Church in Canada, which sustained the finding of the Synod.

The plaintiffs claimed that the practice of the church was based upon the Blue Book of the Presbyterian Church in Canada and the customs and practices of the Presbyterian Church in Scotland, and that these customs and practices required that

before a person had a right to vote upon the question of the disposal of property, the person must be taken on as a communicant by a resolution of the Session and his name be placed on the communion roll.

The plaintiffs claimed the vote to be irregular, because four persons voted who were never taken on as communicants nor were their names on the communion roll; two persons who voted had been taken on by a vote of the Session but their names by inadvertence had not been put on the communion roll; four persons voted who had been struck off the communion roll, and though their names had been restored they had not been restored by a vote of the Session; four persons also voted whose names were on the communion roll but whose names had never been passed upon by the Session.

The principal question which arose was as to whether those persons whose names appeared upon the communion roll with a notation after their name purporting to designate that the name had been placed in an appendix roll, should or should not vote.

It was shewn that thirteen of these persons voted; and it was claimed that should it be decided that these persons had a right to vote, then many others were refused that right, and the vote was invalid; further, if it was held that they had no right to vote, then thirteen voted illegally, and for that reason the vote was null and void.

Statement

It was shewn and admitted that notations had been placed opposite names without ever giving any notice to the members that their names were to be struck off the communion roll; and it was argued that the practices of the church required such notice, and a resolution of the Session of St. Andrew's Presbyterian Church of Nanaimo was produced, shewing that to be the practice of that particular congregation.

There was a conflict of evidence as to what happened at certain Session meetings when it was claimed that the communion roll was purged and names struck off. At the meeting of the Session held on October 23rd, 1923, certain members of the Session claimed that the work had been completed and that a number of persons had been struck off the roll, whilst others claimed that the work done at that Session had only been pre-

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liminary to striking off those names. No specific names had been in any case entered in the minutes of the Session as having been put into an appendix roll, and no such appendix roll could be produced.

A conflict of evidence arose as to whether a meeting of the Session had been held on January 15th, 1924, when the defendants claimed a large number of names had been struck off the communion roll. There was no minute in the minute book of the Session, and the plaintiffs claimed that no such meeting had ever been held.

There were also other objections taken to the manner in which the voting and the congregational meeting was proceeded with. It was contended that the Acts required that the vote should be taken at a congregational meeting, and that the meeting should be adjourned from time to time so that each time of balloting would be held at the same adjourned meeting. The meeting in this case was begun on the 5th of January, 1925, and adjourned until the 19th of January, 1925, and the voting took place between those dates. The plaintiffs submitted that the vote was not thus taken at a congregational meeting. One of the voters was assisted in voting. This, it was submitted was not consistent with secrecy and her vote should not be counted. Tried by MURPHY, J. at Nanaimo on the 15th of October, 1925.

Statement

Clearihue, for plaintiffs.

J. H. Lawson, for defendants David Lister and Alexander Rowan.

Cunliffe, for defendants James A. Murray and the trustees.

23rd November, 1925.

MURPHY, J.: In my opinion, the Court is bound to hold that no valid election, such as is called for by both the Dominion and the British Columbia Acts, dealing with the question of Church Union, was held by the congregation of St. Andrew's Presbyterian Church of Nanaimo. My reason for this conclusion is that I hold no proper voters' list was used at the abortive election held in January, 1925. I hold that at least all those persons whose names appear on the communion roll and

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whose names were not put on said voters' list because pencil annotations appear opposite their names on the communion roll, which pencil annotations were made at the alleged purgings of the roll in 1921, 1923 and 1924, were legally entitled to vote under the provisions of said Acts and should have had their names put on said voters' list.

The second ground, I am about to give for my conclusion would not apply to the alleged purging of 1917. It is not necessary, however, for me to deal with this phase because the anti-union majority was only ten and the names of a far greater number than ten persons, whom I hold were entitled to vote, were not put on the voters' list because of the 1921, 1923 and 1924 pencil annotations. The evidence is clear that had the names of such persons been on the voters' list used at the election of January, 1925, the outcome of such election might have been different from what it was.

There is some difference in the phraseology of the relevant sections of said Acts as to the qualification of voters but, in my view, this does not affect the issue. As the ownership of property was to be affected by the election, I take it that the provisions of the British Columbia Act would govern. At any rate, the British Columbia provisions are the more favourable to defendants' case if there is any difference between the two Acts and for these two reasons they are made the basis of this judgment.

Judgment

The first ground for my conclusion is, that the matter was decided in accordance with such conclusion by the competent church Courts.

The method of procedure with regard to church membership in the Presbyterian Church of Canada was as follows: The Session of each congregation passed upon such membership in the case of each individual applicant. An appeal could be taken by any party considering himself aggrieved—first to the Presbytery, thence to the Synod, thence to the General Assembly, the decision of which was final. Once an individual was admitted to membership he could not be deprived of such membership except by action of his church Session which action was subject to the same rights of appeal. In no other way could a person be either received into membership or deprived of such membership when once so received.

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The scheme of both the Dominion and Provincial Acts deprived the churches affected by them of the power of dealing with the question of membership in so far as the right to vote conferred by said Acts was concerned for they both explicitly confer the right of voting on certain classes of persons who had a certain *status* on the 19th of July, 1924. Thereafter so far as the Presbyterian Church of Canada was concerned, the Sessions in reference to the contemplated voting were bound to accept the *status* of voters as that *status* existed on the 19th of July, 1924.

Under the British Columbia Act, such *status* was conferred on three classes of persons, first, those persons who were in full membership and whose names were on the roll of the church on the 19th of July, 1924; second, those who by the constitution of the congregation, if so provided, would have been entitled to vote at a meeting of the congregation on matters affecting the disposal of property on the 19th of July, 1924; third, those who by the practice of the church with which they were connected would have been entitled to vote at a meeting of the congregation on matters affecting the disposal of property on the 19th of July, 1924.

Judgment

A voters' list was drawn up by the Session of St. Andrew's Church of Nanaimo which excluded most of the persons on the communion roll opposite whose names were pencil annotations on said communion roll. I think the legal effect of what was done by the Session was that it officially adopted, after certain additions thereto, the list so prepared as the list to be used at the January, 1925, election. The list so adopted was the list actually used and no person whose name did not appear thereon was allowed to vote although quite a number excluded, as aforesaid, applied to do so.

As stated, the result of the voting was a majority of ten against Union. A few days subsequently, namely, on January 27th, 1925, a protest which was, in my opinion, the equivalent of the filing of an appeal, was forwarded to the proper Presbytery. This protest I think did raise the question of the disqualification of voters. Eight persons signed this protest, all members of the Session of St. Andrew's Church, Nanaimo. Six of them were actually present at the meeting which I hold officially

adopted the voters' list, the correctness of which was questioned by said protest. All six must be held, on the evidence, to be consenting parties to such adoption. It was strongly urged that this fact must render this protest nugatory. If so, this result must be brought about, so far as a Court of Law is concerned, on the principle of estoppel or some cognate legal principle. To shew that this view cannot be correct, one has but to bear in mind that this litigation is not litigation between members of Session and the anti-Unionists of St. Andrew's Church. It is litigation based on the non-fulfilment of statutory requirements at a statutory election. As pointed out above, Session had been deprived by said statutes of all control over such requirements. Session was bound to accept the *status* of voters as that *status* existed as of the 19th of July, 1924. If Session, or any member thereof, considered that error had crept into the voters' list used at the election the proper course was to have such error rectified by the duly constituted appellate tribunal. I hold therefore the appeal was legally lodged.

The basis of the appeal is not, however, confined to the documents of January 27th, 1925. On February 11th, 1925, a further document was forwarded to Presbytery questioning certain acts of the pastor in reference to congregational matters not relevant here signed by the same eight members of Session. Appended to this document was a protest against the legality of the vote taken in January, 1925. This was signed by some 134 persons claiming to be members of St. Andrew's Church, Nanaimo.

Judgment

These two documents are, as is to be expected, not drawn up with the accuracy required for a proper notice of appeal in the civil Courts but, in my opinion, they do squarely raise the issue of the disqualified voters.

The Presbytery feeling itself incompetent to finally determine the legality of the vote taken gave no decision but stated it would place no obstacle in the way of any interested person seeking a decision from any civil Court. In my view, the Presbytery was correct in holding it could not pass upon the legality of the vote but failed apparently to realize that what it was being asked to pass upon was whether certain persons had on the 19th of July,

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1924, according to the Church law of the Presbyterian Church of Canada, a *status* which placed them in any one of the three categories above cited set out in the British Columbia Act. Thus, for reasons to be given hereafter, I hold they were not only competent to pass upon but were the only tribunal which could do so once the matter had passed the Session but subject to having their decision reviewed by the higher church Courts.

On March 2nd, 1925, an appeal was taken by wire from Presbytery's decision to the Synod. This was followed by a notice of appeal in writing signed by the same eight members of Session but stated on its face to be on behalf of 133 members as well.

Again this document is not drawn with the formality which would be required if it were for use in a civil Court but again I hold it did raise the question of the disqualification of voters. That Synod so understood it and that Synod did actually pass upon the question is shewn by the decision which is in the following words:

Judgment

"Under ordinary circumstances the Synod would be justified in sending this back to the Presbytery of Victoria, inasmuch as they did not grant the request of the petitioners to examine the roll; but considering the unsettled condition and mental strain that all are under at the present time, we desire to state that from the nature of the communion roll, which we have examined, and the manner in which it has been kept, every person whose name was thereon as at July 19th, 1924, was entitled to vote; and that inasmuch as the list of names on which the congregation vote on Union was taken did not correspond with that roll, the vote as taken at the congregational meeting was irregular.

"We further recommend that the finding of the Synod be made known to the congregation of St. Andrew's, Nanaimo, by the Presbytery of Victoria."

It may be that in a part of this decision Synod trenched upon the province of the civil Courts as defined by the said statutes but I hold that Synod did expressly decide that, according to Church law, from the nature of the communion roll, which it had examined, and from the manner in which same had been kept every person whose name was thereon, as at July 19th, 1924, was entitled to vote. This can only mean that the pencil annotations on the roll, no matter when placed there, were from the standpoint of Church law of no effect.

This decision of Synod was in due course affirmed by the General Assembly.

But granted all this to be correct, it is argued against the view I have adopted that the matter of *status,* though to be decided according to Church law, must be decided, not by the church Courts but by this tribunal. No express direction is given by the statute on this point. One must then I think have recourse to the cardinal principle for construction of statutes which is, what was the intention of the Legislature? That intention was clearly that persons who had a *status,* according to Church law on July 19th, 1925, placing them in any one of the three enumerated categories, were to be entitled to vote. If this was the intention the Legislature must be presumed to likewise have intended that the best method for carrying out the primary intention should be adopted. The Legislature must further I think be presumed to have been cognizant of the difficulty of deciding this question of *status* owing to the existence in Canada of "appendix rolls" hereinafter discussed and owing to the ill-defined state of Church law in reference thereto. If so, it is logical, I think, to deduce that the necessary definition of what was the true Church law, in reference to "appendix roll" names, should be left to the elaborate technical tribunals of the Church set up, *inter alia,* for that express purpose rather than to commit such definition to civil Courts, the members of which, no matter what their ability or application, could not be expected to be as qualified to elucidate this difficult question as were the said church tribunals. In the absence of misconduct on the part of such Courts, which I do not understand to be suggested here, and which, in any event, is not proved, I conclude, that the church tribunals were the proper tribunals to decide the matter.

Judgment

But if I am in error in this and if it is the duty of this Court to make such decision then mine coincides with that of the Synod and the General Assembly. The question arises in this way. The Scottish Presbyterian Churches, from which the Presbyterian Church of Canada derived, have not, and never had, an "appendix roll" of church members.

According to the Church law of the Scottish churches, as I gather from the evidence, if a member's name is removed from the communion roll by the action of Session, he ceases to have membership and his name does not appear on any roll. In some

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portions of the American Presbyterian Church a practice grew up if members became lax in church matters, as distinguished from being guilty of conduct justifying loss of membership, that the names of such persons were removed from the communion roll and placed on another called an "appendix roll," sometimes a "reserved roll." This practice began to be adopted in the Presbyterian Church of Canada some 25 years ago following the American practice. Now whilst all experts in Church law, who gave evidence at this trial, agree that those persons, whose names appear on the communion roll, have at least *prima facie* full membership grave differences of opinion were expressed as to the *status* of at any rate those who have pencil annotations opposite their names on the St. Andrew's Church, Nanaimo, communion roll. Those supporting the Unionist cause maintain that such annotations are of no effect. Those supporting the anti-Unionist position maintain that such annotations preclude the persons opposite whose names such annotations appear from being included in any one of the three classes declared by the Act to be entitled to vote. When conscientious men learned in Church law disagree so radically the task of deciding is a difficult one for a layman. My solution of the matter is this: The constitution of the Presbyterian Church of Canada was essentially democratic. Principles or practices originating possibly at meetings of individual congregations or of individual church Sessions could and would, if important, be carried through Presbytery to Synod and thence to General Assembly and, according as to whether they were approved or condemned by that ultimate body they did or did not become a part of Church law. There was possibly this qualification, that even the General Assembly could not alter the fundamental principles of the Presbyterian Church as set out in the Westminster Confession of Faith and possibly other organic instruments of said church. If such qualifications existed this Court need not take cognizance of them since no evidence was given that the *status* of "appendix roll" members comes within their scope. On the contrary the inference is that it does not since the parent Scottish churches never had any such roll. The membership of the General Assembly was determined practically in the same

way as are modern law making bodies where such bodies are of a representative character. Membership in the General Assembly in the last analysis rested on the votes of church congregations. If then I am wrong in holding this question of *status* according to Church law, to be exclusively within the jurisdiction of the church Courts yet the action of these Courts in reference thereto is, in view of the nature of the organic constitution of the church, in my opinion, relevant and cogent evidence of what is the correct view of a disputed point of Church law. In so reasoning, I do not forget that the General Assembly organized from the Presbyterian congregations, which declined to enter the United Church, decided this very Nanaimo case contrary to the view adopted by the General Assembly of the Presbyterian Church of Canada. But the first mentioned Assembly was not an official body of the Presbyterian Church with which the statutes deal whereas the other adjudicating body was.

The second ground for my decision is, that even if the views already expressed are erroneous, as an exposition of general Church law, the Session of St. Andrew's Church, Nanaimo, has competently enacted a regulation still in force which clarified the situation so far as that congregation was concerned, and precluded them from purging the roll in the manner in which that task was attempted to be performed in 1921, 1923 and 1924. At a meeting of the Session duly held on March 24th, 1921, and therefore previous to the 1921 attempted purging of the roll, the following resolution was duly passed:

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"The question of the revision of the roll of membership was taken up, and Mr. Taylor moved, Mr. Coburn seconding that the recommendation of the General Assembly, as contained in their minutes, Vol. V., page 34 of 1879, be adopted, namely 'The Session should, each year, before making the Annual Report to Presbytery, officially revise the roll and formally strike from it the names of any who, after proper admonition, have neglected the ordinances for one year, or have been absent from the congregation and beyond the knowledge of the Session for two years. Carried.'

"Mr. Coburn moved, Mr. Warwick seconding that the Moderator give the Session a definition or guidance regarding the terms 'after proper admonition' at the next meeting of Session. Carried."

It is admitted by all the experts, as already stated, that the question of membership and the question of deprivation of membership, once such membership has been conferred, is, in

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the exclusive jurisdiction of the Session, subject to the rights of appeal already mentioned. It is also I think not disputed that the appearance of a person's name on the communion roll, without annotation, is at least *prima facie* evidence of membership entitling such person to the right to vote under the Acts. At any rate, persons whose names appeared on the communion roll of St. Andrew's Church, Nanaimo, without annotations, were placed upon the voters' list by the Session. Previous, therefore, to the alleged purgings of 1921, 1923 and 1924 all the persons against whose names pencil annotations were made at such purgings had such membership and would have had the right to vote had not such purgings intervened. So far as I can gather from the evidence, there was no clear Church law that before a person's name was removed from the communion roll either by being struck off or by being placed on the "appendix roll" such person should receive notice of the proposed action. All the experts, as I understood them, agreed that such notice was desirable, but whether as a matter of general Church law it was compulsory is disputed. In my opinion, the Session of St. Andrew's Church, Nanaimo, clarified this situation in so far as that particular congregation was concerned by passing the resolution above quoted. Clearly I think the Session had the power to do this subject, of course, to appeal. No appeal apparently was ever taken. Clearly also I think the resolution means that no name is to be struck from the roll—in other words that no member is to lose his rights of membership which the appearance of his name on such roll proves him at least *prima facie* to be possessed of until "after proper admonition." True the Session went on to request that the Moderator give the Session a definition or guidance regarding the phrase "after proper admonition" and that this definition does not seem to have been ever given. But I take it no civil Court would hesitate to say that "proper admonition" means at least notice to the party with whose rights it is proposed to interfere that action interfering with such rights is under consideration. This is in accordance with the elementary principle of natural justice so strongly insisted upon in the civil Courts *audi alteram partem*. The fact is, however, that all three of these purgings took place

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without any notice whatever to the parties whose names were dealt with. Several persons affected by these actions were called and swore they desired to retain their Church membership. I hold the Session was incompetent to so act in view of the resolution which they themselves had passed and that in consequence all the parties whose names were so dealt with, after the passing of said resolution, were entitled to vote under the Union legislation.

Judgment

Judgment for plaintiffs. As counsel for plaintiffs stated his clients did not desire costs, no order is made in reference thereto.

Judgment for plaintiffs.

IN RE ESTATE OF HERMAN BECKMAN, DECEASED.

MCDONALD, J. (In Chambers)

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IN RE BECKMAN, DECEASED

Administration—Deceased domiciled outside the Province—Intestate—Real and personal property within Province—No relatives in Province—Remuneration to administrator—Appointment of official administrator—R.S.B.C. 1924, Cap. 262, Sec. 80.

Under section 80 of the Trustee Act the power to grant remuneration to an administrator is limited to 5 per cent. of the gross value of the estate.

In the absence of special circumstances the estate of one who dies intestate, being at the time of his death a resident outside of the Province, and having no relatives within the Province, should be administered by the official administrator.

In re F. H. Bates, Deceased (1919), 27 B.C. 1 followed.

APPLICATION by F. J. Fulton, K.C., administrator of the estate of Herman Beckman for his discharge on passing of his accounts and for his remuneration. Herman Beckman, a foreigner, and non-resident of the Province, died intestate in January, 1916. He left considerable real and personal property in the Kamloops District. He was survived by a widow and three infant children all of whom reside outside of the Province.

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IN RE BECKMAN, DECEASED

Mr. Fulton was appointed administrator of the estate in 1917, *A. D. Macintyre* as attorney for the widow, and The Toronto General Trusts Corporation applied to be appointed administrator *de bonis non.* This application was opposed by the official administrator for the Kamloops District who asked for an order appointing him administrator. Heard by MCDONALD, J. in Chambers at Kamloops on the 11th of November, 1925.

The applicant, in person.
Chalmers, for the widow and next of kin.
Archibald, for the Official Administrator.

19th November, 1925.

MCDONALD, J.: In my opinion, there is no power to grant remuneration to the trustee beyond 5 per cent. on the gross value of the estate. The power of the Court is expressly limited by section 80 of the Trustee Act. As I understand it in this case the gross value of the estate is $75,909.82 and I allow as remuneration 5 per cent. on that amount, *viz.,* $3,795.49. An order will go accordingly with a reference to the registrar to take the accounts, and with power to the trustee to employ a chartered accountant to assist in making up the accounts. The present administrator is discharged and following the decision in *In re F. H. Bates, Deceased* (1919), 27 B.C. 1, I appoint the official administrator at Kamloops to be the administrator of the estate.

Judgment

Order accordingly.

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Criminal law—Murder—Blood on carpet and hatchet—Bloodhounds—Used to trail murderer—Evidence of their actions—Admissibility—New trial.

On a trial for murder, evidence was allowed to be submitted that two bloodhounds, trained to follow the tracks of human beings, were on the day following the homicide put on what appeared to be the tracks of the guilty party and followed them to the house of the accused's brother where the accused was shewn to have been on the previous evening.

Held, on appeal (MARTIN and GALLIHER, JJ.A. dissenting), that evidence of the action of bloodhounds was inadmissible and the accused was entitled to a new trial.

Per MACDONALD, C.J.A.: The use of such dogs may be of assistance to the police to give them the cue to the identity of the offender, which, if obtained may be followed up by conventional proof of guilt, but evidence of the actions of the dogs themselves should find no place in a Court of law.

APPEAL by accused from a conviction of murder on the 27th of October, 1925, by MCDONALD, J. and a jury at Vancouver. On Monday morning of the 22nd of June, 1925, one Rosso was found killed in his store on Lonsdale Avenue, North Vancouver. He was last seen the night before about 11.30. He was found with his head smashed in evidently by a hatchet, and on the same day a constable claiming to be an expert (sixteen years' experience) with bloodhounds, brought two bloodhounds to the scene of the tragedy, one of them having run with him for five years and the other four years. On giving the dogs the scent of blood on the carpet (evidently stepped on by the murderer) and a hatchet that had blood on it that was in the room the dogs started on a scent and proceeded to go west until they came to Mosquito Creek and from here they went back to the murdered man's place. In the afternoon the dogs were again taken to the murdered man's place and they were again started on the scent. This time they went east and south finishing up at Moodyville wharf. At this point the dogs were taken in an automobile and brought to a point between deceased's store and the house of the accused's brother, when they were

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turned loose. They then took up a scent and went to the house of the brother of the accused and from this house they followed the scent to the seashore. Accused was arrested on the following day. His movements were traced from the night of the 21st of June he having gone to his brother's house where he got the key for his brother's canoe about 11 o'clock at night (before the murder) and at 3 a.m. on the following morning he was in an apartment-house in Vancouver with a chauffeur and two girls. They had a meal in a restaurant and he then went back with one of the girls to the apartment-house where he stayed with her until next day, and shortly after leaving the apartment he was arrested.

The appeal was argued at Victoria on the 5th and 6th of January, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Henderson, K.C., for appellant: Counsel for the Crown in his opening statement said he would prove that deceased had a Canadian $100 bill a short time before his death, but he never proved this and the learned judge erred in not calling this to the attention of the jury: see *Rex* v. *Walker and Chinley* (1910), 15 B.C. 100. There was no evidence of deceased having either an American or a Canadian $100 bill. Bloodhounds can be used for giving information to the police but their actions cannot be recited in Court as it is merely hearsay. It is impossible to say what scent the dogs follow. The conviction was largely due to the evidence of the bloodhounds' actions and is a substantial ground for setting it aside.

Craig, K.C., for the Crown: The murdered man was paid $200 on the 9th of April and received two $100 bills. My submission is that the bloodhound evidence is admissible: see *Hodge* v. *State* (1893), 13 South. 385; *Line* v. *Taylor* (1862), 3 F. & F. 731; Phipson on Evidence, 5th Ed., 148; *Pedigo* v. *Commonwealth* (1898), 44 S.W. 143; *Osborne* v. *Chocqueel* (1896), 2 Q.B. 109. As to the best evidence see Taylor on Evidence, 11th Ed., p. 294, par. 391.

Henderson, in reply, referred to Best on Evidence, 12th Ed., 434.

Cur. adv. vult.

8th January, 1926.

MACDONALD, C.J.A.: This appeal is founded on the objection that evidence was wrongly admitted of tracking by bloodhounds from which an inference of the prisoner's guilt was possibly drawn by the jury.

It was stated by Crown counsel that if this evidence were not admissible he could not contend that there had not been a miscarriage of justice.

The owner of the dogs gave evidence of their character and training and their fitness for employment in the tracking of men. According to him their sense of smell and accuracy of pursuit when put upon the track of an individual was unerring. His opinion, based on his experience and knowledge of his dogs, was to the effect that their actions would give a correct indication of who the guilty person was.

The dogs were taken to the scene of the murder, where on the carpet in the room in which it had been committed, boot marks were imperfectly outlined in blood of the victim. They were not identified with the prisoner. The dogs were supposed to have obtained from that source the scent of the murderer. After nosing about for some time outside, the dogs took an easterly direction, pursuing what was presumed to be the trail of the murderer, and which they followed for about half a mile when they appeared to lose it and were brought back to the starting place. Now they went off in a westerly direction and brought up on the water's edge, a mile or more away. They were then taken in an automobile a distance of about half a mile to the vicinity of the house of the prisoner's brother situate near the beach, where they were again let loose. They there took up a scent, or appeared to do so, which led from the brother's house back in a more or less direct line to the scene of the murder. These actions of the dogs were described in evidence by their master, the prisoner's counsel objecting. The question is, was such evidence admissible? I think not.

No authority for its admission in any British or Colonial Court was referred to. Indeed, it was confessed by counsel on both sides that none such could be found. Two cases were found in the American Reports, *Pedico* v. *The Commonwealth*

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(1898), 44 S.W. 143, and *Hodge* v. *The State* (1893), 13 South. 385. In the latter case the evidence was admitted, and the sentence was sustained; in the former it was said that had a proper foundation been laid it might have been admitted. The suggested foundation was, I think, laid in this case by proof of the training, qualifications and experience of the dogs and their master.

Some English cases were referred to by counsel in which animals were brought into Court in order that their propensities might be displayed, where the same were in question, but in my opinion such cases are not in point.

I am apprehensive of the danger of admitting as evidence the inferences which a witness may draw from the actions of dogs under any circumstances. The rules of evidence evolved by judges in the course of centuries of experience in the elucidation of truth, were adopted with a view to the protection of innocence as well as of society. The aim of Courts and Legislatures has been to adopt or frame rules of evidence which will, as far as is humanly possible, promote certainty even at the risk of allowing some guilty men to escape punishment. This caution has led to the rejection of hearsay evidence, yet in a great majority of instances, such evidence would greatly aid in the attainment of justice. Nevertheless, the dangers of it led to its exclusion.

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The evidence admitted here is of the same character as hearsay and is, in my opinion, more objectionable and untrustworthy. Let me state a parallel case: the natives of this Continent were noted for their ingenuity in the tracking, not only of game, but of their enemies. They were notable for their remarkable craft in that art. Let it be supposed that the most skilful of these was employed to track the murderer, and that he had followed courses such as those taken by the dogs, and that thereafter he had communicated his observations and conclusions to another, but before the trial had died. Under our rules of evidence, that other could not be called as a witness to tell what the tracker had told him.

One of the greatest safeguards against falsehood and error is cross-examination. Even that may fail at times to break down a false or mistaken witness, but its efficacy in general is recog-

nized by all Courts. The Indian might have been cross-examined, had he lived and his testimony accepted for what it was worth, but that, by his death, having been rendered impossible, what he had told to another could not be given in evidence. The dogs, of course, could not have been cross-examined, yet their master was permitted to detail in the witness box what they by their actions had told him.

Some examples were given by counsel of evidence, admittedly competent, and which was claimed to be analogous, *i.e.*, handwriting, the results of chemical analysis, the information supplied by the clock, and the like, but these examples only go to shew that the law does not always follow analogies. Such evidence, when admissible, is so because by the common experience of mankind its reliability has been ascertained. But that even the best trained dogs of a breed noted for acute sense of smell, will, with unerring instinct, pick up the scent of a criminal and not that of another, and by their actions tell a true story of the route taken by him, is not a fact of general acceptance. Nor can, I think, judicial notice be taken of a thing so vague and liable to be erroneous; neither can the evidence of a person professing to be an expert give it the semblance of dependable reality. It is not that I question the training and keen sense of smell of these dogs. I found my opinion on this: that the admission of such evidence, is at best akin to hearsay evidence, and that apart from this, it ought, on principle, to be excluded on the ground that human life or liberty shall not be made to depend upon inferences to be drawn from the actions of dogs. The use of such dogs may be of assistance to the police to give them the cue to the identity of the offender, which, if obtained, may be followed up by conventional proof of guilt, but evidence of the actions of the dogs themselves should find no place in a Court of law.

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I would set aside the conviction and sentence and order a new trial.

MARTIN, J.A.: This is an appeal from the appellant's conviction at the Vancouver Assizes on the 27th of October, 1925, for the murder of one Frank Rosso in North Vancouver on the night of the 21st-22nd of June previous; the only substantial ground

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is the objection to the evidence respecting the conduct of two bloodhounds which were employed by the police to track the murderer. The learned trial judge ruled that in the circumstances before him a proper foundation had been laid for the reception of that evidence and instructed the jury, in effect, that it was for them to attach such weight to and draw such inferences from it as they felt justified by their "own common sense and knowledge" after cautiously considering it in relation to the facts and "set of circumstances" that the Crown had weaved together in support of its case of circumstantial evidence against the accused: no objection was or could be taken to the charge if the evidence could be admitted at all, but appellant's counsel submits that evidence of this nature cannot be received in the Courts of this country because, as I understand him, it was at best only hearsay, also too uncertain to place any reliance upon, and contrary to precedent in our jurisprudence. So far as this last ground is concerned though evidence of the precise kind before us has not been tendered in our Courts and therefore it has not been ruled upon either way directly, yet, in my opinion, when the cases are carefully examined in the light of their underlying principles they will be found to support the ruling of the judge now appealed from. The law of evidence marches in progress with other laws and many mouths have recently been opened and innocence vindicated thereby which were closed by rules of evidence which sent the immortal Thomas More, ex-Lord Chancellor, to the block in 1535 (in a trial which Lord Chancellor Campbell stigmatizes as a "murder" and "the blackest crime that has ever been perpetrated in England under the forms of law" (Lives of the Lord Chancellors, 3rd Ed., Cap. 33) and many more unfortunates since then, because they were not permitted to testify in their own defence—a thing so shocking that it seems incredible in the enlightenment of the present day, and it is to the honour of Canada that it led the way in the great reform in this vital respect by the Canada Evidence Act of 1893.

When new agencies are employed in civil or criminal matters that create new conditions out of which new questions of evidence arise (as, *e.g.*, in the case of the use of the telegraph, the

telephone, the typewriter, the dictograph, the radio-telephone and radio-telegraph radio-photography, etc., etc.) it is the duty of the Court to consider such new questions upon sound principles and not reject them merely because they have not or could not have arisen before. As regards evidence in its general legal sense, there is to be found this observation in Best on Evidence, 12th Ed., p. 6:

"The word evidence signifies, in its original sense, the state of being evident; *i.e.*, plain, apparent, or notorious. But by an almost peculiar inflection of our language, it is applied to that which tends to render evident or to generate proof. This is the sense in which it is commonly used in our law-books, and will be used throughout this work. Evidence, thus understood, has been well defined as,—any matter of fact, the effect, tendency, or design of which is, to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact. The fact sought to be proved is termed the 'principal fact'; the fact which tends to establish it, 'the evidentiary fact.' When the chain consists of more than two parts, the intermediate links are principal facts with respect to those below, and evidentiary facts with respect to those above them."

Subject to appropriate exceptions and limitations in its application to special matters, this is an excellent practical summary of the basis upon which proof of criminality depends, and I note that it has been unanimously adopted by the Supreme Court of Vermont in *State* v. *Ward* (1889), 17 Atl. 483, in a case of a very similar nature.

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The question before us may best be approached by first considering what is the attitude of our system of evidence towards propensities of animals, also alternatively called their dispositions, qualities, natures, characteristics, habits, etc., but I prefer the word "propensities" as being the most comprehensive as well as compendious and as most generally used and by the highest authority, *e.g.*, by the House of Lords in *Fleeming* v. *Orr* (1855), 25 L.T. Jo. 73: it is thus primarily defined in the Oxford Dictionary:

"The quality or character of being 'propense' or inclined to something; inclination, disposition, tendency, bent. . . . Disposition or inclination to some action, course of action, habit, etc.; bent of mind or nature."

On this point, as the books shew, there has been no uncertainty for centuries, and from legal time immemorial our Courts have not only received evidence to determine the propensities of animals and their probable and natural course of conduct or

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action in pursuance thereof in particular and ever-varying circumstances but have, especially in the case of dogs, taken judicial notice of the same in many aspects as the result of the age long "experience of mankind" with them. The examples of this are legion in the reported cases, but though it has become necessary, apparently, to cite authorities in support of this principle which is the foundation of my opinion, I shall confine myself to citing as few as possible out of the great many I have readily found. Thus in 1 Hale, P.C., p. 430, it is laid down:

"If a man have a beast, as a bull, cow, horse or dog, used to hurt people, if the owner know not his quality, he is not punishable, but if the owner be acquainted with his quality, and keeps him not up from doing hurt, and the beast kills a man, by the antient Jewish law the owner was to die for it, *Exod.* xxi. 29, and with this seems to agree the book of 3 *E.* 3. *Coron.* 311. *Stamf. P.C.* 17. *a.* wherein these things seem to be agreeable to law," etc.

In *Mitten* v. *Faudrye* (1625), Pop. 161, the King's Bench, in an action for damage done by a dog in chasing sheep, took cognizance of the nature and actions of dogs in that the owner, though present at the time, "could not withdraw his dog when he would in an instant" as Crew, Chief Justice, put it, and

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Doderidge, J. said "the nature of a dog is such that he cannot be ruled suddenly," and so the owner was excused for "an involuntary trespass of his animal." In *Mason* v. *Keeling* (1699), 1 Ld. Raym. 606; 2 Mod. 332 in an action for injury sustained from being bitten by a dog, the same Court took cognizance of the "great difference between horses and oxen . . . . and dogs" and said "the owner might not have had this dog but one day or two before, and did not know of this fierce nature," and so was not liable, but if he had reason to be aware of the propensity he would have been liable had he not guarded against its probable and natural result, because "if the defendants had known before, that this dog was of such a fierce nature" he kept him at his peril. There has been no change in this view down to the present day, the latest illustration being the recent decision of the King's Bench Division in *Buckle* v. *Holmes* on 4th December last, 95 L.J., K.B. 158; 42 T.L.R. 147; an action for damages done to pigeons and chickens by a cat, and the very interesting decision turned on the alleged difference between the way the law regards the propensities and conduct

and actions of cats and dogs, but it was held that no distinction could legally be drawn. Mr. Justice Shearman said, pp. 159-60:

"It has been well settled for hundreds of years that the dog is subject to different principles of law from those applying to other tame animals. In a case in the year 1625 it was held that there was a difference between a dog and other kinds of tame animals. It is settled law—a very proper expression is used—that a man is not responsible for the unprovoked trespass of his dog. . . . . It is equally held that if it is brought home to a man's knowledge that his dog has a habit, an acquired propensity for trespassing and pursuing game, then he is responsible on the doctrine of *scienter*. It is said that the law is different as to cats. I cannot find any decision as to the propensities of cats, but, in my judgment, one cannot draw a distinction between a dog and a cat."

Sankey, J. was of the same opinion and said, p. 161:

"I believe that from the very earliest days the law of England has divided animals into two classes. The first consists of animals like sheep and horses, oxen, dogs, and, I think, cats, which the law assumes not to be of a dangerous character; and, therefore, before the owner of such an animal can be made liable, it must be shewn that that animal is an exception to its class, that it is accustomed to do mischief, and, therefore, unless the owner knows that, he is not liable for a first act. The second class consists of those animals which have not been shewn to be harmless by nature, and there are numerous cases in the books with regard to such animals."

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The Court therefore, dismissed the appeal because the judge below was right when he

"held that there was no evidence to satisfy him that the man knew that there was any acquired vice of the cat over and above its ordinary characteristics; therefore, the action failed."

In the report of the same case in the Times L.R. *supra,* I note that an appeal from this decision is contemplated but whatever may be the result thereof * it does not affect the point I am making, *viz.,* that the Court took cognizance, and received evidence of what dogs and cats were "accustomed to do," *i.e.,* to act in a proved state of facts, in furtherance of their propensities, and in that same report it is stated that the judge below based his judgment on the fact that "the roaming character of cats was a recognized habit." This method of proof is in pursuance of the recent decision of the Court of Appeal in *Manton* v. *Brocklebank* (1923), 2 K.B. 212, wherein evidence was properly adduced to shew the propensities and conduct of strange

* It was dismissed (1926), 43 T.L.R. 369.

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horses turned loose in a field, Lord Sterndale, M.R. saying, p. 217:

"I think the finding as to the natural disposition of horses proceeds partly upon the evidence in the case and partly upon general knowledge such as the learned judge seemed to think was expressed in *Lee* v. *Riley* [(1865)], 18 C.B. (N.S.) 722."

See also pp. 221-2, 224.

Lord Justice Warrington, p. 227, thought the case was one which required specific evidence to prove the "propensity of horses turned out together to do any injury to each other," and, "seeing how common a thing it is to do" was not prepared to assume the probability of injury in such circumstances, and he also pointed out that certain animals were more dangerous and would act differently in the "course of circumstances," which would have to be shewn by evidence. Lord Justice Atkin also, at pp. 231-2, considers the "natural propensity of horses and cattle" and the "danger to be apprehended from contact with other animals," and he cites approvingly the oft-quoted and approved observations of Willes, J., in *Cox* v. *Burbridge* (1863), 13 C.B. (N.S.) 430 at pp. 439-40, *viz.*:

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"The distinction is clear between animals of a fierce nature, and animals of a mild nature which do not ordinarily do mischief like that in question. As to the former, if a man chooses to keep them, he must take care to keep them under proper control, and, if he fails to do so, he is taken to know their propensities, and is held answerable for any damage that may be done by them before they escape from him and return to their natural state of liberty. As to animals which are not naturally of a mischevous disposition, the owner is not responsible for injuries of a personal nature done by them, unless they are shewn to have acquired some vicious or mischievous habit or propensity, and the owner is shewn to have been aware of the fact. If the animal has such vicious propensity, and the owner knows of it, he is bound to take such care as he would of an animal which is *fræ naturæ*, because it forms an exception to its class."

And Willes, J., at p. 441, went on to say:

"The important circumstance in this case is, that the act was not in accordance with the ordinary instinct of the animal, which was not shewn to be of a mischievous disposition. . . . It comes round, therefore, to the question, whether the owner is liable for an act of this sort done by an animal not of a naturally vicious character, and which is not found to have been accustomed to commit such mischief."

Again, in *Read* v. *Edwards* (1864), 17 C.B. (N.S.) 245, the same learned judge said at p. 261:

"It was proved at the trial that the dog which did the damage was of a

peculiarly mischievous disposition, being accustomed to chase and destroy game on its own account, that that vice was known to its owner, the defendant, and that he notwithstanding allowed it to be at large in the neighbourhood of the plaintiff's wood, in which there were game; so that the entry of the dog into the wood, and the destruction of the game, was the natural and immediate result of the animal's peculiarly mischievous disposition, which his owner knew of, and did not control."

Those important expressions in principle so appropriate to the present case, and shewing that it is proper to admit evidence to prove the "ordinary" results of the propensities of animals I shall refer to later.

There is a very interesting decision in *Line* v. *Taylor* (1862), 3 F. & F. 731, wherein evidence had been given respecting the alleged fierce disposition of a dog and the true meaning to be attached to his intentions when exercising "his habit of bounding upon people," as Chief Justice Erle described it, and so that the jury might have every assistance in determining that point the Chief Justice, despite objection to the "experiment," allowed the dog to be brought into Court

"so that, he said, the jury might judge partly from their knowledge of dogs and their own observance of the animal in question,"

and after the jury examined it, freed of its chain and keeper at their request, they found a verdict for the defendant. The editors of the report draw attention to it, p. 733, as being "a case worth noting" as one whereby the production of personal property in Court was held "material to the proper determination of the question in dispute . . . . in this instance—in the case of animals—[their] temper and disposition."

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In another earlier (circ. 1800) an experiment of a similar nature is recorded in Twiss's Life of Lord Chancellor Eldon, Vol. I., p. 354:

"Lord Eldon: When I was Chief Justice of the Common Pleas (I did like that Court!) a cause was brought before me for the recovery of a dog, which the defendant had stolen in that ground (lying in the fields beyond his house) and detained from the plaintiff its owner. We had a great deal of evidence, and the dog was brought into Court and placed on the table between the judge and witnesses. It was a very fine dog, very large, and very fierce, so much so that I ordered a muzzle to be put on it. Well, we could come to no decision; when a woman, all in rags, came forward and said, if I would allow her to get into the witness-box, she thought she could say something that would decide the cause. Well, she was sworn just as she was, all in rags, and leant forward towards the animal, and said, 'Come, Billy, come and kiss me!' The savage-looking

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dog instantly raised itself on its hind legs, put its immense paws around her neck, and saluted her. She had brought it up from a puppy. Those words 'Come, Billy, come and kiss me' decided the cause."

This is an authority for admitting evidence of experiments before the Court itself, of the instincts and consequent actions of animals and however the actions of the dog in this experiment may be regarded, whether as "ordinary instinct" (as it is called by Willes, J., in his judgment in the unanimous decision of the same Court of Common Pleas *in banco* in *Cox* v. *Burbridge, supra*) or otherwise, they were nevertheless admitted as evidence and as proof to demonstration. In *Jones* v. *Owen* (1871), 24 L.T. 587, the same Court recognized "the common knowledge of the tendency of coupled grey-hounds to rush" to the "probability of injury . . . . to people lawfully using the high road," and so held that they should have been kept in leash. See also *Worth* v. *Gilling* (1866), L.R. 2 C.P. 1, and *Osborne* v. *Chocqueel* (1896), 2 Q.B. 109.

Then in *Fleeming* v. *Orr, supra,* the House of Lords in an important decision made the matter still more clear in the course of that decision that the owner of the dog in question, a fox

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hound, was not liable for his destruction of sheep because the evidence did not establish that the owner had "been aware of the mischievous propensities of the dog" and for all that appeared to the contrary upon the record it might have been "a dog of gentle habits": the Lord Chancellor held, p. 74:

"Blame can only attach to the owner, when, after having ascertained that the animal has propensities not generally belonging to his race, he omits to take proper precautions to protect the public against the ill consequences of those anomalous habits."

This language clearly recognizes the admission of evidence to establish what are the racial propensities and anomalous habits of a particular "race" of hound because they can only be established by evidence or judicial notice, founded upon the "experience of mankind" with the animals in question, to adopt the apt expression employed in *Filburn* v. *People's Palace and Aquarium Company* (1890), 25 Q.B.D. 258, a case of damage by an elephant, wherein Lord Justice Bowen said, pp. 261-2:

"People must not be wiser than the experience of mankind. If from the experience of mankind a particular class of animals is dangerous, though individuals may be tamed, a person who keeps one of the class takes the risk of any damage it may do. If, on the other hand, the animal kept

belongs to a class which, according to the experience of mankind, is not dangerous, and not likely to do mischief, and if the class is dealt with by mankind on that footing, a person may safely keep such an animal, unless he knows that the particular animal that he keeps is likely to do mischief."

Lord Esher expressed himself to the same effect, adding the interesting observation that an animal may change its class, despite its wild nature "by what may be called cultivation" and this cultivation would obviously include the training of its natural propensities. This view was confirmed by the Court of Appeal in *Marlor* v. *Ball* (1900), 16 T.L.R. 239, wherein it was applied to damage done by a zebra in captivity; and in *May* v. *Burdett* (1846), 9 Q.B. 101, the "mischevious propensities" of a monkey were considered in relation to its being "an animal accustomed to attack and bite mankind" (pp. 110-1) and it was laid down that the cause of action depended upon the "propensity of the animal, the knowledge of the defendant, and the injury to the plaintiff."

In *Hudson* v. *Roberts* (1851), 6 Ex. 697, wherein the plaintiff was injured by a bull, evidence was adduced to prove that the bull would attack anything red and consequently when, being driven along a highway, he saw the plaintiff wearing a red handkerchief, he rushed at and injured him, the owner was liable, the Court holding, *per* Chief Baron Pollock, p. 700, that the evidence rightly adduced had established the fact that the owner of the bull must have known that the "character" of the animal was such that in those circumstances he would act in a manner that was dangerous to the public.

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There is an instructive decision of the Full Court of Victoria, Australia, to the same effect, in *Scott* v. *Edington* (1888), 14 V.L.R. 41, in very similar circumstances, of injury to a pedestrian caused by driving "wild or bush cattle" along a highway, the Court admitting "clear and unmistakable evidence" to prove that such animals were of a class "likely to attack passers-by on the highway."

The question of the admission of evidence of this nature arose sharply in the Queen's Bench Division in *Brown* v. *Eastern and Midlands Railway Co.* (1889), 22 Q.B.D. 391, wherein the trial judge (in an action for injury caused by a horse shying) had excluded evidence to shew that the placing

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of a heap of refuse close to a road had the effect of causing other horses, as well as the plaintiff's, to shy on the same day, but the Divisional Court held that the evidence should have been admitted and allowed the appeal, saying, p. 393:

"If . . . this heap was of such a nature as to be likely to cause common horses to shy it was a public nuisance. Whatever, therefore, shewed it to be likely to cause horses to shy was evidence for the plaintiffs."

It is to be noted that in this case the action was brought by, and not against, the owner, and to succeed he had to bring evidence to shew how horses were "likely" to act in the circumstances.

The propensity of animals before noticed to act differently at different times and in different circumstances, was also recognized by the King's Bench Division in *Barnes* v. *Lucille Limited* (1907), 96 L.T. 680, wherein evidence shewing how they would be "likely" to act "ordinarily" or otherwise, was necessarily received in order to determine liability therefor; the report is interesting but I shall not cite it because the decision was approved by the same Court in *Clinton* v. *J. Lyons & Company, Limited* (1912), 3 K.B. 198, which is a more important one based on the propensity and nature of cats though Shearman, J., in *Buckle* v. *Holmes, supra,* said he was unable to find a case of that kind. In it the propensities and habits of cats in certain circumstances came in question, arising out of injuries done to the plaintiff by the defendant's cat (which had kittens) when the plaintiff was in the defendant's tea shop. The case is of special application to the one at Bar because in addition to evidence in general, that in particular of an expert witness on the habits of cats (and authoress of a work on the subject—the "Book of the Cat") was admitted (pp. 199, 207) and she deposed that (p. 199):

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"'Cats rearing kittens are inclined to be savage and in a vicious state, even if gentle otherwise. If such a cat smelt the dress of the plaintiff, who had been carrying a dog, it might attack her, that is, if it was in a vicious state, or had been frightened.'"

The evidence went to the jury on certain questions, the third of which was:

"(3.) Had the cat (to the knowledge of the defendants), while rearing kittens, a disposition to attack a dog in her neighbourhood and a person holding a dog?"

The jury answered this question in the affirmative; the other questions are not material to the present point. It is to be noted that the observations of Bowen, L.J., in the *Filburn* case, *supra*, respecting the "experience of mankind" with animals, were adopted, p. 207, and Bray, J., at p. 208, puts the question:

"Is a cat with kittens likely to do mischief to such a person according to the experience of mankind? Was there any evidence to prove this? Miss Simpson stated that if a cat smelt the dress of the plaintiff, who had been carrying a dog, it might attack her."

And the learned judge proceeded to consider the evidence relied upon to support the finding of the jury.

Now the importance of that case is that evidence was admitted of the sense of smell in animals and what its effect upon their conduct would "likely be," which is the exact point before us.

Such is the law of England upon the subject and I find that it is the same in the United States of America, as numerous cases testify, of which in general it is only necessary to cite a few from the dozens of illustrations given in the text-books, *e.g.*, the unanimous decision of the Supreme (Appellate) Court of Massachusetts in *Todd* v. *Rowley* (1864), 90 Mass. 51, wherein the Court at pp. 58-9, said: MARTIN, J.A.

"The objection to the evidence relating to the habits of the horse subsequent to the time of the accident goes to its weight rather than to its competency. The habit of an animal is in its nature a continuous fact, to be shewn by proof of successive acts of a similar kind. Evidence having been first offered to shew that the horse had been restive and unmanageable previous to the occasion in question, testimony that he subsequently manifested a similar disposition was competent to prove that his previous conduct was not accidental or unusual, but frequent, and the result of a fixed habit at the time of the accident. Under the limitations prescribed at the trial, we think the evidence was admissible."

That decision (and others of the same kind) was followed by the same Court in *Broderick* v. *Higginson* (1897), 48 N.E. 269, the Court saying (p. 270):

"They are authorities, not only to the proposition that evidence of habit may be received in such cases, but that habits may be proved by evidence of the frequent observation of particular instances.

The same rule prevails in New Hampshire—*Folsom* v. *Concord & M.R.R.* (1896), 38 Atl. 209, where the Court held (p. 210) that:

"The testimony of the witness relative to the behaviour of horses when

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in near proximity to a moving train of cars appears to be the statement of a fact within his personal knowledge derived from experience."

And see, in Michigan, *Wormsdorf* v. *Detroit City Ry. Co.* (1889), 42 N.W. 1000, to the same effect.

The general principle of the law of evidence being thus, I apprehend, established, the particular application of it to the case of the use of bloodhounds is thus set out in Wigmore on Evidence, Vol. I., p. 226, par. 177:

"The behaviour of the animal may be the result of an impression made on some peculiarly strong sense by a casual outward event or human act, incapable of being perceived by the human senses. The behaviour of a horse in the vicinity of a concealed beast of prey is an instance of this. The custom, in certain of our communities, of tracking fugitives by bloodhounds, rests on a similar trait of those animals. It seems to be conceded that evidentially the fact that a well-trained bloodhound of good breed, after smelling a shoe or other article belonging to the doer of a crime, has tracked to the accused, is admissible to shew that the accused was the doer of the criminal act."

I have examined many cases to ascertain the soundness of this proposition and in my opinion it is fully sustained.

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Thus in *Hodge* v. *State* (1893), 13 South. 385, the Supreme Court of Alabama unanimously affirmed, upon appeal, the ruling of the Circuit Court that evidence of the nature now objected to was properly admitted, and seeing that it is the earliest reported case that I have been able to find upon the exact point I cite the concise judgment of the Court in full:

"It is common knowledge that dogs may be trained to follow the tracks of a human being with considerable certainty and accuracy. The evidence in this case shewed that a dog thus trained was, within a very short time after the homicide, put upon the tracks of the person towards whom all the circumstances strongly pointed as the guilty agent, and that the dog, as if following these tracks, or 'trailing,' went to the house of the defendant. It was also in evidence by several witnesses that the tracks found at the scene of the homicide were followed by them thence to the house of the defendant, being measured at various points along the route, and otherwise at each of such points identified as being made by the same shoes as were the tracks at the place of the murder, and that the route thus traced by them was precisely that taken by the dog throughout. On this state of case we are of the opinion that the fact that the dog, trained to track men as shewn in the testimony, was put on the tracks at the scene of the homicide, and, 'taking the trail,' so to speak, went thence to defendant's house, where he, the defendant, is shewn to have been that night after the killing, was competent to go to the jury for consideration by them in connection with all the other evidence as a circumstance tending to connect the defendant with the crime; and, of consequence, that the

Court committed no error in refusing to exclude it. The ruling of the Court on this point is the subject-matter of the only exception reserved. This being without merit, the judgment must be affirmed, and, as affirmed, the sheriff of Escambia county will execute the sentence of death imposed thereunder, as prescribed by law on Friday, July 7, 1893. Affirmed."

In *Simpson* v. *State* (1893), 20 South. 572, before the same Court, the appellant had been convicted of arson and the State adduced evidence of his having been tracked by bloodhounds to fasten the crime upon him. The report states, p. 573:

"The owner of these dogs, which were known as 'bloodhounds,' testified that he had trained them to track human beings, and that they would not leave a track of a person, after they had once been put upon it, to follow another track."

No objection was taken to the admission of this evidence but the trainer was asked by the defence, on cross-examination, if he had not trained other bloodhounds of the same blood or stock which had left the trail of a man for that of a sheep? and upon this question being objected to by the State it was rejected and the Supreme Court upheld that objection, saying, p. 574:

"The test by comparison was not sufficiently certain to determine the reliability of the dogs employed here by reference to the qualities of the other dogs."

It will therefore be noted that it was conceded that in principle evidence of the use of the hounds was admissible.

In *Pedigo* v. *Commonwealth* (1898), 44 S.W. 143, the Court of Appeals of Kentucky adopted the principle recognized in the two preceding cases and held "after a careful consideration of this case by the whole Court" (of seven judges) that the testimony was competent after certain indicated requirements and tests had been complied with, saying, p. 145:

"When so indicated, testimony as to trailing by a bloodhound may be permitted to go to the jury for what it is worth, as one of the circumstances which may tend to connect the defendant with the crime of which he is accused. When not so indicated, the trial Court should exclude the entire testimony in that regard from the jury."

The Court after weighing the evidence came to the conclusion, p. 146, that "in this case there was no testimony that the dog had been trained or tested," and therefore a new trial was ordered. Out of the seven judges only one dissented on the ground that the reception of the evidence was "an innovation upon all the heretofore established rules of testimony," but he cites no

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authorities and his reasoning, *e.g.*, that the decision of the Court "will likely be to greatly promote the raising and training of bloodhounds or hounds that will be called bloodhounds," is with all respect, not helpful, and the enunciation of the general principle is confused with its application to particular and ever-varying circumstances; I am also, with respect, unable to follow satisfactorily the speculative illustrations which he gives as inducing him to take the view that "such evidence is entirely too vague and uncertain to be allowed to jeopardize the liberty of a freeman": his attitude towards the subject, is perhaps indicated by this concluding paragraph of his judgment, p. 148:

> "It seems to me that the use of the bloodhound properly belonged to the days of slavery, and of the bloody criminal code of the Dark Ages; and, inasmuch as the institution of slavery and the code aforesaid have ceased to exist, the hound should be relegated to innocuous desuetude."

I have given attention to this judgment because it is the only dissenting one to be found in all the judgments of all the members of the five Courts of Appeal that have considered the matter.

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The next and fourth decision is *State* v. *Moore* (1901), 39 S.E. 626, a unanimous judgment of the Supreme Court of North Carolina (five judges) wherein the principle of the three previous cases was accepted while recognizing that it was the duty of the Court to guard against the danger of too much importance being attached to it in application, and it was held that in the inconclusive facts a proper foundation had not been laid for the admission of the evidence. Upon the nature of dogs in general and bloodhounds in particular, the Court makes, pp. 627-8, some observations very applicable to the case at Bar as hereinafter to be noted:

> "It is a matter of common knowledge that there are many breeds of dogs endowed with special traits and gifts peculiar to their respective kind,—the pointer and setter take instinctively to hunting birds; the hound to foxes, deer, and rabbits,—but we know of no breed which instinctively hunts mankind. Yet we do know that dogs are capable of running the tracks of human beings, and is frequently evidenced by the lost dog trailing his master's track long distances and through crowded streets, and finally overtaking him; which demonstrates the further fact that some distinctive peculiarity exists between different persons which can be recognized and known by a dog. And it is a well-known fact that the bloodhound can be trained to run the tracks of strangers, and in this the training consists only in being taught to pursue the human track. The gifts or powers or instincts being already inherent in the animal, he

is induced to exercise them under the persuasive influence and protection of his trainer or master. Once trained in this pursuit, we must assume that his accuracy depends, not upon his training, but upon the degree of capacity bestowed upon him by nature. Experience and common observation shew that among dogs of the full blood and full brothers or sisters one or more may be highly proficient, while others will be inefficient, unreliable, and sometimes worthless. . . . Apply common knowledge and experience, of which the Court is justified in taking notice, in connection with the evidence, to the case at bar, we are led to consider whether there is any evidence tending to shew that Brinson's dog pursued either one of the tracks made upon the premises at the time of the commission of the crime."

The result of that consideration has been already stated and, if I may say so, I am in entire accord with it on the facts as reported.

The fifth decision is *Brott* v. *State* (1903), 97 N.W. 593, a unanimous judgment of the Supreme Court of Nebraska affirming in effect, the said principle with proper safeguards and limitations, *viz.*:

"The Court [below] received as evidence of guilt the fact that bloodhounds, after being taken to the place where the crime was committed, appeared to trail the burglar to defendant's house. The competency of this evidence is the only question necessary to consider in disposing of the case. The conduct of the dogs was, perhaps, rightly received, in connection with an admission made by Brott, as evidence tending to prove that he committed the crime charged in the information; but it was also received as proof of independent crimes which the state brought to the attention of the jury, and to which the admission did not relate. The only evidence of these independent crimes was the inference afforded by the conduct of the dogs. If such evidence is incompetent, the conviction cannot stand."

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The Court then proceeded to discuss the subject and circumstances and held that the mere evidence of the conduct of the bloodhounds alone was not admissible to connect the accused with said independent crimes "under circumstances disclosed in the present record" and held, apparently, that in general the Court would not upon the evidence of the conduct of a bloodhound "standing alone . . . sustain a conviction." The judgment is, with respect, somewhat confused and inconsequent but if the opening distinction made on the point of the "independent crimes" is kept in mind it is not self-contradictory: the head-note is, however, clearly erroneous, as being too loosely and broadly stated. But whatever may be said of the reasoning or tone of the judgment it unquestionably recognizes the com-

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petency of the evidence in principle while placing limitations and safeguards upon its application in practice to meet the circumstances of the particular case.

Before turning, in the light of the foregoing decisions, to the facts before us it is not out of place to cite from standard encyclopædias, to which, as the cases shew, the Courts resort for common information derived from the experience of mankind respecting the racial propensities of animals and particularly dogs. Thus in the Encyclopædia Britannica, 9th Ed., in the article "Dog," Sec. IV., Hounds, it is said:

"The bloodhound is remarkable for the acuteness of its scent, its discrimination in keeping to the particular scent on which it is first laid, and the intelligence and pertinacity with which it pursues its object to a successful issue. These qualities have been taken advantage of not only in the chase, but also in pursuit of felons and fugitives of every kind. According to Strabo, these dogs were used in an attack upon the Gauls. In the clan feuds of the Scottish Highlands, and in the frequent wars between England and Scotland, they were regularly employed in tracking fugitive warriors, and were thus employed, according to early chroniclers, in pursuit of Wallace and Bruce. The former is said to have put the Sleuth-hound, as it was called, off the scent by killing a suspected follower, on whose corpse the hound stood,

MARTIN, J.A. 'Nor farther moved fra' time she found the blood.'

For similar purpose captives were often killed. Bruce is said to have baffled his dogged pursuer as effectually, though less cruelly, by wading some distance down a stream, and then ascending a tree by a branch which overhung the water, and thus breaking the scent. In the histories of border feuds these dogs constantly appear as employed in the pursuit of enemies, and the renown of the warrior was great who,

'By wily turns and desperate bounds,
Had baffled Percy's best bloodhounds.'

In suppressing the Irish rebellion in the time of Queen Elizabeth, the Earl of Sussex had, it is said, 800 of these animals accompanying the army, while in later times they became the terror of deer-stealers, and for this purpose were kept by the Earls of Buccleuch so late as the 18th century, and even at the present time their remarkable power of scent is occasionally employed with success in the detection of murder. The Cuban bloodhound is of Spanish descent, and differs considerably in form from the English variety, having small, though pendulous ears, with the nose more pointed, and with a more ferocious appearance. Its employment in the capture of runaway slaves, and in the cruelties connected with the suppression of negro insurrections, has brought the animal into the evil repute which more properly belongs to the inhuman masters, who thus prostituted the courage, sagacity, and pertinacity of this noble dog to such revolting purposes."

In Chambers's Encyclopædia it is said to be "A variety of

hound remarkable for its exquisite powers of scent . . . " and particulars similar to those above quoted are given.

Popular misguided prejudice against a certain race of animals can have no place in questions of evidence and there ought to be the same disposition to listen to facts favourable to an animal as unfavourable. Who would, *e.g.*, be disposed to close his ear to facts deposed to by the monks of St. Bernard testifying to the racial propensities and actions of their famous breed of dogs long preserved and trained in their celebrated hospice (founded in the eleventh century) which breed is "remarkable for high intelligence and use in rescuing travellers from the snow"—Encyclopædia Britannica, 11th Ed.

From the evidence before us it appears that two hounds were jointly employed to discover the murderer and concerning their special training and capacities there is evidence much stronger than is to be found in any of the cases cited. To begin with, the hounds come from the kennel of and were trained by an officer of justice, provincial constable Douglas C. Campbell in Vancouver, aged 34, who has been keeping bloodhounds since he was 8 years old, and the animals in question, two bitches, have been kept inclosed and trained for the sole purpose of trailing human beings, the older one for five years and the younger for over three years, and were never allowed out unless for tracking or trailing in the course of which they have been employed in twenty-one to twenty-seven cases; and as the result of his long experience with animals of this class in general and of these two hounds in particular, the witness, their owner and trainer, testified that they were able to trail human scent unerringly and having once been put upon a certain human trail in certain circumstances would not abandon it till it failed unless they were called off. In this case he came with his hounds upon the scene of the murder within a few hours thereafter, not more than nine probably, but in any event so soon that some of the bloodstained footprints of the murderer in his victim's house were still damp upon the carpet, and from them and from the axe used by the murderer and the carpet with the said blood imprint, both the blood scent and the proper human scent were available and upon them the hounds were laid and they followed up the trail first

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by the blood scent and then, when the blood tracks ceased, by the proper or personal human scent of the person who had made them, and persisted in this line of conduct in the ordinary way by back-tracking, etc., to "straighten out on the actual scent" of their quarry with unerring certainty: in this instance, as the witness who accompanied them throughout testifies, all the conditions were unusually favourable. He describes in great detail, and in a manner not shaken at all by cross-examination or frequent searching questions by the Court, the way in which the murderer's trail was "worked" and followed by the hounds under his supervision for several hours, from the time the murderer lurked in the bushes in the vicinity of the crime to when he finally took to the water at a certain wharf on Burrard Inlet after he had achieved his object. The most significant fact was that this continuous and identical trail of the murderer beginning and ending upon a fresh hot scent, led to and from the house of the accused's brother near by, and it is admitted that the accused was at that house that night, his brother saying that he came there "around eleven" o'clock and wanted to get his canoe and that he went with him to the said wharf, shewed him where it was, gave him a paddle and saw him depart, and the hounds trailed the murderer to that same wharf and admitted point of departure on the said hot scent, which in the circumstances is the same as bringing it to his very door. The trainer swore positively and repeatedly that these particular animals would and did cling to a human scent, *e.g.*:

"You put them on a scent once and they will stay on that scent for days as long as you don't pull them off and put them on some other scent.

"Will they change? No, never will. They take one party or one person and they stay right on him. I had them out for three days on one scent straight and they stayed on to it."

And, in answer to a juror:

"You are able to say that that was the same person that took both tracks? Yes, the dogs would not take another scent. They were taking the one scent.

"The dogs arrived there at the store and they got the scent of the person who presumably committed the murder coming down the lane way and the dogs couldn't have the scent of his tracks to the store after they got the scent? Yes, they could then. They get one scent and they follow that one scent right straight through. If you travel all day in different parts of this Court House and went out of this door and travelled around and came in the other door I would follow you around wherever you were and back and

forward until I got you straightened out. What I mean, got you really hot, and then I start to run."

"To counsel: All the scents [here] were made by the same person."

The witness had already testified that he had at the start, laid the dogs on to a "fresh hot scent."

If there is any truth in this evidence, and it is wholly uncontradicted, then it must have been of weight with the jury because it fits in exactly with the case of circumstantial evidence put forward by the prosecution, as is shewn by the plan produced of the locality, and by the lengthy examinations of said witness and others which it is unnecessary to cite further.

It will thus be seen that, to an unusual degree, what the House of Lords, *supra,* calls the "racial propensities" of these two hounds have been put to the test and demonstrated in actual performance, according to their ostensibly reputable trainer, after having also had the further advantage, likewise to an unusual degree, of what Lord Esher, *supra,* in the *Filburn* case, happily calls the "cultivation" of that very remarkable racial propensity. With every respect to contrary opinions, I am unable to see upon what principle such evidence is to be wholly rejected from consideration by the jury instead of permitting them to consider it, after due caution, *quantum valebat*; in no reported case has the suggestion been made that it is in any way in the nature of hearsay or akin to it, but on the contrary the whole trend of the authorities cited is that it is to be regarded as primary evidence of actual and relevant occurrences in pursuance of established propensities possessed by a peculiar race of animals; what in fact, Willes, J., *supra,* in the *Read* case, calls "the natural and immediate result of the animal's peculiar . . . . disposition," which, be it good or bad, can unquestionably be given in evidence, and there can be no distinction in its competency in civil or criminal trials because if it is admissible, as it unquestionably is, to fix civil responsibility it must also be admissible to fix that which is criminal for, as the opening words in Roscoe's Criminal Evidence, 14th Ed., p. 1, says, "[the] general rules of evidence are, at common law, the same in criminal and civil proceedings."

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Much was said about the danger of admitting evidence of this

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nature, but the first answer to that is, that if it is accompanied by appropriate safeguards, such as cautions and warnings to the jury, there is no real danger, and our rules of evidence recognize certain classes of testimony, such as that of young children, informers and accomplices, which are not thought proper to be allowed to go to a jury without cautionary instruction because of the danger of undue weight being attached to them, but that is never a reason for their total exclusion: see *Rex* v. *Beebe* (1925), 19 Cr. App. R. 22; 41 T.L.R. 635, wherein the Court of Criminal Appeal decided that though it was the duty of the trial judge to warn the jury of the danger always of convicting upon the uncorroborated evidence of an accomplice nevertheless it was within the legal province of the jury to do so if they feel so disposed in the circumstances before them; the evidence being competent the weight of it is for the jury, and hence it is the "duty of the judge to tell the jury that they may if they please act on the uncorroborated testimony of an accomplice." As to young children the Court of Criminal Appeal in England lately held in *Rex* v. *Marshall* (1925), 18 Cr. App. R. 164, that where the evidence of young children is under consideration a "clear and full warning about the nature of that evidence should be given to the jury." The second answer is that the Court must also avoid the equally grave danger of being over-cautious and thereby rejecting reasonable evidence which would enable the guilty to escape that just punishment which is necessary for the protection of the public. So while the Court is at all times sensible of the necessity to see that no unlawful means are employed in the detection of the guilty yet, on the other hand, to exclude evidence of this description might well have the effect of preventing the vindication of the innocent because, *e.g.*, it is a well known device of criminals to employ the tools or weapons of an innocent person and leave them by the corpse or otherwise at the *locus* so as to divert suspicion from themselves, and yet by the similar use of such specially trained hounds as were employed in this case the truth would be made manifest and the real criminal brought to justice. Moreover it must not be overlooked that the conduct and actions of animals are not subject to suspicion of fabrication owing to bias, interest or otherwise, because they are the result of innate racial propensities,

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more or less highly trained or "cultivated" as the case may be, and of corresponding value. If, by way of illustration, the owner and trainer of these very animals had been suspected of this crime and they had been laid on a fresh hot scent which led them to his door, can it be seriously suggested that their conduct was of no evidentiary weight against him?

The following observations in that high authority, Taylor on Evidence, 11th Ed., Vol. I., pp. 1-2, upon the general principles of evidence and the practical application of them are most appropriate to the question before us:

"None but mathematical truth is susceptible of that high degree of evidence called demonstration, which excludes all possibility of error. In the investigation of matters of fact such evidence cannot be obtained; and the most that can be said is, that there is no reasonable doubt concerning them. The true question, therefore, in trials of fact is not, whether it is possible that the testimony may be false, but whether there is sufficient probability of its truth; whether the facts are proved by competent and satisfactory evidence. . . . By satisfactory evidence, which is sometimes called sufficient evidence, is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined; the only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of an ordinary man; and so to convince him, that he would venture to act upon that conviction in matters of important personal interest. Questions respecting the competency or admissibility of evidence are entirely distinct from those which respect its sufficiency or effect; the former being exclusively within the province of the Court; the latter belonging exclusively to the jury."

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For all these reasons therefore, and upon the authorities cited, I am of opinion that the learned judge below both properly admitted the evidence and discharged the duty of duly cautioning the jury thereupon and so the application for a new trial should be refused and the appeal dismissed upon all grounds.

GALLIHER, J.A.

GALLIHER, J.A. agreed with MARTIN, J.A.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the evidence introduced of the use of bloodhounds to in some way aid and assist the Crown in fixing guilt upon the accused was the introduction of illegal evidence. No precedent was cited to admit of the introduction of such evidence and I am not aware of any cases approving of any such evidence being led in a criminal trial and especially in a capital case. I can find no case in England nor

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am I aware of any case in Canada, or any other part of the Empire. I am aware that there have been cases where a dog has been brought into Court when it was a case of disputed ownership. Undoubtedly a dog knows his master and what a dog would do under certain circumstances might be some evidence. The dog would ordinarily at least go to his master when called as against remaining with any other person, yet this would not in all cases, perhaps, be absolute evidence as to who was his master. He might go to one who had trained him in preference to his master. Some people have great influence over dogs. It would certainly be perilous indeed that the life of a man should be taken, a man sent to the gallows upon evidence of what bloodhounds did under certain circumstances such as tracking the accused man by scent from the scene of the murder to his home or some place he was known to be, subsequent to the murder. The introduction of the evidence would impress the jury with the belief that the Court lent the weight of its authority to the value of such evidence, and for aught one could tell it might be the turning point in the minds of the jury and upon that evidence the accused would be convicted. It would be a terrible thing that any such miscarriage of justice should take place, and that may have been the case here. You cannot look into the minds of the jury, they give no reasons, they bring in a bald verdict (that they must do under the law), therefore as always, the Courts must be vigilant at all times and careful that no evidence goes to the jury that is evidence illegal in its nature. I have no hesitation, with the greatest respect to all contrary opinion, in coming to the conclusion that the evidence adduced by the Crown relative to what the bloodhounds did under the circumstances detailed was not evidence that should have been admitted. It was plainly illegal evidence and prejudiced the accused at the trial, it assuredly would influence the jury. Sir Charles Fitzpatrick, then Chief Justice of Canada, in *Allen* v. *The King* (1911), 44 S.C.R. 331 at p. 341 said:

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> "On the whole I am of opinion that the appeal must be allowed, the conviction quashed and a new trial directed, on the ground that important evidence, which, in the circumstances, was inadmissible, was put in by the Crown and this evidence may have influenced the verdict of the jury and caused the accused substantial wrong. . . . ."

It was pressed upon the Court at this Bar that there was authority in some of the States of the Union (United States of America) for the reception of the impugned evidence admitted in this case and reference was made to the cases. I take occasion to refer to one of the cases—*Pedigo* v. *Commonwealth*, Court of Appeals of Kentucky (1898), 44 S.W. 143, where it was held by a majority of the Court that trailing by a bloodhound is admissible where it is shewn that the dog has been trained and tested. Mr. Justice Guffy, however, dissented from that view and I may say that the reasoning of that learned judge appeals to me more than the judgment of the majority, and here follow some excerpts from Mr. Justice Guffy's judgment, which I consider to be reasoning very much in point for the absolute exclusion of any such evidence, reasoning that I approve and adopt:

"It is now proposed to use the hound, not to capture a fugitive, but to ascertain or furnish evidence to convict some citizen of crime. It seems to me that this new use of the bloodhound is a radical departure from the former purposes for which they were used; but, whether this be so or not, it seems to me that neither the life nor liberty of a citizen should be taken away or even jeopardized by the mere fact that some person testified that the hound was well trained to track human beings, etc., and that he had trailed the accused from the scene of the crime to the habitation of the accused, or until he came upon the accused party. There is danger that the effect of the majority opinion will likely be to greatly promote the raising and training of bloodhounds, or hounds that will be called bloodhounds. It is a well-known fact that the owners of hounds, as well as other property, usually hold such property in high esteem; and, as the owner or trainer of hounds will be engaged in the business for pay, it will be greatly to their interest to always have well trained hounds. In fact, I presume there will be none but trained and expert hounds in a few years; at least such will be the opinion of their owners, for it would be utterly useless to have any other sort. It is common tradition, and doubtless believed by quite a large number of persons, that bloodhounds are capable of wonderful feats of trailing. In fact, the many wonderful stories told of the achievements of bloodhounds (mostly in the imagination of those originating them) have instilled into the minds of quite a number of persons such wonderful notions of the unerring, if not infallible, knowledge and intelligence of the hounds, that the fact that the hound said that a certain person had lately been at the place where the crime was committed would be the most conclusive proof that could be produced. . . . . The trailing of the hound, if evidence at all, must be upon the supposition that he took the track at the scene of the crime, and followed it; but the defendant has no chance to inquire of the hound how far from the place did he really find the trail, or did he cross any other or find any others.

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If a person was testifying to having tracked the defendant from or about the place, he could be cross-examined upon that subject to know whether there was any other track, and which appeared to be the freshest, and the size, and whether the trail he was following crossed or fell in with other trails. Not so with the dog. He has had his say, and left. There is another familiar rule of law, that A, a witness, will not be allowed to testify that B told him that he saw the defendant at the place, or that he trailed him or saw him going from the scene of the crime; but it seems to be contended in this case that A may tell what the dog said about it. A person may be murdered in a highway or road that is rightfully travelled by numerous persons. Twenty-five or fifty persons may have passed within less than a dozen hours, and, upon the discovery of the crime, a bloodhound may be brought there; and, if he has any of the attributes which he is generally credited with, he will certainly find some trail, and land somewhere. Would it be right to allow that fact to be proven against the party accused of the murder? If such evidence be admitted, it seems to me that a man might in fact be hung without any other evidence than the mere fact that the bloodhound was proven to have taken up the trail at the scene of the murder, and followed it to the house of the defendant. Such evidence must tend to establish his guilt, else it could not be admitted; and, if the jury upon such evidence found him guilty, how could this Court reverse? It will not do to say that the jury will not convict a party upon such testimony. As matter of fact and common history, some party is very likely to be suspected of the crime, and, after suspicion to a greater or less extent permeates the community, but little additional evidence is required to convict the accused; especially if he be defenseless or destitute of friends and facilities for making a defence."

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I would quash the conviction and a new trial should, in my opinion, be directed, in that evidence was improperly admitted not being according to law which may have operated prejudicially to the accused, and further in my opinion unquestionably substantial wrong was thereby occasioned the accused on the trial.

MACDONALD, J.A.

MACDONALD, J.A.: I agree with the conclusion arrived at by the Chief Justice and my brother MCPHILLIPS. The point has apparently not been considered by our own or the English Courts, and in view of that lack of authority and the need of caution in making innovations, and because I do not think sound principles support it, I would reject this evidence as inadmissible. I do not rest my opinion necessarily on the ground that it is secondary evidence. The Court accepts what in a sense may be regarded as secondary evidence, as for example, the records made by inanimate instruments, such as the thermometer. A witness testifies to the temperature because the thermometer

tells him what it is. That is accepted because its accuracy has been so thoroughly established that its record can be accepted without question. There are no uncertain factors. To allow a witness, however, to state the interpretation he places on the actions of a dog, under given circumstances, where there must be with our present knowledge, at least some unknown factors controlling those actions, would, I feel at this stage, at all events, be a dangerous innovation, and one which should not be permitted.

New trial ordered, Martin and Galliher, JJ.A., dissenting.

MUNN v. HAAHTI.

Contract—Marriage—Breach of promise—Correspondence between parties before seeing one another—Money sent plaintiff by defendant—Plaintiff goes to defendant's locality—After seeing him for two days leaves him and commences action.

The plaintiff, who lived in England, commenced correspondence with the defendant, who was a miner in the Portland Canal District, through the medium of a mutual friend who at the time was in England. Shortly after the plaintiff came to Canada and stayed for about one year in Hamilton, Ontario, where the correspondence continued with a view to matrimony. Photographs were exchanged and the defendant sent her money. She then went to Hyder, Alaska, where she met the defendant. They stayed together there for one day and then went to Stewart. The defendant had a house in the course of construction and he wanted to defer marriage until the house was finished. On the day following their arrival in Stewart he went to his mines and on his return the next day he found the plaintiff had gone to Vancouver. Shortly after she brought this action.

Held, on the evidence, that there was a promise to marry which was accepted but it was one from which either party could withdraw, and the action in its present form as claiming breach of promise cannot succeed.

Held, further, on the alternative plea for expenses in coming to the

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defendant on the chance of their suiting each other and the pecuniary loss thus occasioned, the plaintiff may be entitled to such sums as are shewn to have thus arisen, and subject to counsel's submission, an application will be heard for amendment of the pleadings to respond to the evidence in this regard.

ACTION for breach of promise of marriage. The facts are set out fully in the reasons for judgment. Tried by MORRISON, J. at Vancouver on the 27th of February, 1925.

J. A. Campbell, for plaintiff.
Ghent Davis, for defendant.

6th April, 1925.

MORRISON, J.: This is an action for breach of promise of marriage. There seems to be an old deep-rooted feeling against actions for breach of promise of marriage and that parties to such contracts should not be encouraged to invoke the aid of the Courts; if they do, then they should only in a proper case receive special damages or, loosely put, out of pocket expenses. Such a lawsuit being, as one eminent writer puts it, a contradiction in terms and very often employed as a medium of blackmail. There is an aversion to placing a money value on lack of wisdom for it is impossible to love and be wise or it may be that the ordeal to which a defendant in such action is subjected before the derisive gaze of an incurious concourse of spectators (who unfortunately will not treat such a trial as the tragedy it is, but as a comedy, which it is not) is sufficient punishment. Several attempts have been made in England to abolish the action altogether. The last, upon which I am able to lay my hands, was the Bill introduced by Sir Farrar Herschell (afterwards Lord Chancellor) in 1890 which received the support of such men as the late Lord Bryce (then Mr. Bryce). But the Bill did not reach its second reading. Nevertheless a promise to marry, if accepted, is an executory contract and is subject to the usual law of contract upon breach of which the injured party may in an action at law recover damages. There are engagements which should be viewed as sacred as the marriage tie where during their pendency relationships spring up and continue whereby the parties belong to each other, to the extent that the chance of any other suitor is eliminated—and under which

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the woman grows to maturity and foregoes the conventions and opportunities which would enable her to make provisions for her future matrimonial or self-supporting welfare. To have an engagement of that kind broken, without just cause, is a matter of such gravity that exemplary damages would of course be given by any tribunal whose aid is sought. This is not an engagement of that character. There undoubtedly was the promise to marry which was accepted and from which either party might withdraw even capriciously. The engagement or contract was broken or called off. The question to be determined is, which one of the contracting parties committed the breach, the severance, the calling off.

The plaintiff, who stated she had reached the age of 25 years, had been, up to the time of her departure from England, a typist in London from the time she was sixteen. She became acquainted in England with a married couple by the name of Bassit. Bassit had lived in Seattle for a few years and there he met and became on friendly terms with the defendant, who has for some time been engaged in prospecting and locating mineral claims on mountain tops in the region of Portland Canal, near Stewart. Whether his then living on the sky-line, as it were, caused it or not, it does seem he was an easy mark for those requiring small loans. He was living there and thus engaged when the plaintiff was living in London. They had never met nor had ever heard of each other until, through the medium of the Bassits, a long distance acquaintance was formed. Formal correspondence was commenced, supplemented doubtless by representations by the Bassits, and in a comparatively short time the plaintiff and they arrived in Canada which fact was duly communicated by wire to the defendant in Stewart. The party proceeded to Montreal where they remained for a few weeks and receiving no speedy open-armed reception from the defendant they proceeded to Hamilton, Ontario, where the plaintiff deemed it advisable to secure employment. They remained in that city for something like a year during which time the correspondence increased in volume containing reciprocal protestations of the deepest love and affection. The defendant, a native of Finland, was apparently desirous of

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marrying "an English girl." Photographs were exchanged, accompanied by the usual conventional apologies as to their shortcomings in not doing justice to the original model. From this mass and mess of letters written with one exception in handwriting difficult to decipher in most parts, I am driven to search for the promise upon which this action is based and a breach of which is alleged. I confess lack of endurance sufficient to enable me understandingly to read all the letters. Mr. *Davis* admitted it took him five hours to do so, but he is a young man. The plaintiff has displayed commendable foresight and care in preserving those received by her. The defendant has not exhibited the same regard for the love missives received by him, with one exception to which I have referred, as not having been in handwriting, but typed and which was written from Hamilton upon receipt by the plaintiff of a letter from the defendant in which he says he had received several anonymous letters evidently mailed on the train, casting aspersions upon the plaintiff's previous life. The plaintiff, not knowing doubtless exactly how much the defendant knew along these lines, wrote him very frankly about a certain association with a married man in London. The defendant disclosed compendiously the effect upon him of this acknowledgment of a platonic episode, through the medium of an old Finnish proverb of Viking origin which holds that "A boat that has been on the water some distance is safer than a brand new one," and so he continued his amatory protestations. Throughout his letters, he employs expressions, the first use of any one of which should have enabled a woman of refinement or delicacy to visualize the man with whom she was contemplating such a serious step as marriage. In the meantime, certain sums of money were remitted to her by him to be expended in various ways as for the further preservation of her teeth, for the purchase of articles of household requirements and incidentals. In due course, she arrived a little after midnight at Hyder which seems to be the boat-landing for the settlement of Stewart, some few miles distant, and there met the defendant for the first time. Whether they came up to each other's preconceived ideas or ideals it is difficult to determine. The condition of his alleged fortune undoubtedly

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appealed to her. Can the same be said of his person? They remained in the same room at a small hotel at Hyder that night under the protest of the plaintiff, as she asserts. Both admit there were manifestations of affection solely of an extraneous nature and so the night was passed agreeably enough. Next day at their hotel suite at Stewart, which he had engaged for her reception, there was, in the euphonious words of an old French philosopher, "amorous congressive familiarity" on defendant's part, which is now sought to be urged as "evidence of an attempt to satiate a wanton appetite." It appears that he did not unduly press his overtures and ceased when requested. There is no evidence which satisfies me that he used any force or, what I should term, an unexpected exhibition of ardour having regard to the reason, as disclosed by the correspondence, why the plaintiff was there at all. As the defendant's new house was in the course of erection, he suggested that their wedding be postponed for a few days, when they would combine that ceremony with a housewarming. He was obliged that first day to proceed to his claims up the mountain side to look to some matter of necessity concerning his development work; leaving her in care of the matron of the hotel. Upon his return the next evening, I think it was, he found the plaintiff had taken the steamer on its return trip. Shortly after arriving in Vancouver, she instructed a solicitor and this action was commenced. Paraphrasing his letters, he repeatedly tried to make it clear that if they did not like each other upon a full view and inspection that the engagement could be ended and that he would do the right thing by her. This sketchy outline of the evidence adduced at the trial may suffice to give a fair idea of the salient facts.

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The defendant has expressed his willingness to adhere to the bargain and disclaimed any intention of withdrawing from the engagement. He gave his version of the incidents at Hyder and Stewart. He is a foreigner with, what appears to be, a code of morals somewhat different from those promulgated in this country and which he fully disclosed to the plaintiff in ample time for her to consider the advisability of entering into contractual relationship with him. I reserved my decision after suggesting to the parties that they arrange to get married and to

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give them full opportunity to do so. The plaintiff now emphatically declines to enter into any such relationship and asks $10,000 damages. No device has yet been invented by which love letters would become volatilized upon the recipient's perusal. Nothing short of that can prevent them turning up at the most inconvenient junctures. The engagement here was entered into entirely in writing. I do not think that anything the defendant wrote or did was the sole or real reason for the plaintiff leaving England. The first mention of marriage does not appear until along in April, 1924, in a letter written to plaintiff in Hamilton.

In this case, neither party appeared at all super-sensitive. The defendant did not seem to resent the plaintiff's action very much, for after remonstrating against her conduct in leaving him in the lurch, he expressed the hope that, after the trial, all parties would, at his expense, join in a good dinner. My impression of him is that he is a good-natured, sentimental individual who could be easily regulated by a woman of any sense with whom he was associated, and who was really desirous of securing a husband of sorts.

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The action, in its present form, as claiming for a breach of promise cannot succeed. But the alternative plea for her expenses in coming to the defendant, on the off chance of their suiting each other, and for the pecuniary loss thus occasioned, is another matter. It may be that the plaintiff is entitled on such agreement, of which there is some evidence in the correspondence, to such sums as is shewn to have thus arisen. Subject to counsel's submission, I will hear an application for a specific amendment to the pleadings to that effect, to respond to the evidence. Otherwise, I give effect to Mr. *Ghent Davis's* contention that the action stands dismissed, the question of costs to be spoken to.

Action dismissed.

CLARKE v. LANGS & RODDIS LTD.

MORRISON, J.

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Feb. 9.

CLARKE v. LANGS & RODDIS LTD.

Contract—Adance of money—Shares in company received for—Shares to be repurchased in two years—Terms of agreement reduced to writing—Woman who advances money dies—Action by executrix to recover—Evidence—Inference from.

After incorporating for the purpose of manufacturing lumber the defendant Company, requiring money, secured the sum of $5,000 from S. for which she received shares in the Company, the money being advanced on the understanding that the company would repurchase the shares within two years. P. a chartered accountant who was S.'s agent being apprehensive of his principal's interest being safeguarded endeavoured to bring about the repurchase of the shares. To this the defendant agreed and wrote a letter to P. from which standing alone it cannot be accurately determined what had really transpired between them but P.'s letter in reply on the following day set out clearly the terms of the agreement arrived at to repurchase the shares. The details of the agreement were worked out later and the defendant's solicitor wrote a letter that could only be written on the footing that the alleged agreement existed. Before the agreement was carried out S. died and the defendant then claimed that a different arrangement would have to be made. In an action by S.'s executrix to recover the $5,000:—

Held, that on the facts of this case there appear all "the phenomena of agreement" and the defendant should not be heard to say that it has not agreed to anything. As appears by the evidence the conduct of the defendant is quite inconsistent with any other reason than that they intended and agreed to repurchase the shares.

ACTION to recover the sum of $5,000 advanced by Mrs. Shields to the defendant for certain shares of the said Company, the Company agreeing, as is alleged by the plaintiff, to repurchase the shares within two years. Mrs. Shields having died in the meantime, this action was brought by her executrix. The relevant facts are set out in the reasons for judgment. Tried by MORRISON, J. at Vancouver on the 15th of January, 1926.

Statement

J. Edward Bird, for plaintiff.
Wood, for defendant Langs.
W. J. Baird, for defendant Roddis.

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9th February, 1926.

MORRISON, J.: The plaintiff is the executrix of the late Mrs. J. C. Shields, whose husband in his life time had been engaged extensively in the lumber trade in various capacities. After his death, the defendants, who were about to begin manufacturing lumber, and for that purpose to open a mill, incorporated as Langs & Roddis Ltd. They then cast about with a view to supplement their small capital and succeeded in securing the sum of $5,000 from Mrs. Shields for which sum she received shares in the company. The understanding upon which she invested this sum was that those shares should be repurchased by them within two years from the date of the agreement, the terms of which were reduced to writing. Mrs. Shields was, at times material to the issues herein, in an indifferent state of health and subsequently died, leaving her sister, Mrs. Clarke as her executrix. Mr. Pirie, a chartered accountant, acted as her duly authorized agent in dealing with the defendants, whilst Mr. *H. S. Wood,* when he did intervene, did so under authority for and on behalf of the defendants. Mr. Pirie, not being satisfied that the interests of his principal were being properly safeguarded, began a series of interviews and remonstrances with the view to having the defendants consummate the repurchase of the shares at that time. To this they agreed and, on June 12th, 1925 (Exhibit 2) a letter signed Langs & Roddis Ltd., per J. W. Langs, was written to Mr. Pirie from which standing alone it cannot be accurately determined what had really transpired between them. However, on the following day, Mr. Pirie replied (Exhibit 3) setting out definitely and clearly that they were dealing with the acquisition of the shares by J. W. Langs and H. Roddis individually and not in their corporate capacity. The letter is quite lengthy and, in my opinion, sets out the terms of the agreement arrived at to repurchase of the shares and that the defendants made the offer therein set out and that Mr. Pirie's letter is a specific acceptance of the same. In working out the details of this agreement, a series of promissory notes were agreed upon and payments made and also that the

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shares should be placed in escrow. The subsequent correspondence deals with these details and the letter of the 3rd of July was written by Mr. *Wood* acting for the defendants and which could not have been written except on the footing that the alleged agreement existed. Mrs. Shields died in the meantime and on August 14th the plaintiff's solicitor received a letter signed by the company referring to that incident and stating that in consequence a different arrangement must be made. Since then the parties have been at arm's length and this action has resulted.

As to the law of contract apposite to the facts of this case, as I have briefly recited them, I perhaps cannot do better than to quote from the judgment in the case of *Sinclair* v. *Land Settlement Board* (1925), 35 B.C. 434 at pp. 440-1:

"In order to form the basis of a binding enforceable contract the parties thereto must come to some determination and to the same determination; and it must be disclosed. This determination may be manifested by written or spoken words or by other signification of intention from which an implication of law or an inference of fact or both may arise. . . . . There can be no contract during the period of non-determination, and that there must be a contemplation to create a legal obligation between the parties. It has been repeatedly declared that 'the intention of the parties governs the contract.' . . . . A contract being a manifestation of intention, it is a matter of the greatest difficulty at times, where there is a dispute, to find out what the true intention was, involving the inherent difficulties inseparable from all enquiries into disputed facts. . . . . The sense in which that offer is to be taken is the sense in which the offerer believed that the offeree accepted it. I must decide what is the legal obligation which has been created by that offer and acceptance, and therefore the determination of what that sense is rests with me. In so doing, I must put upon the terms, as disclosed, my own interpretation, basing my conclusions upon principle, aided by the interpretation of the respective parties as well as that of disinterested witnesses and the surrounding circumstances. The intention is then presumed from the sense which I may fairly extract from all those aids which, of course, may be more or less adventitious. That presumed intention for the purposes of this case at any rate is the real intention. It is strongly urged that there is not here even an implied contract. Yet there may be an inferred contract. The difference between an implied and an inferred contract is that a contract implied by law is not a real contract but only a *quasi*-contract—a relation having the semblance of a contract—whereas an inferred contract is a true contract by the conduct of the parties."

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Now, on the words and conduct of the parties, can it be

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reasonably said that it is impossible to determine what was really intended as between them? In my opinion, in the facts of this case there appear, as the bookmen put it, all "the phenomena of agreement," and so the defendant ought not now to be heard to say that it has not agreed to anything. The conduct of the defendants, as appears by the evidence, is quite inconsistent with any other reason than that they intended and agreed to repurchase the shares, as I have found.

Judgment

There will be judgment for the plaintiff as claimed for $5,000 and interest, the rate of interest to be spoken to if deemed advisable by counsel. If necessary there will be amendments to the pleadings to respond to the evidence.

Judgment for plaintiff.

LEW v. WING LEE.

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Nov. 15.

LEW v. WING LEE

Judgment—Judicial Committee of Privy Council—Assessment of damages—Order referring back to jury to reassess—Construction of order as to composition of jury—R.S.B.C. 1924, Cap. 123.

In an action for malicious prosecution the plaintiff claimed $490 special damages and $5,000 general damages. The jury brought in a verdict for $490 special damages and $10,000 general damages. The Court of Appeal ordered a new trial. The Supreme Court of Canada ordered that the new trial be limited to the assessment of general damages. On appeal to the Judicial Committee of the Privy Council it was ordered that the judgment of the Supreme Court be varied, in that the case be "referred back to the jury in the Supreme Court of British Columbia to reassess the damages generally." An application for an order that the jury to be summoned for the purpose of reassessing the damages pursuant to the order of the Judicial Committee of the Privy Council, do consist of the same individuals as constituted the jury on the trial of the action, was dismissed.

Held, on appeal, affirming the order of McDONALD, J. (McPHILLIPS, J.A. dissenting), that the decision of the Judicial Committee of the Privy Council should not be construed as meaning that the jury which first tried the case and was discharged should be recalled to reassess the damages, such a construction being inconsistent with our jurisprudence and repugnant to the Jury Act.

APPEAL by plaintiff from the order of McDONALD, J. of the 14th of September, 1925, on an application that a special sittings of the Supreme Court be ordered to be held at Vancouver for the purpose of reassessing the damages pursuant to an order of the Judicial Committee of the Privy Council of the 26th of May, 1925, and for an order that the jury to be summoned consist of the same individuals as constituted the jury on the trial of the action. The plaintiff brought action for malicious prosecution claiming $490 special damages and $5,000 general damages. The jury brought in a verdict for $490 special damages and $10,000 general damages. The Court of Appeal ordered a new trial (see 33 B.C. 271). On appeal to the Supreme Court it was ordered that a new trial be limited to the assessment of general damages. On appeal to the Privy Council it was ordered that the judgment be varied by

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directing that the case be "referred back to the jury in the Supreme Court of British Columbia to reassess damages generally to which the respondent may be entitled." The plaintiff was murdered shortly before the hearing in the Supreme Court of Canada. That portion of the application that the reassessment take place before the jury that sat on the trial was dismissed.

Statement

The appeal was argued at Vancouver on the 17th of November, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Mayers, for appellant: We submit that it is clear the language used by Lord Buckmaster means that the same jury that sat on the original hearing must reassess the damages generally and this meaning cannot be departed from by any Court below: see Chitty's King's Bench Forms, 15th Ed., 460.

Argument

Alfred Bull, for respondent: It should not be assumed that the Privy Council would do something against the established practice. The practice is that once a jury is discharged it cannot be summoned again: see *Craig* v. *Hamre* (1925), [*ante* p. 1]; *Loveday's Case* (1608), 4 Co. Rep. 269.

Mayers, replied.

MACDONALD, C.J.A.: I have no doubt whatever about this case. It is simply a question of the meaning of the judgment of the Privy Council as pronounced by Lord Buckmaster. Now, what he said was this: "the right order in their Lordships' opinion would be to modify the judgment of the Supreme Court by referring the matter back to the jury to reassess the damages generally."

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Now, what do those words mean? They do not profess to set aside the judgment of the Supreme Court, which directs a new trial, but merely modify it by saying the jury shall not be confined in their assessment to general damages, but must assess both general and special damages. In other words, that the two cannot be separated. Now that is the effect of his judgment. Lord Buckmaster has not very happily (as it turns out from this discussion) expressed it, but I should never have entertained any doubt as to what he meant to express.

Now a jury is the proper tribunal to assess these damages and it is admitted very frankly by Mr. *Mayers* that he has found no case, nor can he cite one from all the history of our jurisprudence, in which the jury which first tried the case and was discharged had been recalled to reassess the damages. The thing is utterly inconsistent with our jurisprudence and I think repugnant to the Jury Act.

In my opinion there has been on appellant's part, an entire misconception of the meaning of the judgment of the Privy Council as well as an entire misconception of the law of this country. MACDONALD, C.J.A.

The appeal should be dismissed with costs.

MARTIN, J.A.: I must confess I find myself in a very awkward position, and am constrained to say, that the Privy Council expressed themselves in a very vague and slipshod manner if they intended to do what the majority of my brothers think they did do. It is unfortunate that they did not use clear language in giving the ordinary direction instead of language appropriate to an extraordinary direction entirely without precedent. I dislike very much to differ from my brothers in a matter of this kind, and at the same time I dislike very much to say that the Privy Council would be guilty of using the King's English in such a way that nobody can know what they did really mean. Being in such doubt I think it is better not to disagree with the view which I understand the majority of the Court take, because it is really something that cannot be dealt with on ordinary grounds, and I do not feel disposed to say that the King's advisers do not know how to use the King's language, but that is what it comes to. MARTIN, J.A.

GALLIHER, J.A.: I agree in dismissing the appeal. There is one matter that I am not at all satisfied about and that is this, that the Privy Council had the authority in directing the jury to retry this case as far as the assessment of damages is concerned; to direct that it should be the old jury that originally tried it. It is urged by Mr. *Mayers* that is what was ordered and construed literally there is room for that contention but I can hardly think that was intended. I say this GALLIHER, J.A.

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with every respect and I may be wrong. There is no doubt that their position is paramount as to interpretation of statutes and determining the law, but our Legislature here has provided a method of summoning jurors, a method by which jurors are called and selected to try cases.

Now it seems to me that it must be done in accordance with that method and it is not within the power of the Privy Council to direct that the matter should be tried other than as provided; and by a jury which is *functus officio*. If it were, they are superior to our Legislature.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the opinion that the judgment of the Privy Council (the reasons for judgment and order as framed) is free from ambiguity, and being free from ambiguity it is not within the province of this Court, in fact, it is without and beyond the jurisdiction of this Court to interfere with that judgment.

What is the duty of this Court? Lord Cairns defined it in the Privy Council in the case of *Rodger* v. *The Comptoir D'Escompte de Paris* (1871), L.R. 3 P.C. 465 at p. 475. There it was a case in the Supreme Court in Hong Kong:

> "Now their Lordships are of opinion that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression 'the act of the Court' is used it does not mean merely the act of the Primary Court or of any intermediate Court of Appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of those tribunals, if I may use the expression, to take care that no act of the Court, in the course of the whole of the proceedings, does an injury to the suitors in the Court."

Now, what was the intention? The Supreme Court of Canada took great care that no injury would ensue to the suitors because it said in effect: "Notwithstanding that this action would now have died we put you upon terms that this judgment shall stand unless you agree not to raise the point."

The Supreme Court of Canada took care of the estate of the deceased suitor in this way.

The Privy Council, with like care in effect, said it would not do to send the case back for a new trial in the strict sense of the term; but that the same jury should

assess the damages and the words they have used to accomplish that are "reassess the damages." If the order had been directed to the trial judge alone (had the case been before a judge without the intervention of a jury) that the trial judge should reassess the damages could it have been said that there would have had to be a trial *de novo?* I submit not. Sometimes the jury are thought to be people of no consequence; that they are not a part of the Court, but they are an integral portion of the Court; they are just as important as the judge sitting upon the Bench and under the constitution are just as important. It must be remembered that the jury are performing a high and solemn duty. And what is there to prevent the highest Court of the realm speaking of that jury as a jury just as they would speak of a judge as a judge and in terms saying as has been said here that that jury constituted as it once was constituted sitting again will reassess the damages? Now, as to whether it is an order of inconvenience I have nothing to say. This however may be said in this case: counsel assure this Court that there is no difficulty in the same jury being empanelled. All I have to say is that the final Court of the realm has spoken in no ambiguous terms and it is not for this Court to change or alter the judgment and as Lord Cairns has very well stated it is the duty of every tribunal below to see that the order of the Privy Council is carried out.

MCPHILLIPS, J.A.

MACDONALD, J.A.: To my mind this is simply a matter of construction. While it is possibly open to two interpretations, yet if it were ever intended that such an unusual order should be made apt words would be used to make it clear.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *F. S. Cunliffe.*
Solicitors for respondent: *Tupper, Bull & Tupper.*

HUNTER, C.J.B.C. (In Chambers)

1926

Feb. 1.

REX *EX REL.* BLANCHE HART v. MOORE.

Case stated—Child—Unmarried parents—Maintenance by putative father—Application order—Corroboration—Appeal—R.S.B.C. 1924, Cap. 34, Secs. 7, 9 and 12; Cap. 245.

REX v. MOORE

On the return of a summons issued on a complaint under section 7 of the Children of Unmarried Parents Act, the stipendiary magistrate found the defendant to be the father of the complainant's child on the evidence of the complainant which he held was corroborated by the evidence that the child was born on the 7th of January, 1925, that complainant and defendant lived together as man and wife (unmarried) in 1923, that the defendant was co-respondent in divorce proceedings brought by the complainant's husband against her, that the defendant never denied being father of the child until after these proceedings were started, that the complainant had had two children, the younger being the subject of this action, that defendant had paid the complainant about $100 a month for the support of herself and children and paid the children's hospital and doctor's bills. On appeal by way of case stated:—

Held, that there was not the corroborative evidence that the law requires and the order finding the defendant the father of the child should be vacated.

APPEAL by way of case stated from the decision of J. A. Findlay, Esq., stipendiary magistrate at Vancouver, on a complaint under section 7 of the Children of Unmarried Parents Act, whereby he adjudged one Nelson Moore to be the father of the child of one Blanche Hart and ordered him to pay $10 per week for the maintenance of the child, to furnish security for the performance of the order in the sum of $1,000, and in default that he be imprisoned for six months. The case stated was as follows:

Statement

"1. The defendant, Nelson Moore, was charged before me on the information of Blanche Hart on the 10th of March, 1925, who says a child was born to her out of wedlock and that Nelson Moore, of the said City of Vancouver, is the father of the child contrary to the Children of Unmarried Parents Act, being chapter 34 of the Revised Statutes of British Columbia, 1924.

"2. Upon hearing the parties and the evidence adduced by them, I did on the 8th of April, 1925, adjudge the said Nelson Moore to be the father of the child of the said Blanche Hart born on the 7th of January, 1925, and

did order the said Nelson Moore to pay to the superintendent of neglected children for the maintenance of the said child the sum of $10 per week, the first payment to be made on or before the 15th of April, 1925; and further to furnish to the superintendent of neglected children security in the sum of $1,000 before the 8th of May, 1925, and in default of furnishing the said security to be imprisoned in the common jail for six months.

"3. The defendant, alleging he was aggrieved by the said determination as being erroneous in point of law, did within seven clear days from the date of the proceedings to be questioned apply in writing to me to sign a case stated, setting forth the facts of the case for the opinion of the Court.

"4. I accordingly find the following facts as establishing the parentage of the child on the evidence of the complainant and apart from the corroboration required by the statute:

"(a) The defendant is the father of the child born to Blanche Hart on the 7th of January, 1925.

"5. I find the following facts by way of corroboration:

"(a) The defendant and the complainant lived together as man and wife in 1923 (but were not married). No evidence was adduced that since then they lived together as man and wife or otherwise.

"(b) The complainant gave birth to a child on the 7th of January, 1925.

"(c) The defendant was co-respondent in divorce proceedings brought by the complainant's husband when a decree of divorce was granted the husband. Statement

"(d) The defendant never denied being father of the child until after these proceedings were started.

"(e) The plaintiff has two children, the younger child being the subject of this action.

"(f) The defendant paid to the complainant sums of money approximating in amount $100 per month for the support of herself and children.

"(g) The defendant paid the children's hospital and doctor's bills.

"The question for the opinion of this Court is whether my said determination is erroneous in point of law."

Argued before HUNTER, C.J.B.C. in Chambers at Vancouver on the 1st of February, 1926.

Maitland, for appellant: There was no corroboration under section 14 of the Act: see *Anderton* v. *Seroka (No. 2)* (1925), 2 W.W.R. 433.

Eyre, for the Crown: Paragraph (f) of the case stated shews payment of $100 for the support of the woman and her children and this amounts to corroboration: see *Rex* v. *Steele* (1923), 33 B.C. 197. Argument

HUNTER, C.J.B.C.: In my opinion sufficient corroborative evidence within the meaning of the Act is not shewn by the case stated. There is nothing to bar the inference that some one Judgment

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else was the father of the second child. The child was born in January, 1925, and the case states that no evidence was given to shew that the pair had cohabited since 1923. The appeal must be allowed.

Appeal allowed.

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1926

Jan. 12.

CHAN v. C. C. MOTOR SALES LTD.

CHAN v. C. C. MOTOR SALES, LIMITED. (No. 2).

Practice—Supreme Court—Application to Court of Appeal for leave to appeal—General rule as to—Can. Stats. 1920, Cap. 32, Secs. 35 to 43.

The plaintiff purchased an automobile under a conditional sale agreement. Being in default the vendor (defendant) seized the car and resold it, receiving in all $532.78 more than the original purchase price. The plaintiff recovered judgment for the surplus which was confirmed by the Court of Appeal (36 B.C. 488). On motion by the defendant for leave to appeal to the Supreme Court of Canada:—

Held (GALLIHER and MCPHILLIPS, JJ.A. dissenting), that the questions involved are important as they affect all agreements of this character in the several Provinces and leave should be granted.

MOTION to the Court of Appeal for leave to appeal to the Supreme Court of Canada.

The action arose over the sale of an automobile purchased by the plaintiff from the defendant under a conditional sale agreement. The purchase price was $3,103.60. The plaintiff paid $950 in cash and six monthly payments aggregating $700. Being in default in the next two payments the defendant took possession of the car under the agreement and shortly afterwards resold the car for $2,200. The plaintiff claimed he was entitled to recover from the defendant any sum received by him over and above the original purchase price and obtained judgment for $532.78, the judgment being sustained by the Court of Appeal.

Statement

The motion was heard at Victoria on the 12th of January, 1926, by MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Mayers, for the motion: Leave should be granted for two reasons: (a) there is an important question of law to be decided;

(b) there is an enormous sale of automobiles in this way and the point is one of great public interest. In *Doane* v. *Thomas* (1922), 31 B.C. 457 the Court agreed in the principles laid down by the Supreme Court in *Girard* v. *Corporation of Roberval* (1921), 62 S.C.R. 234.

F. A. Jackson, contra: The amount involved is small and the question involved can hardly be said to be of great public interest nor does it involve an important question of law. Here there is an exercise of judicial discretion.

Argument

Mayers, replied.

MACDONALD, C.J.A.: I think, in the circumstances of this case, and considering the questions involved, which are of importance because they affect all agreements of this character in all the Provinces of Canada, that leave should be granted. The appeal should be allowed to go to the Supreme Court of Canada.

MACDONALD, C.J.A.

MARTIN, J.A.: I am of the same opinion. This application is founded on a state of affairs which comes within every one of the rules that we have laid down, so far as it is desirable or possible to lay them down, in former decisions of this Court respecting the exercise of our discretion to grant leave to appeal to the Supreme Court of Canada. It is eminently a case where that leave should, I think, be granted.

MARTIN, J.A.

GALLIHER, J.A.: I would refuse leave.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I would refuse leave, with the greatest deference to the expressed opinions of my brother the Chief Justice and my brother MARTIN who have preceded me. Our previous decisions have, it is true, been very stringent indeed, so much so, that I felt driven to make the statement in one that no absolute or concrete rule should be laid down, being a sovereign Court with no rules binding us whatsoever in giving leave to appeal, and that leave ought always be given in furtherance of natural justice. That the Court of Appeal is unfettered in granting leave to appeal has now been decided by the Supreme Court of Canada in *Canadian National Railways* v. *Croteau* (1925), S.C.R. 384. I have always felt that in the interests of justice where Parliament clothed us with that

MCPHILLIPS, J.A.

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supreme power, putting us under no trammel, that the interests of justice should always be paramount. This Court in recent decisions put the leave within very narrow and confining lines, and I cannot see that this case has any features which would influence me in the interests of justice to grant leave to appeal. This case, and I say it with the greatest deference to contrary opinion, is simple in the extreme. Notwithstanding the language that is used, the Courts have ever since the introduction of equitable principles held that the spirit not the form shall prevail. The form here is idle, because the spirit of the document is plain. Why should there be the right in case of any deficiency to call upon the vendee for that deficiency and no right in the vendee to be entitled to any surplus after the goods are sold by the vendor? The writing itself brings this out in the clearest terms; in any case equity will insist upon the reciprocal remedy where there is, as here, a surplus; there must be the countervailing equity.

MCPHILLIPS, J.A.

Certainly if I were at all disposed to give leave in this case, which I am not, I would put it on terms similar to those often exacted by the Privy Council; the case in itself is not of such moment that it ought to go to the ultimate Court of Appeal; because it may have some general application and affect many other cases is no reason to warrant the casting upon the successful party in this Court the extreme costs of an appeal to the Supreme Court of Canada, an appeal most probably beyond available means; and were I assenting to granting leave it would only be on the terms that the costs of appeal should be borne by the appellant notwithstanding what might be the result of the appeal.

Finally, in my opinion there has been no disturbance of well-recognized principles of law; the judgment is only carrying out very well known principles of law of every day application.

MACDONALD, J.A.

MACDONALD, J.A.: For the reason that this is a matter of public importance in the commercial world and involves an important question of law, and for the further reasons mentioned by the Chief Justice, I would give leave.

Leave granted, Galliher and McPhillips, JJ.A. dissenting.

[In Bankruptcy.]

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1926

Jan. 14.

WINTER v. CAPILANO TIMBER COMPANY LIMITED AND J. A. DEWAR COMPANY LIMITED.

WINTER v. CAPILANO TIMBER CO.

Bankruptcy—Trustee—Application under rule 120—For declaration that notice of forfeiture of lease is void and that the lease is valid and subsisting—Procedure—Appeal—Right of—Can. Stats. 1919, Cap. 36, Sec. 74—Bankruptcy rule 120.

The trustee in bankruptcy of the Coast Shingle Company applied to a judge in bankruptcy in Chambers for a declaration that a lease from the defendant J. A. Dewar Co. Ltd., to said company of certain premises upon which the Coast Shingle Company had its mills was valid and subsisting; that the notice of forfeiture given by J. A. Dewar Co. of said lease was void and of no effect; that the trustee in bankruptcy was entitled to possession of said premises; and that the defendant Capilano Timber Company should pay rent to the trustee for its period of occupation of the said premises. On the defendant's objection it was held that the subject-matter of the applicant's motion did not fall within rule 120 of the Bankruptcy Rules.

Held, on appeal (McPhillips, J.A. *dubitante*), that what was decided below was a question of procedure and therefore does not fall within either subsection (*a*) or subsection (*c*) of section 74 (2) of the Bankruptcy Act and there is no appeal.

Statement

Appeal by George E. Winter the authorized trustee of the property of the Coast Shingle Company Limited from the order of Gregory, J. of the 23rd of November, 1925, dismissing the trustee's application for a declaration that a certain lease of the 6th of December, 1923, between J. A. Dewar Company Limited as lessor and the Coast Shingle Company Limited as lessee of a certain premises in the City of Vancouver and occupied by the lessee's shingle mill and buildings is valid and subsisting; that notice of forfeiture of said lease given by J. A. Dewar Company on the 4th of June, 1925, purporting to determine the interest and right of possession of the Coast Shingle Company in the premises is void and of no effect; and that the trustee is entitled to possession of the said premises. The trustee further prayed for an order that the Capilano Timber Company occupying the said premises under a purported lease

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from J. A. Dewar Company do pay rent to the trustee from the time they entered into possession until such time as possession is given up by them. The main ground for the application was that prior to the said notice of forfeiture having been given by the lessors, they did not make a formal demand for the rent due under the lease; nor did they demand rent on the premises demised on the date when the said rent came due. It was held that the subject-matter of the applicant's motion did not fall within rule 120 of the Bankruptcy Rules.

Statement

The appeal was argued at Victoria on the 13th and 14th of January, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Alfred Bull, for appellant.

Mayers, for respondent, Capilano Timber Company, raised the preliminary objection that there was no appeal. It was decided below that this application did not come within r. 120 and left the trustee to bring an action in the Supreme Court. Under section 74 of the Bankruptcy Act there is no appeal. On the question of involving future rights see *In re Motherwell of Canada* (1924), 5 C.B.R. 107 at pp. 108-9. The judge below did not get to the stage of considering any amount: see *J. F. Camirand* v. *Laporte-Martin, ib.* 518; *In re Thornton Davidson & Co.* (1921), 3 C.B.R. 181; *Brown* v. *Cadwell* (1918), 2 W.W.R. 229 at pp. 230 and 232; *The St. John Lumber Company* v. *Roy* (1916), 53 S.C.R. 310 at p. 317; *Cushing Sulphite-Fibre Co.* v. *Cushing* (1906), 37 S.C.R. 427; *Re J. McCarthy & Sons Co. of Prescott Limited* (1916), 38 O.L.R. 3 at p. 5. Future rights must be substantive rights and not objective: see also *Shoolbred* v. *Union Fire Ins. Co.* (1887), 14 S.C.R. 624; *Shoolbred* v. *Clarke* (1890), 17 S.C.R. 265; *Re Auto Top and Body Co. Limited* (1916), 10 O.W.N. 76 and 129; *Re Toronto Cream and Butter Co., Limited* (1909), 14 O.W.R. 81.

Bull: This case falls under both subsections (*a*) and (*c*) of section 74(2). The judge's refusal of the application is by no means all that is involved in the application and the question is whether we were right in bringing an action in bankruptcy. It should not be treated as a question of practice.

The whole prayer in the notice of motion should be considered. That there is the right of appeal see *Apex Lumber Co.* v. *Johnstone* (1925), 36 B.C. 81. That future rights are involved see *Re J. McCarthy & Sons Co. of Prescott Limited* (1916), 38 O.L.R. 3 at p. 6; *Marsden* v. *Minnekahda Land Co.* (1918), 2 W.W.R. 471. This is a matter to be dealt with under r. 120: see *In re Bellingham* (1924), 4 C.B.R. 574; *Stillwater Lumber & Shingle Co.* v. *Canada Lumber & Timber Co.* (1923), 32 B.C. 81; *Bartley's Trustee* v. *Hill* (1921), 1 C.B.R. 477; *Viscount Grain Growers Co-operative Association* v. *Brumwell* (1923), 4 C.B.R. 340.

Argument

Mayers, in reply: We are not in the sphere of bankruptcy at all. There is nothing to justify the statement that you cannot proceed in the Supreme Court. Settlements and performances are the only matters that fall within r. 120: see *In re Graveline* (1921), 2 C.B.R. 210.

MACDONALD, C.J.A.: I think the motion to quash the appeal must be acceded to. The question, in my opinion, is one of procedure. It is always a difficult matter to draw a proper line of demarcation between what matters affect future rights and what do not, or to say whether or not a certain sum of money is involved, as is required under section 74 of the Bankruptcy Act, in order to permit an appeal to be taken. But in this case I have very little doubt or difficulty. There are a number of cases bearing upon different facts, but on this fact they seem to agree, that where the question is a question of procedure it does not fall within either (*a*) or (*c*) of section 74(2); that is to say, no question of future rights arises, nor does any question of a specific sum of money.

MACDONALD, C.J.A.

When we come to analyze it, what is the application which was made in Chambers? It was an application to hear and to decide a question in Chambers pursuant to r. 120 of the Bankruptcy Rules. Now, according to the decisions of this Court, as well as of other Courts, there are alternative rights, one, to have the application heard in Chambers under that rule, and the second, to proceed in the ordinary course by action for the redress claimed. We have held that, and other Courts have held it. So that the question before the learned judge appealed from

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was this, what procedure ought the applicant to take? Will it best serve the ends of justice if he make his application under r. 120, or if he bring an action? He decides that the party ought to be allowed to bring his action. He decides a question of procedure, and a question of procedure alone. And as that is enough to decide this appeal I base my judgment upon it.

MARTIN, J.A.

MARTIN, J.A.: I agree with the allowance of the motion that the appeal does not lie in the circumstances before us, and I really do not think it would be profitable to add anything to what my brother the Chief Justice has said.

GALLIHER, J.A.

GALLIHER, J.A.: I agree also.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am agreeing, because I think in a matter of this kind uniformity of decision is very essential. However, in agreeing and not formally dissenting, I wish to say that I have very considerable doubt as to the limitation put upon Bankruptcy rule 120, that is, that the heading should control. I would rather take the view that Lord Cairns expressed in *Hammersmith &c. Railway Co.* v. *Brand* (1869), L.R. 4 H.L. 171. Lord Cairns, it is true, dissented; a decision of the House of Lords, though, is not binding on this Court, we are only bound by the Privy Council and the Supreme Court of Canada. It seems to me, with deference to all contrary opinion, that there is good support for the very able argument and submission made by Mr. *Bull* in this case bearing upon r. 120 and section 74(2) subsections (*a*) and (*c*) of the Bankruptcy Act. But in view of the fact that all of my brothers have arrived at a common conclusion in the matter, I do not formally dissent.

MACDONALD, J.A.

MACDONALD, J.A.: I think the motion to quash should be allowed.

Appeal quashed.

Solicitor for appellant: *Alfred Bull.*

Solicitor for respondent Capilano Timber Company Limited: *J. H. Lawson.*

Solicitor for respondent J. A. Dewar Company Limited: *W. J. Baird.*

R. N. JOHNSTON & COMPANY LIMITED v. FINKLEMAN.

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1926

Jan. 19.

R. N. JOHNSTON & Co. v. FINKLEMAN

Debt—Partnership—Release to one co-debtor—Delivery of release accompanied by letter reciting conditions—Effect on release.

An action was brought against M. and F. carrying on business under the firm name of The Fisherman's Poolroom for $424.17 for goods sold and delivered. M. then approached the plaintiff with a view to settling the claim as against him and the plaintiff in consideration of M. paying $185 on account of the debt executed an unconditional release to M. under seal. The plaintiff's solicitor, then enclosed the release with a letter to M.'s solicitor, reciting that "The understanding of course is that we discontinue our action against M. and amend our plaint for the balance still owing on this account and carry on against F." The plaintiff recovered judgment for the balance against F.

Held, on appeal, affirming the decision of RUGGLES, Co. J., that the solicitor knowing what was in the plaintiff's mind with regard to the release drew up the letter accompanying it in accordance therewith, which should be construed as making the release conditional to the holding of F. liable for the balance of the debt.

APPEAL by defendant from the decision of RUGGLES, Co. J. of the 8th of June, 1925, in an action for goods sold and delivered. The amount received was $424.17. The defendants McKenzie & Finkleman were in partnership as tobacconists and poolroom proprietors, the premises occupied being known as The Fisherman's Poolroom. The action was commenced on the 7th of January, 1925, and in the early part of February the defendant McKenzie approached the plaintiff through its solicitors with a view to settling the claim as against himself, and it was then arranged that he was to be released on payment of $175, and $10 costs. A release under seal, dated the 9th of February, 1925, was signed by the president of the plaintiff Company and was sent to McKenzie's solicitor with a letter from the plaintiff's solicitor, reciting that the understanding was that the action be discontinued against McKenzie and the plaint be amended for the balance still owing on the account and that they carry on against Finkleman. Further that the

Statement

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Statement

release was not to prejudice their rights against Finkleman. The trial judge gave judgment against the defendant Finkleman for the balance of $249.17 and costs. The defendant Finkleman appealed on the grounds (a) That he was no longer responsible for the firm's debts; (b) that in releasing the defendant McKenzie for consideration he thereby released the defendant Finkleman from payment of the account.

The appeal was argued at Victoria on the 18th and 19th of January, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

N. R. Fisher, for appellant: The account in question is for tobacco and supplies for July, August and September, 1923. McKenzie by paying a certain amount obtained a release for the debt and we submit the release of one of the joint debtors releases the other, the release being under seal: see *Mercantile Bank of Sydney* v. *Taylor* (1893), A.C. 317; *The Standard Bank of Canada* v. *McCrossan* (1920), 28 B.C. 291; 60 S.C.R. 655; *Cocks* v. *Nash* (1832), 2 L.J., C.P. 17; *Brooks* v. *Stuart* (1839), 8 L.J., Q.B. 184; *In re E.W.A.* (1901), 2 K.B. 642; *Commercial Bank of Tasmania* v. *Jones* (1893), A.C. 313. The letter accompanying the document cannot vary it in any way, the document being under seal. There is evidence of discontinuance of the action against the firm: see *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504. On the question of the solicitor's letter affecting the document see Halsbury's Laws of England, Vol. 26, p. 744, par. 1231. There was a second release in which was embodied the condition in question but this cannot affect the first release: see *Hammond* v. *Schofield* (1891), 1 Q.B. 453. There is no evidence of retainer of solicitor or of his authority: see *Fray* v. *Voules* (1859), 1 El. & El. 839. If the solicitor attaches a condition he must shew his authority. The evidence shews Finkleman ceased to be a partner in August, 1922. As to contracts entered into on behalf of the firm see Lindley on Partnership, 9th Ed., 242; *Kirk* v. *Blurton* (1841), 9 M. & W. 284; *Hambro* v. *Hull and London Fire Insurance Co.* (1858), 3 H. & N. 789; *Faith* v. *Richmond* (1840), 11 A. & E. 339; *Sealy* v. *Stephenson* (1923), 32 B.C. 187.

Maitland, for respondent: The evidence shews these men are in partnership today. On the release see Leake on Contracts, 7th Ed., 696. The principle of release is that if you release a partner the right of recourse against him is lost to the other partner. When I make the condition in the letter then it is conditional delivery not to prejudice our rights against Finkleman. In any case the second release is good because it is really what was agreed to at first.

MACDONALD, C.J.A.: The solicitor knowing what was in Mr. Johnston's mind with regard to the release drew up a letter which he sent, accompanying it, to the debtor McKenzie. Now my construction of that is that that made the release conditional on the holding of Finkleman liable still to the plaintiff in this action. I think there is no reasonable doubt about the construction which ought to be placed on that letter.

I have no difficulty in deciding the other question in appeal. The only one that I was for a time somewhat puzzled about was the third point taken by Mr. *Fisher,* namely, that obligations incurred by a partner not in the name of the actual partnership are not binding upon the partnership. Without disputing that at all, there is a circumstance in this case which I fancy did not occur in any of the cases to which we were referred, namely, that there had been between these parties a holding out of the name of Finkleman & McKenzie as the style of the firm. I say that they did hold this out as shewn by the fact that for the first three months the plaintiff delivered them monthly three bills altogether in which they are described as Finkleman & McKenzie, without any objection from either Finkleman or McKenzie, and that these bills were paid, presumably by the cheques of Finkleman & McKenzie, whether signing as Finkleman & McKenzie, or as Finkleman individually and McKenzie individually.

MACDONALD, C.J.A.

I would dismiss the appeal with costs.

MARTIN, J.A.: First with respect to the objection to jurisdiction of the County Court I am of opinion that Order X., r. 13 justifies the action being brought, because that rule says that in the event of "two or more persons claiming or being liable as

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copartners," they are subject to the jurisdiction as therein specified. Now here we have held that whatever may be the relation between these persons, they were sued as copartners and are liable as copartners to the plaintiff.

As to the second point of the condition in the release, in my opinion it should be so regarded in the circumstances before us. It is very often a difficult thing to say whether collateral documents delivered at the time of the main document, or statements made at the time of delivery, do or do not constitute a condition. In this case, however, I have come to the conclusion that it should be held there was a condition. A large number of cases are well collected in Leake on Contracts, 7th Ed., at pages 95, 129 and 130; from them I have just selected three which are informing and valuable in the solution of this matter. They are *Bell* v. *Lord Ingestre* (1848), 12 Q.B. 317; *Awde* v. *Dixon* (1851), 6 Ex. 869, and *Evans* v. *Bremridge* (1856), 8 De G. M. & G. 100. And it is worthy of note that Lord Justice Knight Bruce in the last mentioned case makes use of the very word here—"understanding"—that we find used in the letter; and in this case the principle is based upon the point suggested by my brother MCPHILLIPS, that it was something analogous to an escrow, and there is a very informing judgment by Baron Parke in relation to *Awde* v. *Dixon* in which Barons Alderson and Platt concurred.

MARTIN, J.A.

One of these cases goes further than is necessary to go here and in the *Bell* v. *Lord Ingestre* case Mr. Justice Wightman said he had some doubt as to whether the progressive decisions of the Court had really reached the stage of that condition, but he did not feel justified in dissenting from the decision of the Court.

I almost forgot an interesting point that I do not want to be considered as overlooked—*viz.*, the suggestion of Mr. *Maitland* that the effect of the second release was that the parties having recognized there was an omission, undertook themselves to rectify that omission, and it is of course open to parties to rectify an omission themselves, and much more laudable than calling upon the assistance of the Courts to do so.

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GALLIHER, J.A.: I am in agreement.

McPHILLIPS, J.A.: I agree.

MACDONALD, J.A.: I agree.

Appeal dismissed.

Solicitors for appellant: *Fisher & Johannson.*
Solicitors for respondent: *Maitland & Maitland.*

JACK v. NANOOSE WELLINGTON COLLIERIES LIMITED.

Practice—Judgment of Court of Appeal—Mortgagor and Mortgagee—Indemnity—Amount due not ascertained—Taking of accounts—Mortgagee a necessary party.

The plaintiff sold a brick plant to the defendant Company the Company agreeing to form a new company to take the property over and to assume and pay off a chattel mortgage on the property held by one B. Later the plaintiff at the instance of the Company signed what he thought was a transfer of the property but the instrument was in fact an agreement which included a clause releasing the defendant Company from its obligation to pay off the chattel mortgage. In an action for a declaration that he was entitled to be indemnified by the defendant Company it was held by the Court of Appeal (see 35 B.C. 295) that his signature to the instrument was obtained by fraud and he was entitled to be indemnified by the defendant Company. An application by the plaintiff for an order that the defendant pay the mortgagee the amount due under the chattel mortgage and that it be referred to the registrar to take an account of the amount due, was dismissed.

Held, on appeal, *per* MACDONALD, C.J.A. and MACDONALD, J.A., that a mortgage account cannot be taken between a mortgagor and a third party, the mortgagee being a necessary party and the registrar cannot make a foreigner (B. being a resident of the United States) a party to the action.

Per GALLIHER and McPHILLIPS, JJ.A.: That the mortgagee is not a necessary party; that a reference before the registrar should be directed and an affidavit from the principal creditor be accepted to prove the amount due under the mortgage.

The Court being equally divided the appeal was dismissed.

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Statement

APPEAL by plaintiff from the order of MORRISON, J. of the 13th of January, 1926, dismissing a motion in pursuance of the judgment of the Court of Appeal of 3rd March, 1925, allowing the appeal, in which it was provided that the plaintiff was entitled to be discharged from all liability under the chattel mortgage for $23,000, and further advances from the plaintiff to J. M. Braun by payment by the defendant to said Braun all moneys payable thereunder, if or when due. This motion was for an order that the defendant pay Braun the amount due under the chattel mortgage and that there be a reference to the district registrar at Vancouver to take an account of the amount due and that evidence by affidavit of J. M. Braun as to the amount due be accepted as *prima facie* evidence upon the reference.

The appeal was argued at Victoria on the 20th of January, 1926, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Cassidy, K.C., for appellant: This is a motion to bring into effect the judgment of the Court of Appeal, and that in order to ascertain the amount due the affidavit of J. M. Braun be accepted in evidence. There is no dispute as to the mortgage being long overdue and that the defendant Company assumed the debt.

Hossie, for respondent: The mortgagee must be a party before any order can be made. He must come in and claim what he is entitled to then we can dispute the claim both as to *quantum* and validity. There are three elements missing: (1) No demand by the mortgagee; (2) the amount due is not ascertained; (3) he must be a party: see *Morrison* v. *Barking Chemicals Company* (1919), 2 Ch. 325; *Wolmershausen* v. *Gullick* (1893), 62 L.J., Ch. 773. There is no power to order a reference between persons not parties to the action. One of our contentions is that the mortgage is not valid.

Cassidy, in reply: As to the mortgagee it is not necessary to make him a party to the action: see *Ascherson* v. *Tredegar Dry Dock and Wharf Company, Limited* (1909), 2 Ch. 401. This Court has power to take any proceedings necessary to render its judgment effective: see sections 8 and 26 of the Court of Appeal Act.

MACDONALD, C.J.A.: I would dismiss the appeal. The application to Mr. Justice MORRISON was for an order that the defendant do pay to the mortgagee the amount due under the said chattel mortgage, and that it be referred to the district registrar of this Court at Vancouver to take an account of the amount so due. That is what Mr. *Cassidy* applied for, that there be a reference to take the accounts and find the amount due, and on that amount being found that the defendant, the respondent in this appeal, should pay that amount. Now, the difficulty about it, as I see it, is that the Court will not make an order which will lead to no definite and final results. No mortgage account can be taken between the mortgagor and a third person without the intervention of the mortgagee; the mortgagee is a necessary party to any taking of a mortgage account. The mortgagee in this case is in the United States. It is quite plain to me that the registrar cannot make him a party in his office. Whether he could do so if he were a resident of this Province, I need not consider. I am satisfied that he cannot, in his office as registrar of the Court, make a foreigner a party to this action and a party to the taking of the mortgage accounts.

It seems to me that the proper course, or one of probably two or three different courses that might be taken in the Court below, is this: the appellant might have, as he has done on this application, shewn that the mortgage was due; and therefore there is a liability to pay under our own judgment. Then, as he wishes to proceed and have payment at once, it is necessary to ascertain the amount that must be paid by the defendant. In order to obtain that amount there might be, as I mentioned a moment ago, several alternative courses open; the appellant might bring an action for redemption, he is the mortgagor. He might make the mortgagee and the present defendant defendants to that action. The account could then be taken, or any question as to the validity of the mortgage could then be raised by defence or counterclaim, and the whole matter between the three parties be tried, and the final amount which would bind all parties arrived at. Or, he might ask for an order making the mortgagee a party, so that when the reference is ordered the referee will have all parties before him, and can make a finding which will be conclusive upon all parties. Now what Mr. *Cassidy* has

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failed to do is to ask, and he apparently did not wish to ask for an order of that kind—what he has failed to do is to ask that the mortgagee shall be made a party to the action for the purpose of taking these accounts. In view of that circumstance I think the judge was right in refusing to make an order, which might or might not be effective depending upon the consent of the mortgagee to be bound by something which in law he would not be bound by.

On that ground I would dismiss the appeal.

GALLIHER, J.A.: I would allow the appeal. I could agree with very much that the Chief Justice has said if I were not of the opinion that under the order of this Court the appellant in the action has been placed in a different position as to the taking of accounts than that which a mortgagor and mortgagee would be in the ordinary case of a mortgage action. It seems to me that when this Court has decreed that he should be relieved and discharged from this mortgage, and that relief shall be that the respondent, a third party and a party to this action, pay the mortgagee, that he has been placed in a position that he can call the mortgagee to give in evidence the true state of accounts as between the mortgagor and the mortgagee. If I am wrong in thinking he has attained to that *status* by virtue of our order, of course my reasons would be wrong, and I would agree with the learned Chief Justice; but I think he can prove that account by calling the mortgagee. Now then, as to whether the mortgagee will or will not come and give evidence as to the account, Mr. *Cassidy* takes the responsibility. And it is not, I think, for the Court to assume that he will not come, and that the order would be ineffective.

GALLIHER, J.A.

For these reasons I would allow the appeal.

I might perhaps add a word to my judgment on the question of the adding of the mortgagee as a party. As it appeals to me, if the respondent seeks to attack the validity of the mortgage, then the necessary steps taken in order to effectuate that should be taken by him.

MCPHILLIPS, J.A.: I would allow the appeal. It seems to me that, after all, the case is a simple one. On the other hand

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it seems to be attempted to make out on behalf of the respondent that something very intricate is present, something that might not effectuate justice in upholding the right to the reference which was moved for, and as I think, with great respect, wrongfully refused. This case was argued at great length before this Court, we had the pleadings before us, and the mortgage in question was not disputed in any way at the hearing; one of the salient features was this, that the defendant Company had agreed to indemnify the plaintiff from payment of this mortgage. And the mortgage was set up by the defendants themselves. There was no suggestion in the defence made that the mortgage was invalid or not a good or valid security in every respect. Now, it seems to me that it is a very late date to raise this point, and to in that way prevent the judgment of this Court being given full effect to. There are unquestioned decisions and in the Privy Council itself that the Court below must work out the judgment of the Court of Appeal. And I cannot see that that requirement is being accomplished. I illustrated to Mr. *Hossie* during the argument—suppose it had been the Bank of England that held the mortgage, would it have been advanced that the Bank of England must be made a party? Unquestionably all that would be called for would be an affidavit shewing the amount due under the mortgage. I used that illustration because the Bank of England is not within the jurisdiction of this Court. I only refer to this to point the moral of the situation. If it is to be contended that the mortgage has no validity, then that must be a burden that the guarantor or surety will take. If the guarantor or surety desires to agitate this point it will have to be by action, and he would be entitled in a proper case to use the name of the plaintiff, the mortgagor, should there be reasonable ground shewn, securing the plaintiff, the mortgagor, against costs. But no steps have been taken to that end. That is, the defendant Company was, when the judgment was entered in this Court, under the obligation to pay this mortgage; and a very considerable time has elapsed, some ten months, and no steps have been taken to question the validity of the mortgage. Why should we prevent the wheels of justice going around in regard to finding out as to what is due under the mortgage? I think we are entitled to assume in this case that the mortgage is

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a valid mortgage; it was never questioned at this Bar. Mr. *Cassidy* read from my judgment, language indicating that I appreciated during the argument at this Bar, that there would likely be difficulty in working out relief in the case. I appreciated it during the argument and I raised the point with Mr. *Davis,* because I at the time thought there might have to be some amendment. Mr. *Davis* made the answer that if fraud was established there would be no difficulty about working out the relief. However, I do not want to say that Mr. *Davis* took the same view of the question put that I did. We are both fallible, and it may be that I put a higher import on the statement of Mr. *Davis* than I was entitled to put upon it; but I certainly did not anticipate that we would have all these later difficulties. The contention virtually is that the judgment of this Court is not capable of being worked out without the mortgagee who is without the jurisdiction of the Court being made a party; such is the argument advanced by Mr. *Hossie* here today, that would mean that the judgment of this Court very possibly never could be worked out, because we have no control over this mortgagee in any respect. It is for the mortgagee to come into Court and prove his mortgage debt. Now the *Ascherson* v. *Tredegar* case (1909), 2 Ch. 401 as I understand it has precisely determined that the principal creditor is not a necessary party. The mortgagee in this case is in the position of the principal creditor, and he is not a necessary party, and I do not see why he should even be a necessary party in the master's office. An affidavit might well be produced there from the principal creditor to prove the amount due under the mortgage; and having made that affidavit he would be subject to cross-examination upon it even if abroad, *i.e.,* in the United States of America, and if he does not submit to cross-examination deductions might be drawn from that and the claim disallowed; that would be a matter for the master; the master makes his report, and the report has to be approved or disapproved by a judge of the Supreme Court.

I therefore consider, with great respect to the learned judge, that the motion that was made ought to have been acceded to, and the reference ought to have been directed. Certainly it is not pleasant to see that obstacles that would not appear to have any real force should be thrown in the way of the working out

of the judgment of this Court, especially a judgment that followed the statement of counsel that if fraud was found no difficulties would arise in the way of working out the consequential relief.

MACDONALD, J.A.: We have only to determine on this appeal whether or not the judge below should have made the order applied for. It is clear to my mind that before the matters in issue can be determined the mortgagee must be added as a party, and there is no power to do so before the registrar. Whether or not the onus of taking the necessary steps to do so is on the respondent or the appellant we are not called upon to say. Mr. *Cassidy* is attempting to take a course which ignores the necessity for that step being taken. For that reason, and the further reasons mentioned by the Chief Justice, I would dismiss the appeal.

The Court being equally divided the appeal was dismissed.

Solicitor for appellant: *A. C. Brydon-Jack.*
Solicitor for respondent: *Ghent Davis.*

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THE KING v. THE MINISTER OF LANDS.

Appeal—Practice—Application to admit further evidence—Crown lands—Application for lease of waterfront lot—Objection taken by owner of adjoining lots—Lease granted without notice to adjoining owner—Mandamus—Order absolute—Appeal—R.S.B.C. 1924, Cap. 131, Sec. 139.

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On appeal from an order that a writ of *mandamus* do issue directed to the Minister of Lands commanding him to determine the rights of an applicant for a lease of a certain lot and of an objection thereto and to proceed in accordance with section 139 of the Land Act, an application to put in an affidavit of the minister to shew what actually took place before him was refused (MCPHILLIPS, J.A. dissenting).

Marino v. *Sproat* (1902), 9 B.C. 335 followed.

Section 139 of the Land Act provides that "In any application under the provisions of this Act regarding which any adverse claim or protest has been lodged or objection taken, the Minister, ... shall have power to hear, settle, and determine the rights of the adverse claimants, and to make such order in the premises as he may deem just." . . . .

A lumber company applied for a lease of a waterfront lot in the Comox district for booming purposes. S. who owned six lots across a road but fronting on the lot in question, wrote the department of lands, objecting to the granting of the lease and received a reply that his complaint would be considered. The lot was leased to the applicant without notice to S. who applied for and obtained an order for a writ of *mandamus* to determine the rights of the parties in accordance with section 139 of the Land Act.

Held, on appeal, reversing the decision of GREGORY, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the section is confined to cases in which the objector claims a right to or in the subject-matter itself. S.'s objection to the granting of the lease is not founded on an interest either legal or equitable in the subject-matter and his application should have been refused.

Statement

APPEAL by the Minister of Lands from the order of GREGORY, J. of the 23rd of November, 1925. One Charles Simms owned six lots fronting on the water (there being a road between the lots and the actual waterfront) in the Comox District. The Royston Lumber Company applied for a lease of the waterfront in front of his lots for booming ground. Simms wrote the deputy minister of lands on the 3rd of November, 1924, objecting to the granting of the lease and the department replied that

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his complaint would be considered. The lot on the waterfront, being lot No. 151, was leased to the Royston Lumber Company on the 13th of March, 1925, and on the 24th of October following Simms's solicitor wrote the Minister complaining that even after the department said that Simms's complaint would be considered, the lease was issued without his being heard, and he asked that the Minister act under section 139 of the Land Act, and hear, settle and determine the rights of the parties. This was refused. Simms applied for and obtained an order *nisi* for a writ of *mandamus* on the 21st of November, 1925, and obtained an order absolute on the 23rd of November, 1925.

Statement

The appeal was argued at Victoria on the 15th of January, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Maclean, K.C., for appellant: The Minister came to the conclusion it was not necessary to have a hearing under section 139 of the Land Act. We apply to put in an affidavit of Mr. Pattullo to shew what actually took place. This is merely formal evidence and should be allowed in: see *Wallace* v. *Grand Trunk R.W. Co.* (1921), 49 O.L.R. 117 at p. 120. This is a high prerogative writ, and everything should be before the Court.

Argument

Mayers, for respondent, *contra*: There are three requisites wanting before such evidence should be allowed in: see *Marino* v. *Sproat* (1902), 9 B.C. 335.

MACDONALD, C.J.A.: It is a rather hard and fast rule which this Court has always followed, and which is exemplified in *Marino* v. *Sproat* (1902), 9 B.C. 335. I think the evidence is not admissible.

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MARTIN, J.A.: I am of the same opinion. I am in entire accord with what the Chief Justice has said, for the reason it would be unsafe for us to depart from the rule that was laid down so many years ago in *Marino* v. *Sproat,* and which has worked out quite well. I would not open the gate for one moment unless there were compelling circumstances requiring us to do so.

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The Ontario case that Mr. *Maclean* has cited to us should not,

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I think, with all deference, be considered of any weight at all, for this reason, we are not informed as to what was the long established practice of the Ontario Court with regard to the admission of evidence; it might be relaxed and not based on well-settled principles, or it might be on well-defined principles but not settled principles as ours are. Furthermore, the Ontario case is of no assistance to us, because in it there was the rectification of a formal slip in proof, about which there was no real controversy; whereas the matter that is now sought to be introduced, and the whole proceedings bolstered up by, is the whole

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foundation of the proceedings, that is to say, the Minister now admits that he really has considered this matter long ago—which is the whole position for the application for this prerogative writ.

GALLIHER, J.A.: I am not certain that *Marino* v. *Sproat* just covers this case; but I feel that it is dangerous to depart from it. It is a very salutary rule, I think, laid down, and it has been followed by this Court, and other Courts in British Columbia so far as I know, since it was decided. But I feel as my brother the Chief Justice and my brother MARTIN do about

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the admission of this evidence; and I am less inclined to make any fine distinctions as between the circumstances in this proceeding or between the nature of this proceeding and the nature of any ordinary action in Court, because to my mind it does not become necessary for the determination of the point involved.

MCPHILLIPS, J.A.: I am not clear that the same rule ought to apply in *mandamus* proceedings where a person is charged with dereliction of duty or failure to do something which was his duty. Surely that person should be heard out, and be

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allowed to explain. That is the differentiation, I would think, as against the establishment of some question of fact in an ordinary action. As to what the Minister did is not a question of fact bearing on the determination of the issues in the matter at all. He should at all times be admitted to say, "I did consider this, and I did consider that." Suppose a judge, for instance, failed to put down all that occurred, surely the judge could be heard to say, "It is true I did not put it down in my

notes, but I did do this or I did do that, or I did have this before me, and I did have that before me." I would prefer time for further consideration and I might come to the same conclusion as my brothers who have expressed their opinion in the matter, but as at present advised I would decide in favour of what I now consider the interests of justice, and that is that the Minister should be allowed to explain all that he did.

MACDONALD, J.A.: I must say I am inclined to the view expressed by my brother MCPHILLIPS. I will not dissent, however, from the majority of the Court.

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Maclean, on the merits: The matter was before the Minister and he dealt with it. He need not hear anyone if he thinks it unnecessary in the circumstances. Section 139 is an enabling section: see *Julius* v. *Lord Bishop of Oxford* (1880), 5 App. Cas. 214 at p. 227. As to costs see *Watson* v. *Howard* (1924), 34 B.C. 449.

Mayers: It is only through section 139 that persons having a claim can get before the Minister. There must be a hearing of both parties: see *Shannon* v. *Corporation of Point Grey* (1921), 30 B.C. 136; *In re Neath and Brecon Railway Co.* (1874), 9 Chy. App. 263 at p. 264; *Bonanza Creek Hydraulic Concession* v. *The King* (1908), 40 S.C.R. 281; *Esquimalt and Nanaimo Railway Co.* v. *Fiddick* (1909), 14 B.C. 412 at p. 428.

Argument

Maclean, in reply: The Crown is dealing with its own property. The Minister is not compelled to act under section 139: see *The Queen* v. *The Lords of the Treasury* (1839), 10 A. & E. 374.

Cur. adv. vult.

2nd March, 1926.

MACDONALD, C.J.A.: I would allow the appeal.

Section 139 of the Land Act cannot, I think, be applied to the facts of this case. That section is confined in its requirements to cases in which the objector claims a right to or in the subject-matter itself. The context makes this reasonably clear. The Minister is empowered to hear and determine "the rights of the adverse claimants" and to make such order in the premises

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as he may deem just. Mr. Simms's objection to the granting of the lease is not founded on a claim of interest either legal or equitable in the subject-matter. The granting of the lease, he claims would render his view less desirable and would interfere with his access to the sea. If he claimed a legal right to such view and access the result no doubt would have been different, but his land does not abut on the foreshore nor did he claim that it does. There is nothing to make an order about. No doubt he may make his protest, but even if a hearing were granted him the Minister could make no order. He might refuse to issue the lease out of deference to Mr. Simms's objections, but that is all.

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MARTIN, J.A.: Under the provisions of the Land Act, Cap. 131, Part IV., the Royston Lumber Co. Ltd. applied to the Minister of Lands for a lease of certain foreshore lands in Comox Harbour on Vancouver Island separated by a public highway from certain lands owned by one Charles Simms who lodged a written protest and objection with the deputy minister of lands against the granting of the lease claiming that it would authorize and permit the erection of certain buildings which would injuriously affect the lands of the said protester, but despite this protest the lease was granted to the said applicant without any opportunity being given him to establish his protest though in acknowledging it the proper departmental officer said:

"In this connection I beg to advise you that your protest has been noted, and in the event of an application being received in the department same will be given every consideration."

After the protester found out that the lease had been granted a formal request was made on his behalf for the hearing and determination of his protest and objection under section 139 of the Act, but the Minister refused to "reopen this case" and so the protester applied for and obtained an order for a writ of *mandamus* to compel him to do so, and from that order the Minister appeals.

The protester relies on section 139 as follows:

"In any application under the provisions of this Act regarding which any adverse claim or protest has been lodged or objection taken, the Minister, or the Commissioner for that district when so directed by the Minister, shall have power to hear, settle, and determine the rights of

the adverse claimants, and to make such order in the premises as he may deem just; and for all and any of the purposes aforesaid he shall have full power to summon and examine under oath the parties and witnesses, but such decision and order, if made by a Commissioner, shall be subject to review by the Minister, and subject to appeal as provided by section 140."

This, in effect, confers upon the protester, after duly "lodging" or "taking" his "adverse claim or protest . . . or objection," the absolute right, on every principle of natural justice, of being heard in support thereof when the "rights of the adverse claimants" (as both claimants and protesters are comprehensively styled) came before the Minister for adjudication, and if there were nothing more that would be an end of the appeal because there is a clear obligation cast upon the Minister to hear the "adverse claimant" (which term includes protester) despite the permissive form of conferring the power—*Shannon* v. *Corporation of Point Grey* (1921), 30 B.C. 136; (1922), 63 S.C.R. 557. But to justify his refusal reliance is placed by the Minister upon section 88, as follows:

"88. The Minister may, if there appears to be no valid objection, give notice to the applicant that a lease will issue as desired, provided the applicant has the land surveyed in a legal manner within six months from the date of such notification. All surveys of lands leased under this Part shall conform to the regular system of survey in all respects, except that the lengths of the boundaries thereof shall be to the satisfaction of the Minister, and in accordance with regulations made by the Surveyor-General."

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I have carefully considered this section in relation to the whole material portions of the Act and to section 139 in particular with the result that I am of opinion it is wholly inapplicable to "adverse" proceedings instituted by stranger "claimants" under section 139, and is intended to apply only to those "objections" and questions which would arise between the Crown and its applicant and which might well be left to the domestic, so to speak, discretion of the Minister in deciding whether from the point of view of strict legality (such as irregularity in conforming to statutory conditions) or of a wider public policy, the "objection," whatever its nature, should be deemed by him to be "valid" for the purposes of the Act. Such matters—"objections" between the prospective lessor and lessee only it would be reasonable to leave to the lessor to attach what weight he thought fit to, because no one else was concerned, and the striking differ-

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ence in the language employed in the two sections as to the classes of subject-matters and the disposition thereof confirms this view; in section 88, *e.g.*, only "objections" are dealt with and provision is made for notifying the applicant alone, whereas in 139 "adverse claims" . . . "protests," and "objections" are provided for with power to "summon and examine under oath the parties and witnesses" and "hear, settle and determine the rights of the adverse claimants."

That minor classes of "objections" only are subject to the Minister's discretion upon his view of their validity is shewn by the proviso which indicates the objections are such as may be cured by the applicant having the "land surveyed in a legal manner within six months of the date of the notification" to him of such objection: these objections are obviously only those raised by the department itself and not by strangers setting up adverse claims.

When, however, the interests of strangers are affected an entirely different state of affairs arises with a corresponding different policy towards the public at large and it would be most desirable that the fullest opportunity should be given to claimants to support their claims without being arbitrarily shut out from them by the uncontrolled exercise of a departmental discretion, even in the most meritorious circumstances, as to their "validity" under section 88. This construction of the Act gives full effect to its provisions in every aspect while preserving the fundamental principle of the right to be heard to support a right claimed, and it is difficult to believe it was the intention of Parliament to adopt another course, and one at variance with the letter at least of section 139, which would be fraught with such danger to the public at large. It is, with all respect, no answer to say that if the Minister should regard the "claims, protests or objections" as frivolous then he should summarily dismiss them on his own initiative or at the request of the applicant, because he could only do that if such a summary power was conferred upon him, which is entirely lacking in this statute, and in the absence of it he has, in my opinion, only one clear duty, *viz.*, to hear the claimant or protester in support of his claim or "protest lodged" before "determining" the matter

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against him and in favour of the adverse applicant. It must be borne in mind that valid claims or protests might well be so very inadequately presented originally, by, *e.g.*, a layman as to appear manifestly invalid yet when in due course they came to be "heard and determined" their merit would be made apparent. Moreover, even Courts of high and inherent jurisdiction do not venture, in the fear that injustice might be occasioned, to dismiss claims which appear to be frivolous and vexatious upon their face without first giving those who have advanced them the right to be heard in support of them (*vide* rule 284) and obviously not fewer safeguards should be thrown around the proceedings of inexperienced departmental tribunals than are thought desirable in the case of the regular Courts of Justice.

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I am therefore of the opinion that the order appealed from was properly made and so the appeal should be dismissed.

GALLIHER, J.A.: In my opinion this appeal should be allowed.

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MCPHILLIPS, J.A.: I have had the advantage of reading the reasons for judgment of my brother MARTIN, and I may say that I am in entire agreement therewith. I merely wish to add a reference to some of the relevant authorities bearing upon the matter in issue which, tersely stated by my brother MARTIN, is "the fundamental principle of the right to be heard."

Where Parliament especially provides for parties being heard it is a cardinal rule that every step taken must be in conformity with the statute. In *Eastern Trust Company* v. *MacKenzie, Mann & Co. Limited* (1915), A.C. 750 at p. 759; 22 D.L.R. 410 at p. 417, Sir George Farwell delivering the judgment of their Lordships of the Privy Council said:

> "It is the duty of the Crown and of every branch of the Executive to abide by and obey the law."

In *McLean Gold Mines Ltd.* v. *Attorney-General for Ontario* (1926), 1 D.L.R. 11, in the Ontario Supreme Court Appellate Division, Middleton, J.A., who delivered the judgment of the Court, at p. 17, said:

> "In the absence of express statutory authority, the Minister has no power to overrule and dispense with statutory requirements."

And further on, at p. 17, said:

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"The decision of the Supreme Court in *Heron* v. *Lalonde* (1916) 31 D.L.R. 151, is not without its bearing here. Adapting the language of Idington, J., at pp. 153-4, I am unable to understand how a power given by statute to a Minister, to be exercised upon certain conditions precedent, can be said to have produced anything effective in law when attempted to be exercised without the conditions precedent having been fulfilled."

In *Esquimalt and Nanaimo Railway Co.* v. *Fiddick* (1909), 14 B.C. 412, Mr. Justice IRVING, at pp. 427-8 said:

"It was conceded at the trial that the grant had been issued without notice to the plaintiffs, or without notification to them to shew cause why it should not issue. The first question that we have to consider is the construction to be placed upon the Act. In my opinion, the obligation imposed by that statute according to the true construction of that statute, was to be exercised after due inquiry, of which the Railway Company were entitled to have due notice.

"Every statute or rule conferring on any tribunal, be that tribunal the Lieutenant-Governor in Council, a municipal council, or the committee of a club, authority to adjudicate upon matters involving civil consequences to individuals, should be construed as if words stipulating for a fair hearing to all parties had been inserted therein. The Legislature omits them as unnecessary, knowing that the Courts will read these words into the Act. The only question upon which there can be any doubt is as to the consequence of the Lieutenant-Governor in Council omitting to observe this rule.

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"Let us assume that words appropriate to the securing of a hearing to both sides had been actually written into the statute, what would be the effect of a Crown grant issued if this preliminary requirement had not been complied with? I think the Court would be justified in holding it null and void."

Here, in my opinion, it was a statutory obligation to hear both sides. Blackburn, J., in *Reg.* v. *Saddlers' Co.* (1863), 32 L.J., Q.B. 337 at p. 344, said it is "of the very essence of justice that every person should be heard before judgment is given against him."

In *Bonanza Creek Hydraulic Concession* v. *The King* (1908), 40 S.C.R. 281, Duff, J. at p. 291 said:

"It is undisputed that in this case the act of the Minister in professing to declare a forfeiture was not preceded by any inquiry which can be said upon the above principles to satisfy the requirements of the law as regards inquiries of a judicial or *quasi*-judicial character, and it follows that this act was inoperative."

Here, admittedly, the protester was not heard. The principle which was not complied with was the hearing of the protester before adjudicating upon the protest made. In the language of Lord Esher, in *Armstrong* v. *South London Tramway Company*

(1890), 7 T.L.R. 123, "it was a necessary implication that the party should be heard, and it would be monstrous to suppose otherwise." Here the protester was not heard. The learned judge in the Court below, in my opinion, arrived at the right conclusion.

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The appeal in my opinion should be dismissed.

MACDONALD, J.A.: This is an appeal from an order of GREGORY, J., directing that a writ of *mandamus* should issue to the Minister of Lands commanding him to hear, settle and determine the alleged rights of the applicant one Charles Simms in respect to the enjoyment of property owned by him adjoining the waters of Comox Harbour, as against the Royston Lumber Company Limited the lessees of land covered by water below the high-water mark. The leased lands adjoin the applicant's property, except for a public highway intervening. Simms objects that proposed works by the lessees, *viz.*, the making of booming grounds on their water lot will interfere with "the beauties of the situation," spoil his land as a residential property and entirely destroy "the amenities of my property," whatever that may mean. His solicitor by letter complained "that the Company has erected works on the foreshore which injuriously affect the property of Mr. Simms." The deputy minister of lands in response to a letter of protest from Simms, replied, in part, as follows:

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"In this connection I beg to advise you that your protest has been noted, and in the event of an application being received in the department same will be given every consideration."

Subsequently, the lease was granted without further reference, so far as the material shews to the protest lodged by Simms. In reply to the letter from his solicitor complaining that the lease was issued and calling upon him to proceed under section 139 of the Land Act to "hear, settle and determine" the alleged rights of Mr. Simms, the Minister replied that he saw no necessity for reopening the matter.

The point in issue is, must the Minister hold such a hearing as section 139 calls for to consider this protest, or is the section simply permissive so far, at all events, as complaints of this character are concerned? Section 139 under the heading "Hear-

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ing of Adverse Claims," reads as follows: [already set out in the judgment of MARTIN, J.A.].

It should be observed that by section 88 of the Act,

"The Minister may, if there appears to be no valid objection, give notice to the applicant that a lease will issue as desired," etc.

That means he may do so if in his opinion there is no valid objection regardless of the views of others. If he finds there is an objection by an adverse claimant he may hold an inquiry under section 139.

Mr. *Mayers* referred to the judgment of IRVING, J., in *Esquimalt and Nanaimo Railway Co.* v. *Fiddick* (1909), 14 B.C. 412 at p. 428, where he says:

"Every statute or rule conferring on any tribunal, be that tribunal the Lieutenant-Governor in Council, a municipal council, or the committee of a club, authority to adjudicate upon matters involving civil consequences to individuals, should be construed as if words stipulating for a fair hearing to all parties had been inserted therein."

That has no application to this case. No civil consequences are involved *qua* the respondent. Whether or not he would be within the benefit of the section if works were erected or a business carried on upon the leased lands which would amount to a nuisance we need not inquire as no such suggestion can be made. No legal rights of the respondent are interfered with. It is only his sense of propriety that is offended. He wishes to preserve the landscape from features which may mar its beauty. Interference with scenic views usually accompany commercial progress. That, however, cannot be made the basis of a legal right; nor are such protests contemplated by the statute as warranting a formal inquiry.

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We were also referred to *Bonanza Creek Hydraulic Concession* v. *The King* (1908), 40 S.C.R. 281, a decision not of assistance because, there again, a decision was given by the Minister without holding an inquiry adverse to a party whose legal rights were affected. There are cases, where certain consequences affecting others follow a decision by a Minister or by a public body. Such a decision can only be properly made after an inquiry of a judicial or semi-judicial nature and the Courts will, in the absence of such inquiry treat the act as a nullity.

We are not called upon to decide what course the Minister should follow if a protest was lodged by one who, in the words

of the title to the section, and the wording of the section itself, had an adverse claim, although I would have little doubt in such a case. True, in one part of the section the words "adverse claim or protest" are used, suggesting that a protest is enough. But the controlling words shewing the subject of that inquiry, *viz.*, "the rights of adverse claimants" are found in the fifth line of the section. We may also look to the title of the section, if necessary. It would be going too far to suggest that, if letters of protest are received from various parties living in the neighbourhood whose ascetic sense of beauty is offended that the Minister would be bound to grant a hearing in respect to such protests. It is only in respect to the "rights of adverse claimants" that a hearing is contemplated.

A somewhat similar point was considered in *Julius* v. *Lord Bishop of Oxford* (1880), 5 App. Cas. 214, where instead of the words "shall have power" as in said section 139, the words "it shall be lawful" were used. It was held that the words simply made that legal and possible which otherwise there would be no authority to do. True, it was pointed out that the power in certain cases may be coupled with a duty to exercise it. To quote Earl Cairns, L.C. at pp. 222-3:

"But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so. Whether the power is one coupled with a duty such as I have described is a question which, according to our system of law, speaking generally, it falls to the Court of Queen's Bench to decide, on an application for a *mandamus*. And the words 'it shall be lawful' being according to their natural meaning permissive or enabling words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise this power, to shew in the circumstances of the case something which, according to the principles I have mentioned, creates this obligation."

I may add that none of the elements mentioned in the first part of the above quotation are present in this case.

And again at p. 225:

"My Lords, the cases to which I have referred appear to decide nothing more than this: that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the

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Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised."

Here, the "persons who are specifically pointed out" are mentioned in the section, and "a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise," *viz.*, having the rights of adverse claimants. It was never intended that this power should be used in respect to illusory claims of this nature. Neither the section nor the scheme of the Act in dealing with applications for leases would so indicate. It is not "shall hear and determine." It is "shall have power to hear and determine." It is one thing to possess a power and quite another to be compelled to exercise it.

I would allow the appeal.

Appeal allowed, Martin and McPhillips, JJ.A. dissenting.

Solicitor for appellant: *J. W. Dixie.*
Solicitors for respondent: *Mayers, Lane & Thomson.*

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Negligence—Automobile—Injury to pedestrian—Negligence of driver—Failure to look—Excessive speed—Agony of collision—Contributory negligence.

The plaintiff in crossing a street at a corner and when about two-thirds of the way across looked to her right and saw the defendant's automobile almost upon her. Her evidence was that she hesitated as to which way she should go and then the car was upon her. The defendant admitted that when he first saw her he swerved to the left to try to avoid her and put on his brakes but they did not take effect until after he struck her; but he claimed that she hesitated and suddenly took two steps back that brought her in front of his car. The defendant's car skidded 63 feet and the plaintiff was carried from 45 to 50 feet after she was struck. The trial judge found the defendant guilty of negligence and that the plaintiff was guilty of contributory negligence in getting in the way and dismissed the action.

Held, on appeal, reversing the decision of MURPHY, J. that there was the finding of the trial judge that the defendant was guilty of negligence and the evidence amply sustained this, but the plaintiff's evidence which was uncontradicted on the point was that she did not see the defendant's car until it was practically upon her, and, being then in the "agony of collision," she could not be guilty of contributory negligence and was entitled to recover for the damages sustained.

APPEAL by plaintiffs from the decision of MURPHY, J. of the 5th of October, 1925, in an action for damages for personal injuries resulting from being run into, knocked down and dragged by the defendant's McLaughlin motor-car. On the evening of the 16th of March, 1925, at about nine o'clock, the plaintiff was walking on Douglas Street southerly, approaching its junction with Dunedin Street and Burnside road, she being on the east side of Douglas. On reaching the corner of Dunedin Street she crossed the road but before reaching the sidewalk on the oppostie side she turned to her right and proceeded to cross Burnside Road. When she was a little more than half way across (on the westerly railway tracks) she was struck by defendant's car. The defendant was driving his car southerly on Douglas Street and turned into Burnside Road, going southerly. He had a McLaughlin car and his two lights were

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dimmed. The defendant's witnesses admitted he was going 15 miles an hour. He did not see plaintiff until very close to her nor did the plaintiff see him until very close. The defendant claimed the plaintiff, after getting two-thirds of the way across, suddenly stepped back and he was corroborated in this by one witness. The plaintiff said, being in agony of collision she hesitated and had no time to do anything. When the defendant tried to stop he skidded 63 feet and went from 45 to 50 feet after he struck the plaintiff. The trial judge found the defendant guilty of negligence but that the plaintiff was, on the evidence, guilty of contributory negligence which amounted to inevitable accident and he dismissed the action.

The appeal was argued at Victoria on the 21st of January, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

D. S. Tait, for appellant: On finding inevitable accident the learned judge misdirected himself in law as you cannot have inevitable accident with one party guilty of negligence. On the admitted facts she was suddenly confronted by the defendant's car and in the agony of being run down she did what she could to avoid him; the finding of contributory negligence was unjustified. The finding was that she was more than half way across. When they saw one another they were both in the agony of collision. He skidded 63 feet and carried the plaintiff from 45 to 50 feet after hitting her. This gives a fair estimate of the speed he was travelling at.

F. C. Elliott, for respondent: We rely largely on the evidence of the plaintiff stepping back. The evidence is clear that she nearly reached the sidewalk and then suddenly stepped back in front of the car. The trial judge is in our favour as to this. The plaintiff had a right to assume she would continue onto the sidewalk: see *Todesco* v. *Maas* (1915), 23 D.L.R. 417 at p. 419; *The Canadian Pacific Ry. Company* v. *Smith* (1921), 62 S.C.R. 134. Was it reasonable that the defendant should anticipate the plaintiff suddenly turning and coming back in front of his car? see *Gavin* v. *Kettle Valley Ry. Co.* (1918), 26 B.C. 30. On contributory negligence see *Neenan* v. *Hosford* (1920),

2 I.R. 258 at p. 268; *Morrison* v. *The Dominion Iron & Steel Co., Ltd.* (1911), 45 N.S.R. 466 at p. 471.

MACDONALD, C.J.A.: The appeal should be allowed. Mr. *Tait* in his opening, reading the particulars of the contributory negligence, confined the issue to the effect of her stepping back at the time the occurrence took place. That is all we have to consider. We have the finding of the learned trial judge who tried the action that the defendant was negligent, but apart from all that, the evidence amply sustains that finding.

Now the question for us is whether upon the facts and circumstances we have here she was guilty of contributory negligence in stepping back. To determine that we have to determine first whether she had opportunity of exercising her judgment at the time of impact. Now she says herself, and she could hardly be contradicted upon it, and has not been contardicted, that she was crossing the street and had got to a certain point, when suddenly she realized that this car was practically upon her. The defendant himself in his evidence says it occurred so quickly that he was unprepared; he was in the agony of collision. He had his brakes, but he says his brakes did not take effect until he had actually struck her. Now what does this mean?

The evidence of Erb, one of the witnesses for the defence, is that she hesitated when, I suppose, she saw the car, and made two steps backwards or sideways, when she was struck down. That is a different story to what Mr. *Elliott* puts forward, that she was within three feet of the curb and had run back from the curb to a position a very short distance from the rail. That is entirely inconsistent with Erb's statement.

I have read a considerable amount of the evidence of the defendant, and while at first it seemed to have been given very frankly, yet when read, I do not say it is dishonest, but it is the evidence of a person who, like the plaintiff, was in the agony of collision and did not observe very closely what took place.

I think it is the bounden duty of a driver of an automobile, especially at a crossing, to take particular care. Pedestrians must take care also; on the one half of the street one looks out for the traffic on that half. When he gets to the middle he must

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look to see if there is any that will endanger his proceeding. If someone comes as this defendant did, suddenly, the law does not require that he should act as coolly and collectedly as under normal circumstances.

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An Appellate Court must always feel a good deal of embarrassment in setting aside the finding either of a judge or jury, but in this case I have no hesitation. When a judge, or a jury, comes to a manifestly wrong conclusion, or has proceeded upon a wrong principle, the duty of this Court is to set that judge or jury right. That is the function of this Court, to be exercised with great care and caution it is true. I think this is eminently a proper case for setting aside the verdict. The assessment of damages is to be dealt with in the ordinary way.

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MARTIN, J.A.: In my opinion this appeal should be allowed. The case presents one unusual feature, in this, that in the particulars of the contributory negligence set up in the statement of defence that negligence is restricted to one sole kind, namely, that the plaintiff stepped back into the path of the motor-car though she at the time had attained a position of safety, and in consequence of that stepping back she was struck by the car in a way which would not be attributed to the negligence of the driver thereof.

Now it is necessary that the position of the plaintiff should be most carefully considered, because the learned trial judge has found that she, in that situation, did not act with reasonable apprehension, to use the learned judge's expression, of what should have been done, but, with all respect to the learned judge, and basing my observations on the uncontradicted evidence of the defendant himself, I am unable to take that view. The situation must be viewed from the aspect that the defendant, at that very moment, was found by the learned judge to have been driving his car in a negligent fashion. The position then is that a person who at that moment is not negligent is suddenly placed in a situation of extreme peril by a person who is negligently driving his car. To my mind that is a clear situation of imminent peril, or, as it is very appropriately

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styled in Admiralty Courts (and adopted by Courts in general) the "agony of collision," and in such cases the law does not require anyone so wrongfully placed to exhibit extraordinary presence of mind of extraordinary skill, and if he should fail to do that which an ordinary person might be expected to do under ordinary circumstances, that is not held to be negligence. See the cases cited in Marsden on Collisions at Sea, 8th Ed., pp. 12, 13 and 65.

So we have here a case where a woman is suddenly placed in a position of imminent peril and can it be said that under such circumstances she did anything that is unreasonable? With all respect, I am unable to find that to be the case. When a person acting properly is confronted with a situation such as that, it requires a very strong case to hold him responsible for any involuntary action he might take, and probably it is a question as to whether it is best to jump sideways, or frontways, or backways, or not at all, and so it really is almost impossible to say under such circumstances that in the effort to save his life a pedestrian took a wrong course, and consequently I am unable to say that what the plaintiff did here constituted negligence on the uncontradicted evidence.

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I observe that our decision in *Rainey* v. *Kelly* (1922), 3 W.W.R. 346, has been somewhat misunderstood in some quarters, but in many respects it is appropriate in this case. What I said in my judgment therein must be taken in the light of the circumstances, as was laid down in *Quinn* v. *Leathem* (1901), A.C. 495; 70 L.J., P.C. 76, by Lord Chancellor Halsbury, and what I said was:

"I repeat it again, once a pedestrian has got into the vehicular traffic, and has begun to cross, he must be allowed to continue his crossing in safety and to finish it."

Of course, that presupposes that he has lawfully got into the traffic after exercising prudence and due caution and continues to exercise it, but my language has been obviously wrongly interpreted as meaning that a person once having blundered upon the highway can incautiously proceed to carry out that blunder irrespective of anything or anyone. One of the patent reasons why the position of the crossing pedestrian is perilous on frequented highways is that he is or may be caught between at

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least two cross streams of traffic and more at street intersections and thus cannot generally even venture to retrace his steps or even look behind him.

My judgment is founded upon the principle of *Rex* v. *Broad* (1915), A.C. 1110 at p. 1115; 84 L.J., P.C. 247, where their Lordships of the Privy Council say this, laying down the principle of law in general:

"Where a highway is crossed at right angles [which is the case at Bar] as of right priority of passage belongs to the first comer; he has a right to be on the crossing, and, so long as he is crossing with all convenient speed, the second comer cannot disregard or object to his presence, but must wait his turn if he cannot pass clear."

This is precisely the application of the *Rainey* case, and I make these timely observations thereupon because I am unable to perceive why it has been so misconceived.

GALLIHER, J.A.: The case before us really comes down to a very narrow point for consideration, and that is whether the acts or act of the plaintiff can be brought within the scope of, and whether it can be said to be something done in the "agony of collision."

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Now I have hesitation in setting aside the judgment of a judge below in a matter of this kind, but at the same time I feel myself impelled in this case to come to the conclusion on the evidence that what was done by the plaintiff was done in what is termed the agony of collision. That being so, it cannot be said that contributory negligence can enter into it, and the appeal must be allowed.

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

The case really is within very small compass in the end, and can only be sustained upon the learned trial judge's finding of fact, if that finding of fact can be said to be reasonable upon the evidence.

MCPHILLIPS, J.A.

Now there is some evidence that the plaintiff, a pedestrian, in crossing the street was across the intended line of passage of the motor-car, but I do not consider the evidence at all satisfactory upon which the learned judge proceeded. We have streets converging at the point where the accident occurred. The evidence upon which the learned judge could only have proceeded

would be the evidence of the witness Erb and the evidence of the defendant himself. Now Erb was at a distant point from the point of impact and it is perfectly clear that he could not tell that the coast was clear in front of the driver of the motor-car; that would only be possible by the driver of the motor-car himself or some other persons who were immediately in the rear or in front of where the collision took place, which was not Erb's position. I exclude the evidence of Erb, as being impossible to prove that fact. Then as to the evidence of the defendant, the judge himself makes a finding of negligence against him. Stress is laid upon the fact that he had his side curtains up and his lights were dim. Now that would prevent him from having a clear view, and we have the distinct language of the learned judge:

"I think it is probable that the defendant was guilty of negligence, inasmuch as he admits himself that he did not see this lady until he was within 20 feet of her."

If he did not see her until he was within a distance of 20 feet of her, he would only have a fraction of a second to endeavour to avoid the plaintiff, and the plaintiff likewise only had that time to avoid being hit. I think that comes within the rule of the agony of collision and it was the negligence of the defendant that precipitated this situation.

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The learned judge himself has said "apparently she got confused." Now if the plaintiff was absolutely clear of the line of passage of the driver of the motor-car, why would there be any opportunity for confusion? She would be completely away from any possibility of being hit by the car. The learned judge found negligence against the plaintiff. It is impossible, upon the facts, to arrive at other than one conclusion—the defendant negligently drove the car upon the plaintiff, not having it under control and capable of being stopped. At a speed of 15 miles an hour I think it is unquestionable that the plaintiff was placed in a position of peril, and the facts reasonably establish that she had not completely passed the line of direction of the car. There is no reasonable evidence, in my opinion, with great respect to the learned trial judge, capable of being utilized to support the finding that she was safely over. That being so, whether she was an appreciable distance, a foot or two, or even perhaps a

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few inches over the line where the right wheel of the motor-car would pass is too fine a point. But even if she had been actually past the point where the right wheel of the motor-car and mud guard could have passed her, that would be too close—she would reasonably become "confused." How could she tell with certainty that the motor-car would safely pass her—if it would pass her by perhaps the fraction of an inch? And for that reason I think it perfectly clear there was the situation of "agony of collision" upon the facts, and that being so, then it is impossible to say that she should not have made a step, even if she did make a step into the direction of greater danger.

My brother MARTIN has referred to *Rex* v. *Broad* (1915), A.C. 1110 in the Privy Council, where Lord Sumner dealt with the Common Law rule. Lord Sumner makes it perfectly clear that if a pedestrian is in the act of crossing, the traffic coming up, coming later, must not proceed until that traffic can clear the person in the act of crossing upon the street.

Now was that the case here? I think not. On the evidence this driver of the motor-car came up and proceeded when the passage was not clear, she was upon the street in the act of crossing in front of him.

MCPHILLIPS, J.A.

I would refer to the case of *Rex* v. *McCarthy* (1921), 2 W.W.R. 751, a judgment of the Supreme Court of Canada, and in the head-note we find that the contention cannot be upheld that there is a distinction between the negligence that renders a man liable criminally and that which renders him liable for damages in a civil case, and Mr. Justice Duff on page 754 deals with the driving of a motor-car; the learned judge said:

> "Where the accused, having brought into operation a dangerous agency which he has under his control (that is to say, dangerous in the sense that it is calculated to endanger human life), fails to take those precautions which a man of ordinary humanity and reasonably competent understanding would take in the given circumstances for the purpose of avoiding or neutralizing the risk, his conduct in itself implies a degree of recklessness justifying the description 'gross negligence.' The facts of course may disclose an explanation or excuse bringing the accused's conduct within the category of 'reasonable' conduct."

There the accused was driving a motor through a frequented street at the rate of 12 miles an hour without seeing that the road was clear before him.

Now we have the defendant in this case driving at a crossing, a frequented crossing, the evidence shews at a speed of at least 15 miles an hour, without seeing the road clearly before him, not observing the plaintiff until within 20 feet of her, and the learned judge holds that he was negligent in that. That being the state of facts I think that the authorities shew conclusively that the plaintiff is entitled to recover. The defendant was guilty of actionable negligence and the plaintiff was in no way guilty of contributory negligence, and the direction should be as the Chief Justice has stated, merely for the assessment of damages, as the case has been clearly proved.

MCPHILLIPS, J.A.

MACDONALD, J.A.: I would allow the appeal. I think Courts should exact a high degree of care from motorists towards pedestrians, particularly at street crossings.

Here the learned trial judge found that the defendant was negligent. In view of that finding we have only to consider the conduct of the plaintiff. Should her actions or alleged want of care be regarded as contributory negligence, causing the accident? I do not think so.

MACDONALD, J.A.

The fact that the plaintiff in the confusion of the moment made a move which if not made might have avoided the accident cannot be regarded as contributory negligence on her part.

The evidence of the defendant which appeared to be given very frankly shews that it all occurred so quickly that there was no time for deliberate action by the plaintiff. Her failure to continue across the street, or her sudden action in stepping back, was excusable, as she was then in an agony of doubt.

Appeal allowed.

Solicitor for appellants: *H. W. Davey.*
Solicitors for respondent: *Courtney & Elliott.*

HUNTER, C.J.B.C. (In Chambers)

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McKENZIE v. BREMNER.

Practice—Action to dissolve partnership—Consent order for accounting—Information obtained on cross-examination of defendant—Application to amend statement of claim alleging misrepresentation.

McKENZIE v. BREMNER

The plaintiff and defendant were in partnership in a logging operation the defendant being in full charge of the work. On the defendant refusing to complete the work the plaintiff brought action claiming damages, for an accounting and for dissolution. Subsequently an order was made with the consent of the parties directing the defendant to give an account of the real and personal property of the partnership, and of all moneys received and expended by him on behalf of the partnership. On cross-examination of the defendant on his affidavit supporting his accounts the plaintiff claims to have first ascertained that there was material misrepresentation at the inception of the partnership contract regarding the purchase price of the partnership property made by the defendant. The plaintiff then applied for leave to amend his statement of claim alleging misrepresentation and claiming rescission and alternatively claiming dissolution and an accounting.

Held, that the cases cited to the effect that another action must be started to set aside the order on the ground of fraud are not in point as the alleged misrepresentation, if there was such, goes to the contract itself, and the rights and liabilities of the parties would be wholly different if the Court found that the right of rescission was established.

Held, further, that in the existing statement of claim there is a claim for damages or breach of the alleged agreement which could not be disposed of by the registrar under the order for taking accounts, but the liability would have to be decided by the Court itself, so that the order for accounts is not in the nature of a final order disposing of all the issues in the action but only an interlocutory order, and the amendment should be allowed.

Statement

APPLICATION by plaintiff to amend the statement of claim. The plaintiff and defendant were in partnership in logging operations the arrangement being that the defendant was to have full charge of the operations, expenditure of money, etc., the plaintiff being substantially a dormant partner. The defendant refused to complete the logging operations and the plaintiff then brought this action for damages, an accounting and dissolution of partnership. A consent order was made by MORRISON, J. on the 17th of April, directing the defendant to give an account of the real and personal property of the partner-

ship and of all moneys received by him and expended on behalf of the partnership and that the account be filed and enquiries taken before the registrar. On the cross-examination of the defendant on his affidavit supporting his accounts the plaintiff ascertained that material misrepresentation at the inception of the partnership contract regarding the purchase price of partnership property was made by the defendant. This application was then made for leave to amend the statement of claim alleging misrepresentation and for rescission and alternatively claiming dissolution and accounting. Heard by HUNTER, C.J.B.C. in Chambers at Vancouver on the 2nd and 4th of February, 1926.

Statement

Gillespie, for the application.
Mayers, contra.

5th February, 1926.

HUNTER, C.J.B.C.: The plaintiff alleges in his statement of claim that he and the defendant entered into a partnership agreement to log and market the timber off a named tract, of which a memorandum in writing was afterwards made, and that other terms were afterwards agreed to but were broken by the defendant and the plaintiff claimed dissolution, account, and $7,000 damages. An order for accounts by the defendant was made by consent by my brother MORRISON, the costs being reserved with liberty to apply. The plaintiff now moves to be allowed to amend the statement of claim by alleging misrepresentation of a material fact leading to the agreement of partnership and claiming rescission and it is objected that he is estopped by the consent order. The misrepresentation is stated to have been learned for the first time after cross-examination of the defendant on his affidavit of accounts. I think that the cases cited, to the effect that another action must be started to set aside the order on the ground of fraud, are not in point, as the alleged misrepresentation, if there was such, goes to the contract itself and the rights and liabilities of the parties would be wholly different if the Court found that the right of rescission was established. There is moreover, in the existing statement of claim, a claim for damages or breach of the alleged agreement

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which could not be disposed of by the registrar under the order for taking the accounts but the liability would have to be decided by the Court itself so that it is clear that the order for accounts is not in the nature of a final order disposing of all the issues in the action but only an interlocutory order as it is in form. There will, therefore, be no prejudice occasioned to the defendant, which cannot be met by costs, by allowing the proposed amendments. Five days within which to serve the amended claim; five days within which to serve the amended defence; stay of proceedings under the order for accounts until further order; costs reserved for the trial judge.

Order accordingly.

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BRITISH COLUMBIA HOP COMPANY LIMITED v. THE KING.

Taxation—Assessment—Hops grown on farms—Taxed on income—Personal property tax claimed—Petition for refund under section 138 of the Taxation Act—Manifest error—Meaning of—R.S.B.C. 1924, Cap. 254, Secs. 42(c), 138 and 141.

The British Columbia Hop Company Limited raised hops on its farms in British Columbia. After picking they were dried and bleached in kilns before being baled for sale. Having been taxed on the income derived from the hops for the years 1918 to 1923 inclusive the Company petitioned the Court of Revision for a refund of the difference between the income tax which was paid for these years and the personal property tax which should have been paid claiming that as the income was derived from the growth and sale of hops it was exempt from the income tax under section 42 (*c*) of the Taxation Act. The petition was dismissed on the ground that as the income tax was paid under a mistake of law the Company could not recover.

Held, on appeal (MARTIN and MCPHILLIPS, JJ.A. dissenting), that section 138 only provides for the hearing of cases where there is manifest error in the asessment roll, there being no jurisdiction to entertain a petition complaining of an error in a decision of fact which could only be decided by the trial of an issue and the appeal should be dismissed.

Per MACDONALD, C.J.A.: If the Court of Revision had power to entertain the petition by virtue of section 138, the case would not be governed

by the common law rule that one cannot recover money paid under a mistake of law.

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APPEAL by the British Columbia Hop Company Limited from the decision of D. McKenzie, judge of the Court of Revision, of the 13th of August, 1925. The Hop Company paid income tax for the years 1918 to 1923 inclusive amounting in all to $15,151.99. The Hop Company claimed that for these years it paid taxes on its income, whereas under the Act (R.S.B.C. 1924, Cap. 254, Sec. 42(*c*)) no income shall be taxed on "All income from the working or operation of a farm, orchard, or ranch derived by the person who actually works or operates the farm, orchard, or ranch, other than income derived from the sale of cattle, horses, mules, or sheep." It claimed that during these years the whole income had been solely from the working or operation of the farms kept by the Company and were not subject to income tax but only subject to personal property tax. The personal property tax during these years would have aggregated $6,070.89 and it claimed the right to a refund of $9,081.10. The taxes actually paid for the years 1918 to 1923 inclusive, in each year were $77.40; $1,892.70; $1,120.94; $4,150.35; $5,731.70 and $2,178.90; whereas for each year on personal property tax it would have paid $729.67; $2,404.43; $1,067; $889.67; $535.39 and $444.73. The Crown contended that the hops, after being picked, underwent a drying process in kilns where with the aid of sulphur they were bleached and then baled for export, that this rendered them partially manufactured goods and therefore subject to the income tax. It was held by the judge of the Court of Revision that in view of the fact that the taxes were paid under a mistake of law they could not be recovered.

Statement

The appeal was argued at Victoria on the 19th and 20th of January, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Reid, K.C., for appellant: If we should have been taxed on personal property and not on income we paid $9,081.10 too much. The issue is whether we should pay income tax. Although paid under a mistake of law we say in the circum-

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stances we are entitled to recover: see Halsbury's Laws of England, Vol. 21, p. 33, par. 67. We say we are exempt under section 42(*c*) of the Taxation Act. The statute is retrospective and it is not necessary that it should specifically say so: see Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., 471; *Pardo* v. *Bingham* (1869), 4 Chy. App. 735; *West* v. *Gwynne* (1911), 2 Ch. 1 at pp. 15-16; *Rex* v. *Chandra Dharma* (1905), 2 K.B. 335; *Koksilah* v. *The Queen* (1897), 5 B.C. 600 at p. 615.

Argument

Maclean, K.C., for respondent: This case should have been dealt with under sections 133-4 of the Act at the Court of Revision. It does not come under section 42 as what goes out from the farm is a manufactured hop, as the hops undergo a special treatment on the farm by the use of sulphur. Under the Taxation Act of the 1911 Revision and the later Act in 1921 mistakes of this nature were dealt with by the Court of Revision and they could only deal with the previous year. Here they are attempting to go back eight years.

Reid, in reply: The use of sulphur is merely a drying process and should be treated as *qua* farm. It was agreed in the Court below that this was the only point at issue.

Cur. adv. vult.

9th April, 1926.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: These proceedings were brought under section 138 of the Taxation Act, Cap. 254, R.S.B.C. 1924. It is true there was no petition as required by the section but this irregularity was waived by Crown counsel.

The facts appear to be that the plaintiff operates hop farms and was assessed on returns made by itself and that it actually paid income tax on income from its farms for the years 1918 to 1923 both inclusive, which it now seeks to have refunded to it.

Speaking generally, the income derived from products of farms is exempt from income tax.

At a Court of Revision held in 1925, the plaintiff put forward a claim for the refunding of these taxes. The contention of the Crown was that the income was not purely from products

of the farm but was from the partly manufactured hops, in which case it would not be exempt from taxation. Evidence was heard on this issue but the judge of the Court of Revision made no finding upon it but founded his judgment on a question of law. He said:

"The assessment was made on the returns as filed by the British Columbia Hop Company Limited from its head office in San Francisco, California, and the taxes were paid voluntarily with the knowledge of these facts. It now seeks for a refund on the ground and on this ground alone, that the assessment levied against it is not in accordance with the provisions of the Taxation Act, which specifically exempts items complained of from taxation. In view of the fact that the taxes were paid under a mistake of law and not under a mistake of fact, they cannot be recovered."

In my view of the case, I do not need to say more than this: that if the Court of Revision had power to entertain the petition by virtue of section 138, the case would not be governed by the Common Law rule that one cannot recover money paid under a mistake of law. Moreover, if the Court of Revision had power to entertain the petition, we should have to decide whether or not the Crown is bound by what appears to me to have been agreed to by both parties, namely, that if the issue of fact above mentioned were decided in plaintiff's favour, the refund, when the amount had been ascertained by actuaries, should be made as a matter of course. Section 138 reads:

"The Court of Revision may at any sittings, after notice has been given to the assessor, receive and decide upon the petition from any taxpayer who declares himself, by reason of any manifest error in the assessment roll for any preceding year, to have been overcharged more than twenty-five per centum on the sum with which he ought to have been charged for that year, and may remit or reduce the taxes due for that year by the petitioner, or may reject the petition."

From this it appears that the Court of Revision is empowered to entertain the petition of a ratepayer who claims that by reason of "manifest error in the assessment roll" he has been overcharged or wrongly charged, and if a complaint shall be established the Court may "remit or reduce the taxes due."

There seems to me to be no ambiguity in this language. Given manifest error in the roll in respect of taxes due, the Court may "remit or reduce" the taxes. That seems to me to be plain enough. The language given its ordinary and grammatical meaning leaves no doubt in one's mind as to the powers of the

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Court. It would, I think, be absurd to hold that taxes due might be read to mean money paid, and that taxes paid might be remitted or reduced. In addition, it would be, in my opinion, wrong to say that the words "manifest error in the assessment roll" could refer to an error which could only be ascertained in the case of dispute by the trial of an issue of fact—"Things manifest do not require proof"—4 Co. Rep. 132. "Manifest" means, "clearly revealed to the eye, mind or judgment; open to view or comprehension; obvious": Oxford Dictionary, Vol. 6, p. 122. No doubt, when used as a verb, *i.e.*, to make manifest, evidence might well be admissible, but here it is used as an adjective. If the section is to be construed as relating to other than palpable errors—errors which are manifest not those to be made manifest—then it opens up a vast field of inquiry in respect of assessments and renders illusory the carefully framed provisions of the Act relating to appeals from assessments, which require them to be brought within a limited time and which declare the roll when completed and certified, to be final and conclusive.

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If the plaintiff's contention be correct that the Court may review questions of substance relating to the assessment, such as whether the income was produced from the raw product of the farm or from the partly manufactured product of the farm, then I see no obstacle in the way of litigating any question relating to an assessment, however remote the assessment had been. It must, however, be conceded that to some extent—to the extent declared—the Legislature did detract from the finality of the roll, but I think only to the extent of permitting the correction of obvious errors in it, and only in respect of unpaid taxes, since taxes cannot be due if they have already been paid.

But it was argued that section 141 of the Act must be read with section 138, so as to give section 138 a different meaning from that which its language imports. I have already said that in my opinion there is no ambiguity at all in the language of section 138, and that being so we cannot add to or subtract from it unless it be repugnant to the clear intent of the Legislature (see Beal, p. 344 *et seq.*). In my opinion section 141 does not clash with 138. It is obvious to me that section 141 has reference to

the ordinary appeals from assessments and is in aid of the tax payer who may have paid his taxes before his appeal had been decided to avoid penalties for default.

While the fact does not bear directly upon my opinion that the Court of Revision lacked jurisdiction to entertain the petition, I would point out that the assessment roll is not before us nor does it appear to have been before the Court of Revision. There was therefore no pretence that what the Court was asked to correct was a manifest error in the roll in the sense in which I have construed those words. The complaint was that there was error in a decision of fact which could only be decided by the trial of an issue.

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As regards the consent above mentioned, it becomes in the result, unnecessary to say more than that it is settled law that consent cannot confer jurisdiction when it is lacking.

The appeal should be dismissed.

MARTIN, J.A.: It appears from the record before us that differences had arisen in December, 1922, between the appellant Company and the Provincial assessor of taxes respecting the amounts due the Government for taxes and, in the course of negotiations for adjustment, the Company, in response to the assessor's request, furnished him with its profit and loss accounts and balance sheets for 1916-22, and during the discussion and proceedings thereupon the Company discovered that it had, as it submitted, been improperly assessed upon certain income which it claims is exempt under section 42(*c*) of Cap. 254, R.S.B.C. 1924 as follows:

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"All income from the working or operation of a farm, orchard, or ranch derived by the person who actually works or operates the farm, orchard, or ranch, other than income derived from the sale of cattle, horses, mules, or sheep:"

This claim for exemption was not allowed by the assessor so the Company served the usual notice of appeal from the assessment to the next Court of Revision and the assessor gave to the Company (through its authorized agents) the following notice:

"Take notice that you are required to attend the Court of Revision for the Vancouver Assessment District at the Court House, Vancouver, on the

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29th day of June, 1925, at eleven o'clock in the forenoon on the hearing of the following appeal:

"Appellant: B.C. Hop Co. Ltd.

"Subject-matter, Claim for refund of Taxes.

"Dated at Vancouver this 18th day of June, 1925.

"(sgd) N. R. Brown

"Provincial Assessor."

When the matter came before that Court the appellant's counsel, Mr. *R. L. Reid, K.C.*, explained the situation to the Court, substantially as above recited, and concluded thus:

"Now the income of this Company which is a 'person' under the Interpretation Act is derived from the working or operation of the farms, which farms the B.C. Hop Company owns at Sardis and Agassiz, and it was pointed out that the assessment was manifestly wrong and negotiations have been going on ever since in connection with the matter until on April 18, 1925, the assistant surveyor of taxes suggested we ask for relief under section 138 of the Taxation Act, and this case comes in in pursuance of that section under the arrangement made between the Government and the B.C. Hop Company. I propose to shew from the manager and from the assessor the fact that the whole income of the B.C. Hop Company during all those years has been solely from the working or operation of the farms kept by that Company and therefore not subject to income tax but only subject to personal property tax. If that should be decided in my favour I should suggest that the matter be adjourned and the auditor of the Hop Company and the auditors of the taxation department get together and settle what are the proper taxes under the ruling of the Court and then a Court order shall be made covering that.

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"Mr. *Dixie*: Yes, I agree to that.

"Mr. *Reid*: I call Mr. Cohen.

"THE COURT: Just one moment, that was section 138?

"Mr. *Reid*: Section 138 is the section under which this Court may be held [reading section].

"Mr. *Dixie*: And we will take that statement as your petition; no formal petition has been put in.

"Mr. *Reid*: No formal petition has been put in."

It will be noted that the notice of appeal from the assessment was a "claim for refund of taxes," and by section 141 the minister is directed to make a refund when taxes are "remitted" (*i.e.*, released or discharged—Abbott's Law Dictionary, Vol. 2, p. 407) by the Court of Revision under section 138.

I have recited the exact terms of the question, and the sole and only question, that the parties had thus formally agreed to submit for the adjudication of the Court in just the same way as though a petition had been presented to raise it under section 138: the appellant expressly undertook to limit his appeal to

that one ground which he was prepared, and is still prepared, to win or lose on. Some discussion arose at this Bar as to whether this agreed question came within the expression "manifest error in the assessment roll" and the assessor's counsel now submits that it does not, but the obvious answer to that objection is that after agreeing to submit the question as and upon a petition under section 138 and invoking the decision of the Court below on that basis as being "manifestly wrong" (to quote counsel, *supra*) the assessor cannot be permitted to change his ground before us to the detriment of the other party to that solemn arrangement, and above all other litigants it would be expected that the Crown would exemplify the highest standard of forensic ethics. This is not a case where this Court is called upon to exercise a jurisdiction which it does not possess, for it will never permit that to be done and it is its duty *ex mero motu* to take the objection *in limine* to its own jurisdiction, as we have often done: the situation here is quite different, because we are asked now for the first time to inquire into the jurisdiction of the Court below, not in general, but in the application of a certain section to afford relief from errors in the assessment roll, though the parties had, by express agreement recognized it and no one questioned it. In the case of appeals from inferior tribunals the old Full Court of this Province rightly exercised a discretion in such case and has refused to allow objections to the jurisdiction not taken below to be raised in appeal. See *e.g., Gelinas* v. *Clark* (1901), 8 B.C. 42; 1 M.M.C. 428, an appeal from the County Court of Yale, and this case is much stronger because here is an express agreement to raise and abide by one point only: moreover such a proceeding comes, in my opinion, within the principle that Courts of Justice will act in such circumstances as "any high-minded man would do, *viz.*, not to take advantage of the mistake of law" as the Queen's Bench Division held (*per* Lord Esher, M.R., and Cotton and Lindley, LL.J.) in *Ex parte Simmonds* (1885), 16 Q.B.D. 308, in a case where an officer of the Court, the trustee in bankruptcy, sought under the ordinary rule as between litigants to retain money which had been paid to him by mistake of law, but was directed to repay it, Lord Esher saying, p. 312:

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"The Court has never intimated that it is a highminded thing to keep money obtained in this way; the Court allows the party who has obtained it to do a shabby thing in order to avoid a greater evil, in order that is, to put an end to litigation. . . . [But] The Court will order [the trustee] . . an officer of the Court . . . to act in an honourable and highminded way . . . . and replace the money."

This high-minded way of viewing the matter should *a fortiori* be applied to this case where not merely an officer of the Court but the Crown itself is seeking to avoid its solemn engagement, and I must decline to view the matter in any other light than that of such engagement.

Moreover the assessment rolls are not before us, though the said notice of appeal specified the "rolls, 1918 to 1923" as those appealed from, and so it is impossible to say, as a fact, whether or no the error was "manifested" thereupon, whatever that expression might in the circumstances be held to mean, as to which much and weighty argument might be heard arising out of, *e.g.,* such decisions as *Forster* v. *Hale* (1798), 3 Ves. 696; *Smith* v. *Matthews* (1861), 3 De G. & J. 139; and *Rochefoucauld* v. *Boustead* (1897), 1 Ch. 196, 206, which shew that the expression "manifested and proved by some writing" under section 7 of the Statute of Frauds does not mean obvious or patent and therefore self-proving without any explanation but something which may be made manifest as being erroneous: the "writing" has to be considered and explained in the light of relevant proof just as the roll would have to be: it is not self-correcting or explanatory otherwise there would be no error in it, manifest or otherwise: once it appeared that exemptions had been assessed contrary to law the roll would contain a "manifest error," *i.e.,* made manifest by clear proof, and I cannot, with all respect, accept the narrow restriction that is sought to be placed upon it. A good illustration of an error in an assessment roll being made "manifest" by such proof by shewing that the wrong owner has been assessed, thereby creating a manifest injustice, is to be found in *Re Maritime Fish Co. Ltd.* (1919), 46 D.L.R. 108.

MARTIN, J.A.

Such being the situation agreed upon by the Court and litigants below the appellant proceeded to give evidence to establish its case thereunder (no evidence being adduced by the respondent) upon the sole issue in question and the Court reserved judg-

ment thereupon but instead of determining that question so submitted to it undertook to dismiss the appeal on a wholly different (*viz.*, the effect of payment under a mistake of law) question which was by the act of the parties excluded from its consideration. From this wholly unexpected and inappropriate decision the Company appeals, as being beyond the scope of the sole question submitted by special agreement, and I entertain no doubt that the decision should be set aside as being in contravention of the said agreement and that since we have all the short and uncontradicted evidence before us we should make, under section 140, that order which the Court below should have made in the unusual but clearly defined circumstances.

This brings me to a consideration of said section 42(*c*) and it is to be noted that it is sweeping in its inclusions and specific and limited in its exclusions. It applies to income derived from the "working or operation of a farm, orchard or ranch" which in the various senses that these three words are used (particularly the last which is of very extensive local meaning) cover everything in the way of agricultural undertakings from the great ranch of the big cattle-man to the small garden truck or chicken or milk ranch or bee-farm of the small suburban holder, and the expression "working or operation" must have a corresponding wide and varying application to those dissimilar occupations.

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The only practical question, then, is, was the way the hops were dealt with on the hop farm or ranch in question something which would be done in the ordinary "working or operation" thereof? That depends upon the circumstances and what was done here is thus described by the Company's manager:

"The hops are picked and after they are picked they are carried to the kilns. There they are dried and after they are dried they are baled and in that shape they are shipped to consignees.

"When you take them to the kiln do you put them through a process with sulphur. What is the process; that is what I want to know. I do not want any trade secrets; tell me generally? I do not think I can give any; it is simply a matter of taking the moisture out of the hop and while the moisture is coming out of the hop a little sulphur is burned underneath them and this sulphur combines with the moisture of the hop and tends to bleach them.

"That makes them commercial or merchantable? They would be just as good if not bleached but brewers like them better if they are bleached.

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That is, it does not add or give them any additional value by bleaching them, that is intrinsic value.

"Do you have to keep them any material time? No, as soon as they are dried they are put in big buildings and in the course of a week they are baled and then they are ready to ship.

"What you have to do is, when they are picked, you have to put them through a process? They are dried, that is all.

It is to my mind impossible to say that this simple process of drying with incidental bleaching all "worked" upon the farm itself is not part of the usual "working and operation" of a farm of that class: it essentially amounts to nothing more than the preparation of the natural product upon the farm for its delivery therefrom to the manufacturer; almost all natural products require, upon the place where they are grown, much careful preparation for the market to insure the best price; the great staple wheat, for example, has to be cut, bound, stooked, threshed out and often stored in the farmer's barns from the weather; and hay also requires careful attention in cutting, drying, stacking, baling and storing in barns, etc. In milk farms or ranches, the greatest care is essential in handling the natural product, milk, necessitating in these days the use of machinery and the scientific methods in the "working" of what really is, in the case of butter, a manufactured article, but will it be said that an income derived from butter made on a farm does not arise from the working or operation of it? And the same may be said of poultry or hogs not only living but butchered and carefully prepared and "dressed" upon the farm to be taken and sold in a public market, not to speak of home-made bacon and hams, or the preserved fruits and pickled vegetables of the thrifty farmer's wife; and it is to be noted that the income from, *e.g.*, pigs, goats and rabbits, is excepted from the taxing proviso affecting certain animals in subsection (*c*) reared on various kinds of farms.

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If the appellant succeeded on his one ground then a legal question arises in the application of it to the years prior to 1922 depending upon whether or no section 138 is to be considered as retrospective. The general rules upon that subject are well summarized in Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., 468 the first of them being:

"Statutes are not to be interpreted so as to have a retrospective opera-

tion, unless they contain clear and express words to that effect, or the object, subject-matter or context shews that such was their object."

The key to the object of the Legislature in said section 138 is to be found in the meaning to be attached to the words "any preceding year," and if "any" is to be read as including "all" then there is no doubt about the matter. It is clear from many cases I have examined that unless there is something in the context "any" will be construed to include all, because as Lord Justice Cotton put it (Lindley and Fry, LL.J. concurring) in *Isle of Wight Railway Co.* v. *Tahourdin* (1884), 53 L.J., Ch. 353, 359, a notice to remove any director "would justify . . . removing all directors"—in fact "any" would involve "all," and in *Vallancey* v. *Fletcher* (1897), 1 Q.B. 265, the Queen's Bench Division held that a conviction for riotous behaviour in a churchyard and under a statute which penalized "any person" for such conduct the curate himself was included because "the words of the statute are perfectly general" and "it applies to all persons of every kind."

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In the present case bearing in mind its obvious remedial intention there is no reason for restricting the ordinary inclusive construction of "any" and therefore the section is, in my opinion, retrospective in its operation.

It follows that the appeal should be allowed.

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

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MACDONALD, J.A.: This is an appeal by the British Columbia Hop Company Limited from the judgment of Mr. D. McKenzie, sitting as a judge of the Court of Revision under the Taxation Act, Cap. 254, R.S.B.C. 1924, wherein he dismissed the appeal of the said Company against the assessment of income taxes for the years 1918 to 1923 both inclusive. The Company claim that in the first two years of said period there was an underpayment by them of $1,164 and in the remaining four years an overpayment of $10,245.10, or an overpayment in

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all of $9,081.10 for which a refund is claimed. This is arrived at by estimating the amount of personal property tax which the Company was liable to pay and the amount of income tax which it claims it should not have paid, making an overpayment of the amount referred to. It may be that under section 42(*c*) income derived from the growth and sale of hops even though when taken off the vine they are dried in kilns and baled for shipment, sulphur being used in the process, is exempt from taxation, on the ground that it is income derived from "the working or operation of a farm." In that case an application for a refund of moneys erroneously paid could be made to the Lieutenant-Governor in Council under the Revenue Act. This application, however, in my opinion, was misconceived. Section 138 of the Taxation Act has no application to the facts and circumstances outlined above. That section is confined to rectifying overcharges occurring by reason "of any manifest error in the assessment roll." It would appear that the assessment roll was not even produced. Instead an inquiry was made, not in respect to the assessment roll to rectify manifest errors but to ascertain as a matter of construction of section 42(*c*), if on the facts disclosed the products of this hop farm were subject to income taxation at all. To hold that such an inquiry can be the subject of the petition referred to in section 138 would be contrary to the whole scheme of those sections of the Act, including section 141 dealing with assessment appeals.

In view of my opinion that the Court of Revision had no jurisdiction to deal with the question in issue the alleged consent of the Crown is not material.

I would dismiss the appeal.

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

Solicitors for appellants: *Reid, Wallbridge & Gibson.*
Solicitor for respondent: *J. W. Dixie.*

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Debtor and creditor—Accounts—Guarantee—Appropriation of payments.

The defendant's son, being in the lumber business and requiring supplies, his father wrote the plaintiffs in April, 1922, directing them to supply his son with groceries to the extent of $500 for which amount he guaranteed payment by the 1st of July, 1922. On the 30th of June, when the son owed $572 the plaintiffs wrote the defendant saying that any further extension of credit would have to be arranged for. The son continued to get supplies and made certain payments on account until December 20th following, when the plaintiffs advised the defendant by letter that they were still holding his guarantee for $500, and that they would be obliged for payment. The payments made on account by the son covered the cost of all supplies up to the 1st of July and when action was commenced there was due on the account $630.11. The action was dismissed.

Held, on appeal, reversing the decision of LAMPMAN, Co.J. (MCPHILLIPS, J.A. dissenting), that the rule in *Clayton's Case* (1816), 1 Mer. 572, that where debits and credits are entered in a continuous account and neither party has made an express appropriation the payments made should be appropriated to the older debts, does not apply as the plaintiffs' letter of the 20th of December was in itself an express appropriation made at a time when it was open to the plaintiffs to do so, and they were entitled to recover on the guarantee.

APPEAL by plaintiffs from the decision of LAMPMAN, Co. J. of the 21st of November, 1925, in an action for recovery of $500 on a guarantee signed by the defendant. The facts are that one M. H. Elliott, the defendant's son, was engaged in getting out logs and was obtaining his supplies from the plaintiffs. On April 10th, 1922, M. H. Elliott, being short of funds his father wrote the following letter to the plaintiffs:

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"Kindly supply Mr. M. H. Elliott with groceries and supplies to the extent of $500, which amount I will guarantee payment by the 1st of July, 1922."

At the time this letter was written the son owed the plaintiffs $51. On the 1st of July, 1922, there was owing $572. On the 30th of June, 1922, the plaintiffs wrote defendant saying his son received the credit as arranged and any further extension on

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credit would have to be arranged for, and on the same date they wrote the son saying the amount of credit arranged for, *i.e.*, $500, was used up and that fresh arrangements for further credit would have to be made. After this date business was continued to the end of the year with goods being supplied each month and certain payments being made amounting in all to over $700. On December 20th the plaintiffs wrote the defendant stating that they still held his guarantee for $500 on the account and that they would be obliged if he made payment. There was $911 due at the end of the year and after that no further goods were supplied but on the 21st of March, 1923, $300 was paid on account leaving a balance of $630.11 due the plaintiffs. The action which was commenced on the 27th of May, 1925, was dismissed.

The appeal was argued at Victoria on the 21st and 22nd of January, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

P. R. Leighton, for appellants: The question is whether the subsequent transactions relieved the guarantor. The creditor has the right to make the appropriation up to the last moment. This case should follow *Grant* v. *Matsubayashi* (1922), 31 B.C. 375; *Simson* v. *Ingham* (1923), 2 B. & C. 65. He relies on *Deeley* v. *Lloyds Bank, Limited* (1912), A.C. 756 at pp. 783-4 and *Clayton's Case* (1816), 1 Mer. 572 at p. 610. On the question of appropriation see *City Discount Co.* v. *McLean* (1874), L.R. 9 C.P. 692; *The "Mecca"* (1897), A.C. 286; Broom's Legal Maxims, 8th Ed., pp. 634-5.

H. J. Davis, for respondent: This is an account between the parties: see *Laing* v. *Campbell* (1865), 36 Beav. 3. After the 1st of July, 1922, they continued to supply the son with goods without further guarantee and the son paid on the account after that date the sum of $551 which covers the amount of the guarantee: see *Kinnaird* v. *Webster* (1878), 10 Ch. D. 139; *Merriman* v. *Ward* (1860), 1 J. & H. 371. The letter claiming the amount of the guarantee was written after sufficient had been paid in to cover it: see Halsbury's Laws of England, Vol. 7, p. 450, par. 919. By the manner in which they kept this account

it must come under the rule in *Clayton's Case* (1816), 1 Mer. 572. Both *Grant* v. *Matsubayashi* (1922), 31 B.C. 375 and *City Discount Co.* v. *McLean* (1874), L.R. 9 C.P. 692 are distinguishable. The payments made by the principal debtor discharges the guarantee: see Halsbury's Laws of England, Vol. 15, p. 535, par. 1009; *Bodenham* v. *Purchas* (1818), 2 B. & Ald. 39.

Leighton, in reply, referred to *In re Sherry. London and County Banking Company* v. *Terry* (1884), 25 Ch. D. 692; *Seymour* v. *Pickett* (1905), 1 K.B. 715; *Browning* v. *Baldwin* (1879), 40 L.T. 248; *The Agricultural Insurance Company* v. *Sargeant* (1896), 26 S.C.R. 29; and *Griffith* v. *Crocker* (1891), 18 A.R. 370.

Argument

Cur. adv. vult.

2nd March, 1926.

MACDONALD, C.J.A.: The defendant guaranteed payment by his son to the plaintiffs of goods to be supplied to the value of $500. When the goods had all been supplied the plaintiffs wrote a letter, enclosing the bill, to both father and son telling them that no more goods would be supplied unless a new arrangement were made. This was notice that the plaintiffs considered the account on the existing basis as closed, and that they would insist upon defendant's guarantee in respect of that account. The defendant's son then saw the plaintiffs and made some new arrangement not disclosed in the evidence. Thereafter other goods were supplied to him and were carried to the same account, payments being made by him from time to time which were credited in the continued account. There remained at the time this action was commenced a sum due to the plaintiffs from the son of more than $500, for which the plaintiffs sue the father, the defendant, upon the guarantee.

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No appropriation was made of the credits by either the principal debtor or by the creditors at the time of payment. The defendant now claims that those payments should be credited upon the earlier items of the account, *viz.*, those guaranteed by him.

Clayton's Case (1816), 1 Mer. 572, and many others subsequent thereto on cognate subjects were referred to in the argu-

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ments of counsel. It is conceded that by the law of England the debtor has the first right to appropriate a payment made by him to any debt he may owe to the creditor, and in default of such appropriation the creditor has the right to appropriate it as he may see fit. But there were differences of opinion amongst the judges as to whether subsequently the creditor might make an express appropriation of it. It seems now to be well settled that where debits and credits are entered in one continuous account and neither party has made an express appropriation and there is nothing else to shew a contrary intention, the law presumes that the parties intended that the payments should be appropriated to the older debts, but that this presumption may be rebutted and that where the entries in the book are not communicated to the defendant by a statement of account or otherwise the plaintiff, according to the decision in *Simson* v. *Ingham* (1823), 2 B. & C. 65 at p. 73, is not prevented from making an express appropriation at any time. Bayley, J. there said:

"If, indeed, a book had been kept for the common use of both parties as a pass-book, and that had been communicated to the opposite party, then the party making such entries would have been precluded from altering that account; but entries made by a man in books which he keeps for his own private purposes, are not conclusive upon him until he has made a communication on the subject of those entries to the opposite party."

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That each case must depend upon its own facts is recognized in *Clayton's Case* itself, although perhaps, not fully recognized in some of the cases which follow it. The Master of the Rolls, Sir William Grant, in that case said, at p. 608:

"The cases then set up two conflicting rules;—the presumed intention of the debtor, which, in some instances at least, is to govern,—and the *ex post facto* election of the creditor, which, in other instances, is to prevail."

He then proceeds to say that he does not find it necessary to decide this question in the case before him, so that that case is not an authority affecting the right of a creditor to make an appropriation subsequent to payment when he has done nothing more than to make entries in a book, which is not communicated to the debtor.

The Court in *City Discount Co.* v. *McLean* (1874), L.R. 9 C.P. 692, makes it clear that the presumption of law arising from the entries of debits and credits in one continuous account,

is not an irrebuttal one. This principle is further sustained by the opinion of Lord Macnaghten in *The "Mecca"* (1897), A.C. 286.

The learned County Court judge relies on a quotation by Lord Shaw in *Deeley* v. *Lloyds Bank, Limited* (1912), A.C. 756 at p. 783, from the opinion of Lord Selborne in *In re Sherry* (1884), 25 Ch. D. 692, as authority for his conclusion. In a House consisting of Lords Atkinson, Shaw and Macnaghten, Lord Atkinson at pp. 772-3, quotes with approval, Lord Macnaghten in *The "Mecca"* as follows:

"'The presumed intention of the creditor may be gathered from a statement of account, or anything else which indicates an intention one way or the other and is communicated to the debtor provided there are no circumstances pointing in the opposite direction.'"

And Lord Shaw, p. 783, following the said quotation, said that he understood the words of Lord Selborne to mean that,

"'If there is nothing more than this, that there is a current account kept by the creditor, or a particular account kept by the creditor, and he carries the money to that particular account, then the Court concludes that the appropriation has been made; and having been made, it is made once and for all, and it does not lie in the mouth of the creditor afterwards to seek to vary that appropriation.'"

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I think the learned County Court judge overlooked the words "and if there is nothing more than this." I agree, and the authorities support this, that if there is nothing more than the account the presumption of law is that the subsequent payments have been appropriated to the earlier debts. That, I think, is all that Lord Shaw meant to express and is in consonance with what Lord Atkinson said in the same case, and with what Lord Macnaghten said in *The "Mecca," supra.*

The question therefore is, is there anything more in this case than that debits and credits were entered in the plaintiffs' books in an unbroken account? The fact that the account containing the credits was not communicated to the debtor would in itself entitle the plaintiffs at any time before such a communication to make an express appropriation.

The last of the goods were supplied in December, 1922; the only account alleged to have been rendered was the one above mentioned in which no credits were shewn. On the 20th of that month the plaintiffs wrote to the defendant as follows:

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"Replying to your letter of the 15th instant, *re* the M. H. Elliott account, we are still holding your guarantee for $500 on this account and we may be obliged to call on you at any time for payment of this. If this is not satisfactory to you, we would like to hear from you by return mail."

It was argued that this letter was written in an attempt to bolster up the plaintiffs' case but if I am right in my law it requires no bolstering. Moreover, this letter is in itself an express appropriation made at a time when it was open to plaintiffs to make it. Besides there never was any intention on plaintiffs' part to appropriate the payments to the earlier debts. Mr. Peden in his evidence said:

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"Just gave him credit on his current account—always thought we had $500 coming from defendant on his guarantee. . . . I wrote Mr. M. H. Elliott [the son] asking for a fresh arrangement. . . . . Mr. M. H. Elliott came in and arranged for further credit."

I would therefore allow the appeal and direct judgment to be entered accordingly.

MARTIN, J.A.: This appeal raises a question of appropriation of payments upon a debt guaranteed up to $500, and so in the first place it is necessary to look to the account kept by the creditors and I regard Exhibit 5 as being that account, taken from their ledger, and in essentials a "regular running account in which one item must be set off against the previous one"—*Laing* v. *Campbell* (1865), 36 Beav. 3, but subject to communication in its entirety as hereinafter considered. It begins on 22nd March, 1922, and on the 1st of April the debtor M. H. Elliott owed $197.17. On the 10th of that month his father, the defendant, gave the creditors (plaintiffs) the following guarantee:

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"Kindly supply Mr. M. H. Elliott with groceries and supplies to the extent of $500, which amount I will guarantee payment by the 1st of July, 1922."

In August and in June the debtor made payments more than sufficient to discharge the guarantee which were credited on the said account but the plaintiffs continued to give him credit at large upon it treating the guarantee as a continuing one upon the balance of the account up to $500, though when the guarantee was exhausted the situation clearly required a new arrangement to be made, and on the 30th of June the plaintiffs

did write to the debtor inclosing the account and notifying him that.

"The amount of credit you arranged for $500 is now used up. We will have to have fresh arrangements for any further credit you want."

And upon the same date plaintiffs also wrote to defendant as follows:

"We wish to advise you that Mr. M. H. Elliott has had the extent of the credit arranged for and guaranteed by yourself. We do not know how Mr. M. H. Elliott figures on paying but any further extension or more credit will have to be arranged for. We would like to hear from you in this matter and also about your own account."

But all that happened was that the surety (defendant) wrote to plaintiffs on 5th July, in regard to his son's and his own account, saying that "in another thirty days you will be settled with," and later sufficient payments were made by the son as aforesaid to discharge the father's guarantee. The plaintiffs submit that the debtor never made any appropriation of said payments so as to extinguish the surety's obligation and they claim the right to appropriate them on the indebtedness at large, and take the further position that even if an account was in fact kept by them upon which an appropriation might have been made it was not "communicated," to adopt the expression of Quain, J., in *Hooper* v. *Keay* (1875), 1 Q.B.D. 178 (and also of the King's Bench in *Simon* v. *Ingham* (1823), 2 B. & C. 65) to the debtor or his surety. In the latter case Field, J. said, p. 182:

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"The facts of the present case are very clear; there was no appropriation by the payer, and the plaintiffs who received the payments appropriated them to the general account in their ledger. But not only did they do that, they also sent a copy of the account thus treated as one to Keay, so that the account became one by the consent of both parties; and there is no further room for any question as to the appropriation, because the law says that in such a case the payments or credits must be appropriated to the items of debt in order of date. This principle has been recognized in many cases."

The surety here would in any event be entitled to stand in the shoes of the debtor to the extent of his guarantee and not to be prejudiced in his rights by anything done by the creditor and debtor between themselves. As Lord Chancellor Selborne put it in *Sherry's* case (1884), 25 Ch. D. 692 at pp. 703-4:

"A surety is undoubtedly and not unjustly the object of some favour both at law and in equity, and I do not know that the rules of law and

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equity differ on the subject. It is an equity which enters into our system of law, that a man who makes himself liable for another person's debt is not to be prejudiced by any dealings without his consent between the secured creditor and the principal debtor. If, therefore, it could be shewn that what has been done here was done without the consent of the surety in prejudice of an implied contract in his favour, I quite agree that he ought not to suffer from it."

Cases of this nature are often difficult to decide satisfactorily and "every case must be determined according to its own circumstances"—*The Agricultural Insurance Company* v. *Sargeant* (1896), 26 S.C.R. 29, 34, wherein several of the leading decisions were considered.

In *Birkett* v. *McGuire* (1882), 7 A.R. 53, it was said by Burton, J.A., p. 61:

"The rule is well esablished that, where no appropriation is made by either party and there is one continuous account of several items, the payments will be applied on the account according to the priority of time: that is, the first item on the debit side is discharged or reduced by the first item on the credit side. But this is not an artificial or arbitrary principle, but one founded on the presumed intention of the parties, and is applicable only where there is no evidence sufficient to shew a different intention. Where there is such evidence the presumption fails; and such evidence may consist of any facts and circumstances from which the intention of the parties may properly be inferred."

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This is in accordance with the decision of the King's Bench in *Henniker* v. *Wigg* (1843), 4 Q.B. 792 (following *Bodenham* v. *Purchas* (1818), 2 B. & Ald. 39 wherein it was said that the rule was "most consistent with reason") in regard to which Blackburn, J. says in *City Discount Co.* v. *McLean* (1874), L.R. 9 C.P. 692 at p. 701:

"The true rule is that laid down in *Henniker* v. *Wigg*, which is that accounts rendered are evidence of the appropriation of payments to the earlier items, but that may be rebutted by evidence to the contrary. Lord Denman, C.J., referring to the rule in *Clayton's Case* [*supra*], there says, 'It is equally certain that a particular mode of dealing, and more especially any stipulation between the parties, may entirely vary the case.' That judgment seems to me to be sound sense."

The learned judge below took the view that there was nothing in the facts to prevent the application of the rule in *Clayton's Case* (1816), 1 Mer. 572, as explained by the House of Lords in *Deeley* v. *Lloyds Bank, Limited* (1912), A.C. 756, in the passage which he quotes, and also Lord Atkinson's remarks, at p. 769, on the creditor's failure to rebut the "*prima facie*" inten-

tion created against him by the rule in *Clayton's Case* "to apply the earlier payments to discharge the earlier debts," and see also pp. 771 and 774. But in the recent decision of this Court in *Grant* v. *Matsubayashi* (1922), 31 B.C. 375, some of the leading decisions were reviewed by my brother GALLIHER and that case resembles this in the main fact that no account was rendered or communicated herein after the 20th of June, and as the case turns upon the payments made after that date, in the absence of any "communicated" account the rule in *Clayton's Case* cannot be applied and the uncommunicated entries in the plaintiffs' ledger must be regarded as merely private in their nature.

There are certain instructive cases in Ontario, *e.g., Griffith* v. *Crocker* (1891), 18 A.R. 370, and *Thomson* v. *Stikeman* (1913), 30 O.L.R. 123 which illustrate circumstances that rebut the presumption above noted.

In *Sherry's* case, *supra,* the Court of Appeal pointed out, *per* Lord Chancellor Selborne, 702, that the way to escape from the rule in *Clayton's Case* is "to break the account and open a new and distinct account" which was held to have been done in that case and I am of opinion that in effect that was what was done here as the result of the letters above recited. MARTIN, J.A.

If the account had been communicated the matter would have assumed an entirely different aspect because in *Merriman* v. *Ward* (1860), 1 J. & H. 371, 377, it is said that it is "incumbent upon the creditor to signify . . . his intention" to make an arrangement differing from the ordinary course of dealing by appropriation, and in the instructive case, in the Court of Appeal in Chancery, of *Pennell* v. *Deffell* (1853), 4 De G. M. & G. 372, it is said, p. 391, that the principle is one of general application, Lord Justice Turner saying, in a case between a trustee and his banker:

"These are the principles which in my opinion—concurring fully in that of my learned brother—are to be applied to such a case as the present. They are plain and simple, and furnish, as it seems to me, a ready solution to all the difficulties which can present themselves. They are the principles which govern all other accounts, and I can see no reason why they should not be held applicable to the accounts before us."

The appeal therefore should, in my opinion, be allowed.

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GALLIHER, J.A.: After a careful consideration of the authorities and the circumstances of this case, I see no reason to change the view I entertained at the hearing, that this appeal should be allowed.

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MCPHILLIPS, J.A.: In my opinion this appeal must be dismissed. I entirely agree with the conclusion arrived at by LAMPMAN, Co. J. At the outset, I wish to make it clear that this appeal is on a very different state of facts to those existent in *Grant* v. *Matsubayashi* (1922), 31 B.C. 375. Here the defendant was in no way originally indebted to the appellants. His position was that of guarantor solely. The respondent in the appeal was the father of M. H. Elliott and his liability as guarantor was evidenced by a letter in the words and figures following: [already set out in statement.]

The appellants kept a running account with M. H. Elliott, the son, the principal debtor. It would appear that the son paid moneys to the appellants which in amount more than covered the $500 guarantee given by the respondent, *viz.*, on the 9th of April, 1922, $200 was paid, on the 19th of October, 1922, $500 was paid and on the 21st of May, 1923, $300 was paid and the evidence given by Peden, one of the appellants, was "just gave him [meaning M. H. Elliott, the original debtor] credit on his current account—always thought we had $500 coming from defendant [the respondent]." Now it is contended that these moneys were not in any way appropriated to the earlier items of debit in the account and that the appellants are at liberty to apply these payments upon debits against the principal debtor incurred after the account had exceeded $500, the amount guaranteed by the respondent. In my opinion, upon the facts, the appellants were disentitled to make any such appropriation, especially in the case where the liability of the respondent was that of surety only. It would appear that the appellants and the principal debtor, after the $500 guarantee was exhausted, without consultation with the surety at all, came together and it was agreed that the account should be continued and further goods supplied it being assumed by the appellants that the surety was liable in any case for $500 and all payments received by

the appellants from the principal debtor have been appropriated to the later items of debit against the principal debtor. At least that is the claim now made although no specific appropriation was ever made in the books of the account. As we have seen the moneys received were credited in the current account that account never changing in form from first to last, *i.e.*, a continuous account and all payments made are credited therein. It is quite impossible for the appellants to advance any such contention and it would be contrary to law to give effect to any such contention. The effect would be that the creditor would be materially altering the terms of the contract of guarantee and altering the position of the surety—there was no concurrence to any such arrangement on the part of the respondent. It was all done without his knowledge. In the result, the surety is, in my opinion, discharged and no longer liable upon the guarantee. What the appellants are really attempting to uphold at this Bar is that the guarantee was a continuing guarantee. It was not that at all, it was a guarantee to cover the purchase of groceries and supplies on the part of the principal debtor to the amount of $500 and no more and all moneys paid to the appellants by the principal debtor must be applied to reduce the earlier items of debit in the continuous account. There is absolutely no authority for the contention of the appellants and the course here attempted of now crediting the payments only upon items of debit occurring after the debits in the whole amounted to $500 and holding the surety for $500. This could only be if the original contract were that of a continuing guarantee for any ultimate balance to the extent of $500, irrespective of the changing state of account—such as we are familiar with in the case of a guarantee to a bank. This is the error into which the appellants have fallen. But quite apart from this view the action is not sustainable as the payments must upon the state of the facts of this case be appropriated to the earliest items of debit and in so applying them the surety is upon this ground discharged as admittedly, if that is the law and the payments are to be so applied, the respondent (the surety) owes nothing upon his guarantee. A great number of authorities were cited at this Bar but I really cannot see the necessity for a discussion

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of them. The whole point in controversy is finally determined in the House of Lords in *Deeley* v. *Lloyds Bank, Limited* (1912), A.C. 756 at pp. 783-4. Lord Shaw said:

"My Lords, the judgment of Eve J. in this case, although in my view it is erroneous in holding that the general rule was by the conduct of the parties departed from, humbly appears to me to state that general rule, and also the effect of the series of authorities under which it has been canvassed, clearly and luminously, and I respectfully adopt that part of the learned judge's judgment. After referring to *Sherry's* case [(1884)], 25 Ch. D. 692, at p. 702, he says: 'In giving judgment the Lord Chancellor (Lord Selborne) says this: "The principle of *Clayton's Case* [(1816)], 1 Mer. 572) and of the other cases which deal with the same subject, is this, that where a creditor having a right to appropriate moneys paid to him generally, and not specificially appropriated by the person paying them, carries them into a particular account kept in his books, he *prima facie* appropriates them to the account, and the effect of that is, that the payments are *de facto* appropriated according to the priority in order of the entries on the one side, and on the other of that account." I understand that to mean this: According to the law of England, the person paying the money has the primary right to say to what account it shall be appropriated; the creditor, if the debtor makes no appropriation, has the right to appropriate; and if neither of them exercise the right, then one can look on the matter as a matter of account and see how the creditor has dealt with the payment, in order to ascertain how he did in fact appropriate it. And if there is nothing more than this, that there is a current account kept by the creditor, or a particular account kept by the creditor, and he carries the money to that particular account, then the Court concludes that the appropriation has been made; and having been made, it is made once for all, and it does not lie in the mouth of the creditor afterwards to seek to vary that appropriation.' This is substantially the view taken by the learned Master of the Rolls in his clear opinion, of this case, and I respectfully agree with that opinion."

The learned trial judge quoted this language in his judgment and it certainly is conclusive upon the point in issue here. The case relied upon by the learned counsel for the appellant in the Supreme Court of Canada of *The Agricultural Insurance Company* v. *Sargeant* (1896), 26 S.C.R. 29, is in no way helpful. In truth, it is in complete support of the judgment here under appeal. Mr. Justice Gwynne, who delivered the judgment of the majority of the Court (Gwynne, Sedgewick and King, JJ.) said at p. 37:

"In the application of the rule in *Clayton's Case*, besides its being necessary that the entries of debit and credit should all be in one unbroken account, it is also necessary that the debit entries should represent payments made by the debtor of money which the debtor paying it has a right in law to appropriate to the payment of any debt of his that he

pleases; the payment must be of the debtor's own money, or at least of money over which he has the absolute power of appropriating as he pleases."

Here it was the debtor's own money and the debtor made no appropriation, neither did the creditors, the appellants, it was "one unbroken account" and the payments made were entered up in that account.

The contention put forward in this case that there is the right of appropriation is wholly fallacious. I do not take time to analyze the many cases that could be usefully referred to but would refer to what is said in Halsbury's Laws of England, Vol. 7, p. 450, par. 919, first paragraph.

MCPHILLIPS, J.A.

With the greatest respect to all contrary opinion there is no force in the contention made that there is the right of appropriation here in that it is not shewn that an account was rendered to the principal debtor exhibiting the debit and credit items in one continuous account. Certainly in a case such as this, where the respondent is in the position of surety only, not being a principal debtor, and it not being a question between creditor and debtor only but between creditor and surety, such a contention is an idle one.

I would dismiss the appeal.

MACDONALD, J.A.: This is an appeal by the plaintiffs from a judgment of LAMPMAN, Co. J., dismissing plaintiffs' claim against the defendant on a guarantee given by the latter in the following words: [already set out in statement].

The defendant's son was engaged on a logging contract, obtaining supplies from the appellants. When the guarantee was given the son owed appellants considerably less than that amount for goods supplied. He continued to receive further credits for the balance of the year. From time to time the son made several payments on account. After the date of the guarantee he made payments of about $700 at different times in 1922, and $300 in May, 1923, still leaving a balance on general account in excess of $500.

MACDONALD, J.A.

On June 30th, 1922, when the balance was over $500 the appellants wrote to the respondent as follows: [already set out in the judgment of MARTIN, J.A.].

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SCOTT & PEDEN v. ELLIOTT

On the same date they wrote to Mr. M. H. Elliott, saying: [already set out in the judgment of MARTIN, J.A.].

On July 5th, 1922, the respondent replied as follows:

"In answer to your note of June 30, in regard to M. H. Elliott's credit having expired, also the settling of my own account, I think by the last of this month we will be able to settle up with you as they have now got started to put in logs which makes things lots brighter as they were handicapped before they got the donkey on the ground, and in another thirty days you will be settled with."

Then, on December 20th, 1922, when the balance due from the son was about $900, appellants wrote to the respondent as follows: [already set out in the judgment of MACDONALD, C.J.A.].

It may be noticed that this letter was written after sufficient payments were made to retire the amount guaranteed. It was, nevertheless, still relied upon. The payments referrd to made "on account" were credited to M. H. Elliott. Nothing was said as to their appropriation. The contention is—sustained by the trial judge—that the portion of M. H. Elliott's indebtedness, guaranteed by the respondent was fully discharged by the payments subsequently made, applying them as they should be applied to the debits as incurred.

MACDONALD, J.A.

The general rule is that the debtor has the right to apply his payments in whatever manner he chooses. If he owes several items he may say to which of the items the payment applies. If he does not do so then the creditor may apply them as he thinks fit. Here, while the creditors applied the payments generally on open account, they corresponded with the respondent and primary debtor as outlined above, introducing an element that must be considered. Although the creditors did not in so far as their books shew, apply the payments to subsequent indebtedness, they have a right to make that application at a later period if their intention to do so was actually or inferentially conveyed to the parties concerned. The letter of June 30th, when the balance due was more than $500, contained an intimation to the guarantor that the credit arranged for by the guarantee was exhausted and that new security would be required. If there was not a further letter I do not think I would find that the account was necessarily broken on June 30th,

and the transaction separated into two parts. There is, however, the further letter of December 20th. At that time sufficient payments were made to release the guarantee if they were applied on the earlier debits. This letter shews, however, that the creditors were still relying on the guarantee. They so elect and they communicate their intention to the respondent.

The rule in *Clayton's Case* is simply a presumption of fact and may be rebutted by evidence shewing that it was not the intention of the parties to follow it. I find, however, in the correspondence sufficient evidence to rebut the presumption that the credit payments were appropriated to the debit items in the order in which they were incurred. If the debtor or creditor makes no appropriation the latter has a right to apply the payments made to any item of the debt he chooses up to the very last moment (*The "Mecca"* (1897), A.C. 286). He may declare that intention even by bringing an action. I do not think it follows that in every case launching an action determines this point. If it did all difficulties would be at an end in every case of a similar character. We need not, however, look further than the correspondence in this case.

I would allow the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellants: *Tait & Marchant.*
Solicitors for respondent: *Pooley & Davis.*

HUNTER, C.J.B.C. (In Chambers)

1926

March 17.

REX v. HING HOP.

Criminal law—Unlawful possession of opium—Summary conviction—Habeas corpus—Certiorari—Warrant of commitment—Omission of word "forfeit"—Sufficiency of evidence—Can. Stats. 1923, Cap. 22—Criminal Code, Sec. 1124.

REX v. HING HOP

An accused, having been convicted for being in unlawful possession of opium, applied for his discharge on *habeas corpus* on the ground that the word "forfeit" was omitted from the warrant of commitment. The Crown obtained *certiorari* and the conviction and depositions were brought in.

Held, that as the word appeared in the conviction itself there was substantial compliance with the provisions of the Code. The omission of the word from the warrant should be regarded as a technicality as the word "pay" when used in a conviction necessarily connotes the idea of forfeiture of money and the evidence disclosed that the magistrate had come to a proper conclusion.

Statement

APPLICATION for a writ of *habeas corpus* for the discharge of the prisoner convicted of having opium in his possession. The conviction and depositions were brought in on *certiorari* obtained by the Crown. Heard by HUNTER, C.J.B.C. in Chambers at Vancouver on the 11th of March, 1926.

Bray, for the application.
Haviland, contra.

17th March, 1926.

Judgment

HUNTER, C.J.B.C.: In this case, which was a conviction under The Opium and Narcotic Drug Act, 1923, for unlawful possession of opium, it is sought to obtain the prisoner's discharge on the ground that the warrant of commitment omits the word "forfeit." The Crown having obtained a *certiorari,* the conviction and depositions were brought in. The conviction itself contains the magic word and I think that, notwithstanding the criticism to which it was subjected by Mr. *Bray,* it is substantially in compliance with the provisions of the Code. The Crown now invokes the powers given by section 1124 and asks that the omission of the word in the warrant be disregarded. With regard to the technicality itself I cannot regard it

in itself as other than a technicality since the word "pay" when used in a conviction which imposes a money penalty necessarily connotes the idea of the forfeiture of the money. But it is interesting in this connection to note how far the Courts will give effect to such technicalities when in their opinion it is necessary to do so in order to prevent injustice that might otherwise result from over zealous or unreasonable legislation which cuts off the ordinary common law mode of redress against improper convictions and which is the most speedy, inexpensive and efficient remedy known to the law. One of the latest cases of the kind I have seen is *Rex* v. *Long Wing* (1923), 1 D.L.R. 942. In this case the Appellate Division of Alberta decided that a liquor conviction under similar legislation was invalid because it omitted the word "forfeit" from the phrase "forfeit and pay" in the prescribed form and thereupon after examining the depositions quashed it on the ground that the magistrate proceeded to find the prisoner guilty after he had made an admission which did not in law amount to a plea of guilty.

Of course I am not bound by the Alberta decision nor have I to consider whether I ought to follow it as the cases are distinguishable, for here the word appears in the conviction although not in the warrant. I may say, however, that I am quite in accord with the views of the learned judge who delivered the judgment of the Full Bench when he says:

Judgment

"In my opinion, since the judgment in *Rex* v. *Nat Bell Liquors, Ld.* 65 D.L.R. 1, 37 Can. C.C. 129, (1922), 2 A.C. 128, it is necessary to scrutinize convictions very carefully because they are by that judgment given a far more conclusive and final effect against the accused than was the case before the decision. It is now impossible upon *certiorari* to look up the evidence to see if there is any evidence at all to support the conviction, provided the conviction is perfectly regular on the face of it. The consequence is that the Court ought to see that convictions are perfectly regular in form."

One of the strongest arguments in favour of written constitutions, such as exist in the States, is that, notwithstanding their inherent defects, such fundamental rights, as the right to the writs of *habeas corpus* and *certiorari,* are not allowed to be impaired or whittled away by legislation.

So long as the Court is disabled by legislation from granting

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summary relief from unlawful imprisonment just so long do I think that this is the proper attitude to take to such legislation as it is the paramount duty of the Court to see that no injustice is done. Other judges, as well as myself, have frequently stated that the law ought to be revised and codified so as to insure on the one hand speedy relief to those unlawfully imprisoned and, on the other hand, that no guilty person should be allowed to escape on technicalities. If the Courts were armed with the proper and necessary powers then technicalities would become useless and obsolete and a great deal of time and money would be saved.

Looking now at the evidence in this case, I have no doubt that the magistrate was right. The accused, Hing Hop, who was the tenant in possession certainly did not meet the burden of proof imposed upon him by section 16 of The Opium and Narcotic Drug Act. He was the tenant in possession and paid the rent collecting a proportionate part from each of the others who lived in the den. It was a two-roomed shack with a pantry. The police found a tin, two-thirds full of opium in the pantry. It had a damp cloth over it so that evidently some one had recently handled it. There were also found three knives and two steels smeared with opium and a piece of paper such as is commonly used to contain opium. I have no doubt that the place was an opium joint within the meaning of the statute and that Hop was the proprietor. All that was needed to fully advertise it was to have his name on the door. The application is dismissed.

Judgment

Application dismissed.

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IN RE LEGAL PROFESSIONS ACT AND BARNARD, ROBERTSON, HEISTERMAN & TAIT

IN RE LEGAL PROFESSIONS ACT AND BARNARD, ROBERTSON, HEISTERMAN & TAIT.

Solicitor and client—Costs—No bill of costs furnished—Mutual release signed by parties—Originating summons—Application for delivery of bill of costs for taxation—Lapse of over three years—Order directing an issue—Appeal—R.S.B.C. 1924, Cap. 136, Secs. 100 and 101.

A firm of solicitors carried on extensive litigation for A., defendant in an action commenced in 1915. The case was carried to the Privy Council, and later, on appeal from a reference, it again reached the Privy Council being finally disposed of in December, 1920. In January, 1922, a mutual release was executed by the solicitors and A. reciting that the former had acted for the latter in various matters including the litigation referred to, and had not rendered accounts for their services; that it was agreed that all accounts between them should be settled by A. paying a certain sum to the solicitors and it was thereupon agreed that each should release and discharge the other from all claims and demands. In September, 1925, A. applied by way of originating summons for an order to compel the solicitors to deliver and submit to taxation a bill of costs in respect of the action commenced in 1915, on the ground that when he signed the release he was not aware and had not been advised that the solicitors had received from the plaintiffs in said action the costs ordered by the Court of Appeal when he had been successful before that Court. It was ordered that the following issues be tried: (a) Did A. execute the release referred to? (b) If A. executed the release under what circumstances did he so execute it?

Held, on appeal, reversing the decision of MCDONALD, J., that an order directing an issue was not the proper course to pursue and it should be set aside.

Per MACDONALD, C.J.A., MCPHILLIPS and MACDONALD, JJ.A.: That the application for an order for delivery of a bill for taxation should be dismissed not only on the ground that the application was not made within three months as required by section 101 of the Legal Professions Act but also on the general law applicable to the facts disclosed even if the section should not be regarded as a bar.

Statement

APPEAL by the client, John Arbuthnot, from the order of MCDONALD, J. of the 16th of December, 1925. Arbuthnot took out an originating summons on the 30th of September, 1925, claiming to be entitled under the Legal Professions Act to the delivery and taxation of a bill of costs and an account of all moneys received by Barnard, Robertson,

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IN RE LEGAL PROFESSIONS ACT AND BARNARD, ROBERTSON, HEISTERMAN & TAIT

Statement

Heisterman & Tait, as solicitors for John Arbuthnot and the other defendants in the action of the Pacific Coal Mines Limited, E. A. Bogue and Henry C. Thompson who sued on behalf of themselves and all other shareholders of the Pacific Coast Coal Mines Limited as plaintiffs against the said John Arbuthnot and other defendants. The action was to set aside certain debentures of the original company issued in pursuance of an agreement entered into by the shareholders in February, 1911, whereby a certain group of shareholders headed by Arbuthnot were to take over the debentures in lieu of their stock and another group were to carry on the affairs of the Company. The facts are set out in the judgment of CLEMENT, J. (see 23 B.C. 267). The trial took place in Victoria in October, 1915, the plaintiffs recovering judgment. The Court of Appeal reversed the trial judge whose judgment was later restored by the Judicial Committee of the Privy Council. Accounts were then taken before the registrar and the confirmation of his report was contested eventually reaching the Judicial Committee of the Privy Council where the case was finally disposed of in December, 1920. The total sum received by Barnard & Co. for costs was $72,434.44 and from this sum they paid counsel fees, agency fees, and other disbursements. This sum included $25,934.44 taxed costs received from the plaintiffs when the defendants were successful before the Court of Appeal. No detailed solicitor and clients bill of costs was ever furnished Arbuthnot but on the 3rd of January, 1922, a mutual release was executed by the members of the firm of Barnard & Co. and by Arbuthnot each releasing and discharging the other from all claims and demands. Arbuthnot now claims that when he signed the release he was not aware and had never been advised of the payment of $25,934.44 made to Barnard & Co. by his opponents when he was successful in the Court of Appeal. The order of the Court was that the following issues be tried:

"A. Did the said Arbuthnot execute the release referred to in paragraph 26 of the affidavit of Henry G. S. Heisterman sworn herein on the 18th of November, 1925?

"B. If Arbuthnot executed the said release, under what circumstances did he so execute it?"

Further,

"that the affirmative of issues shall be upon the solicitors."

The appeal was argued at Victoria on the 22nd and 25th of January, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. R. Green, for appellant: The bill paid the solicitors was over $72,000. Arbuthnot claims he did not know that the solicitors had received in costs taxed against the other side the sum of over $25,000 in February, 1917. On the 3rd of January, 1922, when the last payment on account of costs was made the parties signed a release, but Arbuthnot claimed he did not know of the above payment when the release was signed. My submission is that (1) the learned judge had no power to do what he did; and (2) it is futile without a bill of costs. There cannot be a settled account without a bill: see *In re Webb. Lambert* v. *Still* (1894), 1 Ch. 73 at p. 85; *In re Baylis* (1896), 2 Ch. 107 at p. 110; *O'Donohoe* v. *Beatty* (1891), 19 S.C.R. 356; *Re Crothers, a Solicitor* (1892), 15 Pr. 92; *In re Frape. Ex parte Perrett* (1893), 2 Ch. 284; *In re Legal Professions Act and A. E. Beck* (1925), 36 B.C. 76; *Hall* v. *Lane* (1923), 31 B.C. 507 at p. 513. That the bill was so large is a special circumstance. In the case of special circumstances and no independent advice: see *Ex parte Flower* (1868), 18 L.T. 457. They continued as solicitors after the settlement: see *In re F——, a Solicitor* (1868), 16 W.R. 749; *Smiley* v. *Nault and Lawson* (1924), 56 O.L.R. 240. Under section 94 of the Legal Professions Act there is a time limit of twelve months, but there is no limit under section 80. That we are entitled to a bill of costs see *In re Blackmore* (1851), 13 Beav. 154; *In re Street* (1870), L.R. 10 Eq. 165 at p. 167; *Re Pinkerton and Cooke* (1899), 18 Pr. 331; *In re Callis* (1901), 49 W.R. 316; *In re West, King, & Adams. Ex parte Clough* (1892), 2 Q.B. 102; *Wilkinson and another* v. *Smart and others* (1875), 33 L.T. 573; *Ray* v. *Newton* (1913), 1 K.B. 249; *In re Brockman* (1909), 2 Ch. 170 at p. 179; *MacGill & Grant* v. *Chin Yow You* (1914), 19 B.C. 241 at p. 242. The evidence of the client should be accepted in preference to that of the solicitor. On the question of delay see *In re Dendy* (1856), 21 Beav. 565 at p. 566. On the excuse that papers are mislaid and he cannot now make a complete bill see

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In re Baylis (1896), 2 Ch. 107 at pp. 114 and 120. Where no bill is delivered time does not run: see *Turner* v. *Hand* (1859), 27 Beav. 561; Morgan & Wurtzburg on the Law of Costs, 2nd Ed., pp. 439-40.

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Maclean, K.C., for respondents: The decisions referred to are all since 1843 and are founded on English statute law that do not apply here. Where there is no fraud or undue pressure the settlement of a bill between solicitor and client will not be disturbed: see *Stedman* v. *Collett* (1854), 17 Beav. 608 at pp. 610 and 614 to 617. Sections 100 and 101 of the Legal Professions Act apply and preclude any such action as this. These sections are in force as in *Taylor* v. *Mackintosh* (1924), 34 B.C. 56, only one of the judges of the Court of Appeal held the sections to be *ultra vires*. In any case where a section of an Act is declared *ultra vires* it does not affect the validity of the remaining sections: see Lefroy's Legislative Power in Canada, p. 297; *Morden* v. *South Dufferin* (1890), 6 Man. L.R. 515. The case of *Turner* v. *Hand* (1859), 27 Beav. 561 is in our favour on the question of delay; see also *Re Pugh* (1863), 32 Beav. 173 at p. 175. *In re Baylis* (1896), 2 Ch. 107 was non-contentious business: see at p. 113. Where the agreement is a fair one the Court will not interfere: see *Belcourt* v. *Crain* (1910), 22 O.L.R. 591.

Argument

Green, replied.

Cur. adv. vult.

9th April, 1926.

MACDONALD, C.J.A.

MACDONALD, C.J.A. (oral): I would allow the appeal. Not on the ground set out in the notice of appeal but on the ground that the original proceeding (commenced by appellant) was out of time; it was not taken within the delay mentioned in section 101 of the Legal Professions Act. This is a result not desired by the appellant, and not asked for by the respondent. There was, therefore, no "event" in the sense used in the statute, hence no order should be made as to the costs of the appeal. The originating summons should be dismissed, and the costs of and incidental thereto should be paid by the appellant to the respondent.

MARTIN, J.A.: This appeal arises out of an application by the appellant (Arbuthnot) by way of originating summons to compel the respondents (Barnard, Robertson, Heisterman & Tait) his solicitors to deliver their bills of costs for certain legal services rendered and for the taxation of such bills and also "claiming to be entitled to" an account of all moneys received by said solicitors, "or for such other order as may seem proper." In answer to the application the solicitors set up a special agreement dated 3rd of January, 1922, which after reciting in general the performance of services at large "in various matters . . . including litigation arising in connection with the Pacific Coast Coal Mines Ltd." and that no accounts had been rendered by the solicitors since the 19th of August, 1917, to their client who had "made payments on account of services performed," proceeded as follows:

"AND WHEREAS it has been agreed between the parties hereto that all accounts as between the first parties and the second party up to the date hereof shall be stated and settled by the second party paying to the first parties the sum of six thousand eight hundred dollars ($6,800.00), the receipt whereof is hereby acknowledged, and the first parties applying towards the satisfaction of their account all moneys received by them, and not heretofore disbursed, in connection with the second appeal to the Privy Council in said Pacific Coast Coal Mines litigation, whether received from the second party and his associates or the Canadian Bank of Commerce; and the second party shall release and discharge the first parties and each of them of and from all claims and demands of any nature or kind whatsoever, which he may have, or might or can have, as against them for or by reason of them, or any of them, having acted as solicitor for the second party, or otherwise howsoever:

MARTIN, J.A.

"NOW THEREFORE THIS INDENTURE WITNESSETH that in consideration of the premises the first parties and each of them, and the second party, doth and do hereby release the other party and each of them, their and each of their heirs, executors, administrators and assigns, and their and each of their estates and effects from all sums of money, accounts, contracts, agreements, covenants, actions, proceedings, claims and demands whatsoever, which any of them the said parties of the first part and second part now have or may or can have as against the other, or either of them, for or by reason or in respect of any act, matter, cause or thing whatsoever, up to and including the day of the date of these presents:

"IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written."

Upon this agreement the solicitors took the position that an order for delivery or taxation of bills of costs could not be made.

The client in answer alleged entire ignorance of the making

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of this release as such, and that he thought that he was only executing a release as regards Heisterman, a member of the firm, in his personal capacity only in respect of certain matters in his charge, one of which the client complained of as being negligently handled so as to occasion him considerable loss; he also alleged that he was not aware of the receipt of a sum of $26,000 odd by his solicitors from the other parties to the main lawsuit against him which knowledge would have materially affected his action respecting the settlement set up against him, and that he acted in the settlement of the accounts entirely without independent advice and was not given a copy of the release relied upon against him, and was not advised of his right to the delivery of bills of costs or taxation thereof. In this situation, after considering affidavits in denial and support of the allegations, the learned judge made the following order:

"IT IS ORDERED that the following issues be tried:

"A. Did the said Arbuthnot execute the release referred to in paragraph 26 of the affidavit of Henry G. S. Heisterman sworn herein on the 18th day of November, 1925?

"B. If Arbuthnot executed the said release, under what circumstances did he so execute it?

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"AND IT IS FURTHER ORDERED that the affirmative of issues shall be upon the solicitors and that the trial of the said issues shall take place on oral evidence at the Court House in the City of Victoria.

"AND IT IS FURTHER ORDERED that this application stand until after the trial of said issues."

The first ground of appeal is that in cases of this description where the conduct of an officer of the Court is called in question respecting his relations with his client, the Court cannot, in the discharge of its peculiar and summary jurisdiction, direct the trial of an issue, or, alternatively, if it has that power it has never exercised it and it is contrary to its established practice to exercise it in that expensive and complicated manner instead of disposing of the question in the usual way. In my opinion the latter alternative of the submission is sound, whatever may be said of the former. No case was cited to us, nor have I been able to discover one after an exhaustive search which would warrant such an innovation, the objections to which are so many and obvious that they do not require illustration, and it would be, I feel, a mistake to loosen at all the summary jurisdiction that the Court inherently possesses unless deprived of

it by statute. In *Storer & Co.* v. *Johnson* (1890), 15 App. Cas. 203, Lord Chancellor Halsbury said, p. 206:

"I think it is quite clear that the Solicitors Act did not deprive the Court of the jurisdiction which they always possessed to do justice in the premises when dealing with one of their officers, and that they might therefore order that the costs should be taxed, although not in terms of the Solicitors Act, and they might have selected one particular portion of the bill of costs to be taxed. The moment it was taken out of the region of the Solicitors Act and brought within the general jurisdiction of the Court, then the Court could exercise its own jurisdiction in the way it might think fit; and I am of opinion that the Court rightly exercised its jurisdiction so far as it was advised of what were the real facts."

And see in *Re Foster* (1920), 3 K.B. 306, 314, and the decision of the Privy Council in *Duffett* v. *McEvoy* (1885), 10 App. Cas. 300: so far the Courts of this Province have taken no step in that direction in limitation of their inherent jurisdiction, but quite the contrary, because in *e.g.,* the recent case of *In re Legal Professions Act and A. E. Beck* (1925), 36 B.C. 76; (1925), 1 W.W.R. 370; 3 W.W.R. 64, the question not only of the original retainer of the solicitor but of an alleged special agreement for payment of costs which was set up as supplanting it, was referred to the registrar for report in the ordinary way when such agreements are set up or disputes as to retainer arise, and the circumstances require such a report before the Court or the judge in Chambers deals with the matter finally; and the same course was adopted in *In re Dickie, De Beck & McTaggart and Sherman* (1916), 23 B.C. 538, where in addition to the question of retainer a "special agreement with respect to the appeal book" (*per* MACDONALD, C.J.A. 539) was set up and passed upon by the registrar and confirmed by the Court.

MARTIN, J.A.

More than a century ago in *Balme* v. *Paver* (1821), Jacob 305, Lord Chancellor Eldon dealt in a summary way with a claim for costs set up by solicitors under a special agreement to pay the costs untaxed which were paid in a lump sum to effect a compromise of a certain lawsuit, and said:

"I am decidedly of opinion, that unless solicitors expressly enter into an agreement for payment of untaxed costs, the Court will say that they are costs to be taxed. But I go further, and desire it not to be understood that I consider them at liberty to agree for untaxed costs. And though I dare say the gentlemen meant very well, yet I think it was their duty to tell the plaintiff that he ought to have the costs taxed before he demanded them of Young. A party may, if he pleases, waive the benefit of taxation of the

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bill; but I will not hold that to have been done unless the solicitor has given him the knowledge that he may have it taxed. These bills must be delivered to the defendant, and with respect to taxing them, if the defendant thinks fit, he must apply separately for that purpose afterwards."

Lord Chancellor Cottenham also affirmed the practice and jurisdiction in *In re Stephen* (1848), 2 Ph. 561, wherein solicitors' costs were paid in a lump sum upon a settlement and "full discharge of all costs" in writing and it was submitted that "the settlement was not a transaction that the Court had jurisdiction to set aside upon petition" for delivery of bill of costs, and the Lord Chancellor repudiated this submission on p. 575, citing many authorities to shew that the "summary jurisdiction of the Court" was not excluded so as to prevent it from entering upon the question as to the means by which the special agreement relied upon had been arrived at, and after distinguishing and restricting *In re Whitcombe* (1844), 8 Beav. 140, said, p. 576:

"If then the petitioner was in a position to entitle him to make the application, and if the connection between the parties was merely that of solicitor and client, and the account between them was merely that of costs, and if the payment and settlement of such account did not exclude the summary jurisdiction of the Court, the only remaining question will be, whether there were special circumstances to authorize the exercise of such jurisdiction."

He proceeded to consider the proofs of the case of pressure and undue advantage "taken of the client" which had been set up against the settlement and found that it had been established and that his jurisdiction had not "been ousted by the terms the solicitors have compelled their clients to adopt" and so ordered bills of costs to be delivered despite the declaration in the agreement "in the strongest terms" that "all claims and questions are this day finally and forever concluded between us."

In *In re Hair* (1847), 10 Beav. 187 at p. 191, Lord Langdale, M.R., said, on a petition of this kind:

"The last question is, whether there ought to be a trial of the question of retainer. What is there to try? There is nothing in this which may not as well be tried by the taxing master as by a jury. The taxing masters are in the daily habit of trying such questions without any difficulty, and I think, therefore, there is no reason for allowing this trial to take place."

But it is unnecessary to multiply precedents to the same effect, so I shall only refer to, *e.g., In re Blackmore* (1851), 13 Beav. 154; *Re Pugh* (1863), 32 Beav. 173, and the cases collected in *In re Brockman* (1909), 2 Ch. 170 at p. 179.

Furthermore, in the case at Bar the second of the so-called issues directed to be tried, and upon which the burden of the affirmative is laid upon the solicitors, is not an issue at all and therefore could not in any event be tried, it being merely a direction to ascertain "the circumstances" under which the release was executed, which would be considered and reported to the Court by the registrar in the ordinary way if the proper reference to him had been directed. I am therefore of opinion that the order directing the trial of issues should not have been made and that the client was entitled to have the matter proceeded with in the ordinary and long established way and so the appeal should succeed to that extent.

But the objection to the entertainment of the client's application at all, in view of said document set up as a barring contract, must be considered because if the objection is valid then it would be useless for the learned judge below to take any further action upon the application and it should be dismissed by this Court now. The section relied upon as a bar as aforesaid is 101 of the Legal Professions Act, Cap. 136, R.S.B.C. 1924, as follows:

"At any time within three months after the making of the contract, the person who has so contracted with a barrister or solicitor, or the representative of such person, may apply by motion or petition to a judge of the Supreme Court; and if the judge does not consider the contract fair and reasonable, he shall have power either to modify the contract or to order the contract to be cancelled, and the costs, fees, charges, and disbursements in respect of the business done to be taxed in the same manner as if no such contract had been made." MARTIN, J.A.

The "contract" referred to is one of those "either under seal or otherwise" which are authorized to be entered into by the preceding section 100, for legal "services rendered or to be rendered in lieu of or in addition to the costs which are allowed to such barrister or solicitor," and the constitutionality of this part of the section is not disputed, so I need not refer to its other provisions as to sharing the "proceeds of the subject-matter," etc., which do not relate to this case.

The contract is, as many cases shew, one of those which could properly have been made apart from and before said section 100 was passed, and so no change in the law concerning it is made thereby, and it stands ostensibly valid but subject to whatever safeguards and limitations have been placed by the Courts about contracts of that nature between solicitor and client.

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It is submitted that the effect of section 101 is to validate all contracts of this description unless within three months the client applies "by motion or petition to a judge of the Supreme Court," but the statute strangely omits to state what the client may apply for. But once this indefinite application is made the judge, if he "does not consider the contract fair and reasonable" is given "power either to modify the contract or to order the contract to be cancelled and the costs, fees, [etc.] . . . to be taxed in the same manner as if no contract had been made." These powers are exceptionally wide and literally enable the judge to overhaul the contract and make a new one for the parties in addition to giving him power to set it aside, and as he is clearly *persona designata* there is no appeal from his absolute discretion and so the extent of such extraordinary powers should from any point of view be most carefully scanned. In so doing it is first to be observed that said powers can only be invoked by the client and second that they depend upon the contract being "fair and reasonable," which expression in the context I take to mean an adequate remuneration for the services agreed upon in the circumstances and does not relate to the means "fair or foul" by which the contract was obtained, and hence it follows that the section at most relates only to these "motions or petitions" which are presented solely upon the question of the "fair and reasonable" price of the said services. There is, to my mind, no indication in the section of an intention to limit the right of the client to object to the contract upon any ground based upon misrepresentation, non-disclosure, failure of duty or advantage in any way by the solicitor over his client, and it does no more than confer upon the client the right to invoke the assistance of a *persona designata* without appeal, in a new remedy in addition to what he had before, *viz.*, the modification, *i.e.*, the alteration of the contract, instead of its cancellation only: in other words he acquires under it two alternative remedies instead of the former sole one of setting aside the contract. The section admittedly does not in terms nor, in my opinion, does it by clear implication deprive a client of any of his pre-existing rights to have the contract reviewed either by the exercise of the inherent summary jurisdiction of the Court, as hereinbefore declared, or

by its ordinary jurisdiction to set aside the contract upon equitable principles in an action brought for that purpose. I do not think it could be even plausibly submitted that this section could be set up as a bar to an action so brought, and, to me at least, it is equally clear that it is no bar to proceedings of the same nature in invocation of said summary inherent jurisdiction. The time barrier of only three months that is sought to be set up against the client is a limitation of a right of action of an exceptionally drastic kind in circumstances of a peculiar fiduciary relationship with one of its officers respecting bargains between them that the Court has always kept a vigilant eye upon.

Now while the statutes of limitation depriving persons of rights may, as Lord Chancellor Cranworth said in the important case of *Roddam* v. *Morley* (1857), 1 De G. & J. 1, 23, "often be a very righteous defence" yet he proceeded to sound this note of warning:

"But it must be borne in mind that it is a defence the creature of positive law, and therefore not to be extended to cases which are not strictly within the enactment."

In that case the Lord Chancellor was specially "assisted by two very eminent judges of the Common Pleas, namely, Williams and Crowder, JJ." as the Master of the Rolls pointed out in *Read* v. *Price* (1909), 2 K.B. 724 at p. 731, and the citation is most appropriate to the case at Bar. But the section is not only relied on as setting up a bar of limitation but also as depriving this Court of its two-fold jurisdiction as aforesaid. Again it is conceded that it does not do so in terms so respondents' counsel had to fall back upon the contraction of some plain and necessary implication from the statute as a whole to support his submission. Now no principle of statutory interpretation is clearer than that in order to deprive superior Courts of their jurisdiction the intention of the Legislature must be beyond doubt. Thus Lord Campbell, with Lord Chancellor Lyndhurst concurring, said in the House of Lords, in *Balfour* v. *Malcolm* (1842), 8 Cl. & F. 485, 500:

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"With regard to the main question, there can be no doubt that the principle is, that the jurisdiction of the Supreme Courts can only be taken away by positive and clear enactments in an Act of Parliament. But the words here appear to me to fulfil that condition; they are positive and express. . . ."

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And in *Oram* v. *Brearey* (1877), 2 Ex. D. 346, 348, the Exchequer Division said, *per* Pollock and Huddleston, BB., that:

"No rule is better understood than that the jurisdiction of a superior Court is not to be ousted unless by express language in, or obvious inference from, some Act of Parliament. Here there is no expression to oust the jurisdiction of the Superior Court, and no inference can be drawn that that was intended."

The general principle is well stated in Maxwell on Statutes, 6th Ed., 235-6:

"It is, perhaps, on the general presumption against an intention to disturb the established state of the law, or to interfere with the vested rights of the subject, that so strong a leaning now exists against construing a statute so as to oust or restrict the jurisdiction of the Superior Courts. . . . It is supposed that the Legislature would not make so important an innovation, without a very explicit expression of its intention. It would not be inferred, for instance, from the grant of a jurisdiction to a new tribunal over certain cases, that the Legislature intended to deprive the Superior Court of the jurisdiction which it already possessed over the same cases."

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In this light I have carefully searched the whole statute with the result that not only do I not find any obvious and necessary implication in favour of the respondents' submission, but quite the reverse, because I do find that the Legislature has not failed to clearly express its intention when it has desired to limit the rights of the client in another similar respect, *i.e.*, to have a bill rendered referred to taxation, section 81, providing:

"No such reference shall be made upon application made by the party chargeable with such bill if a verdict has been obtained against him for the amount thereof, or after twelve months from the time such bill was delivered, sent, or left as aforesaid, except under special circumstances to be proved to the satisfaction of the judge to whom the application for the reference is made."

That is an expression beyond all doubt and in favour of the solicitor, and it is to me incredible that the Legislature intended impliedly to limit the rights of the client against the solicitor by a three months' limitation in the solicitor's favour under section 101 while expressly only limiting the client to twelve months (with the additional right of an extension of that period under special circumstances) under section 81, and in addition giving a judge further powers of reference under section 94 even 12 months after the bill has been paid. Of course if it could be said that section 101 would be superfluous and useless unless

the respondents' submission be given effect to that would afford a strong indication of the intention of the Legislature, but such is manifestly not the case, because the section fills a useful purpose if the client chooses to invoke it in appropriate circumstances as an alternative and additional remedy, here he has not invoked it but disclaims it while invoking the jurisdiction of the Court both inherent and as conferred by said Act. Furthermore, the present application is not only one respecting "the remuneration to be paid for services" as specially contracted for under section 100 but also for "an account of all moneys received by the said solicitors as solicitors . . . in a certain action of Pacific Coast Coal Mines, Ltd. *et al.* against the said John Arbuthnot," and the ordering and taking of such an account is clearly within the powers of the Court and is recognized by the Act, *e.g.*, in section 80 wherein it is provided that, "a judge . . . may order a reference, with such directions as to taking the accounts between the solicitor and the party chargeable with such bill . . ." Yet that matter is not even alluded to by section 101, which simply deals with the subject of remuneration for "costs, fees, charges and disbursements." This raises another question because it has been decided that statutes of limitation cannot be set up in favour of an agent who stands in a fiduciary relation—*Burdick* v. *Garrick* (1870), 5 Chy. App. 233, Lord Chancellor Hatherley saying, pp. 240-1:

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> "I do not say that in every case in which a bill might be filed against an agent the Statute of Limitations would not apply, but in all cases where the bill is filed against an agent on the ground of his being in a fiduciary relation, I think it would be right to say that the statute has no application."

This decision was followed by the Privy Council in *Reid-Newfoundland Company* v. *Anglo-American Telegraph Company, Limited* (1912), A.C. 555, and no doubt was expressed as to the application of the rule to solicitors in *Dooby* v. *Watson* (1888), 39 Ch. D. 178, in proper circumstances, and it was said that "impropriety or fraud . . . with reference to a solicitor are one and the same," p. 186; see also *Mare* v. *Lewis* (1869), 4 Ir. R. Eq. 219, 235, where the statute was said not to apply to a case of fraud, of trusteeship or of account" between solicitor and client, though on the facts it was held the particular transaction was excluded from that rule.

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A careful consideration of section 101 itself discloses, to my mind, no implication of any kind that accords with the respondents' submission. On the contrary (and to give only one illustration of many that its perusal suggests) seeing that the contract may under section 100 be for services "to be rendered" (and probably most often in practice such contracts would be of that future nature) how would it be possible for a judge to decide whether the "remuneration" therefor was "fair and reasonable" in *e.g.*, a case where $1,000 had been agreed upon as the remuneration for the solicitor in performing certain services in defending a threatened action, or otherwise, and yet during the first three months under the contract the time had not arrived for the solicitor to do anything thereunder; nevertheless unless the client made a motion which must inevitably be futile the Court would because of that useless section be unable to afford him any relief however greatly he may have been overreached. I cannot, in the absence of any clear language, bring myself to take the view that a section which produces such inequitable and extraordinary results must be regarded by this Court as debarring the client from his just and ordinary remedies, and so I am of opinion that it has no application to the appellant's proceedings.

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It follows that there is and was no obstacle to the full consideration of this matter in the ordinary way by the learned judge below and it should go back to him for that purpose, and it is well that it should be so because there will now be an opportunity for that full investigation of it in the usual manner which was attempted by resorting to the trials of issues in an unusual manner, but which has been frustrated by the course adopted. Such being the situation I refrain from saying anything upon the merits of the case as now incompletely disclosed before us observing only, first as to the contract, that it includes (as the affidavit of one of the solicitors, Heisterman, of 31st of December, 1925, shews) a settlement of the client's claims against Heisterman personally as well as against the firm and that the formal and "complete release" of Heisterman was required by the firm as a condition precedent to the execution of the contract relied upon; and second, as to section 101, that at present I incline to the opinion that if it is to be for the first

time held to deprive the client of theretofore existing and long established rights and creating a new and special tribunal which he could only resort to within an extremely short time, then whatever may be said as to the solicitor's duty before that time, it became their duty to fully inform the client of this fundamental change in the law affecting the contract that they desired him to enter into.

The appeal therefore should, I think, be allowed, the order for the trial of issues vacated, and the matter referred back for the further usual proceedings already indicated.

GALLIHER, J.A.

GALLIHER, J.A. agreed with MARTIN, J.A.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. allowed the appeal.

MACDONALD, J.A.: The notice of appeal deals mainly with the order directing an issue to be tried to ascertain if Arbuthnot executed a release as alleged and if so under what circumstances, the general application to stand in the meantime. The whole issue was therefore not finally dealt with, but as all the points involved were argued before this Court and as there is now no question that the release was in fact executed and that all necessary material is before us, there is no reason why we should not finally dispose of the whole question.

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An application by way of originating summons was made by John Arbuthnot for an order to compel solicitors to deliver and submit to taxation a bill of costs in respect to the suit of *Pacific Coast Coal Mines Limited* v. *Arbuthnot and others* commenced in 1915 and carried through the Courts to the Privy Council. Later, on an appeal from a reference, it reached the Privy Council the second time, being finally disposed of in December, 1920. On the 3rd of January, 1922, an agreement was entered into between the respondents Barnard, Robertson, Heisterman & Tait, and the said appellant Arbuthnot. It recited that the former acted for the latter in a professional capacity in various matters including the litigation referred to, since 1915 and had not rendered accounts for their services since that date. It further recited that it was agreed that all accounts between them should be stated and settled by the appellant paying $6,800 to

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the respondents, the latter applying on their account all moneys previously received whether from appellant or his associates in said litigation. It was thereupon agreed that each should release and discharge the other from all claims and demands which they otherwise might have.

The full amount received by said solicitors from the appellant and his associates appears to be $46,500 and a further sum of $25,934.44 received as taxed costs of trial and Court of Appeal costs. Of this amount $42,157.43 was disbursed in various ways in counsel fees, travelling expenses, etc. It also appears that the trial lasted 17 days and the hearing in the Court of Appeal seven days. The amount taxed on trial and appeal would indicate the extent of the work involved and affords a key to the inquiry as to the fairness of the agreement. These figures of course are simply contained in the affidavits filed on behalf of the respondents, without cross-examination or production of documents. There is, however, no reason to doubt their accuracy. The material filed also shews that other services apart from this litigation were included in the settlement referred to. The point is—in view of the release referred to—

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is the appellant entitled to demand the delivery of a bill of costs for taxation?

It is necessary to consider the application, if any, of sections 100 and 101 of the Legal Professions Act, Cap. 136, R.S.B.C. 1924. Section 100 reads as follows:

"Notwithstanding any law or usage to the contrary, any barrister or solicitor in the Province may contract, either under seal or otherwise, with any person as to the remuneration to be paid him for services rendered or to be rendered to such person in lieu of or in addition to the costs which are allowed to said barrister or solicitor, and the contract entered into may provide that the barrister or solicitor is to receive a portion of the proceeds of the subject-matter of the action or suit in which the barrister or solicitor is or is to be employed, or a portion of the moneys or property as to which the barrister or solicitor may be retained whether an action or suit is brought for the same or a defence entered or not, and such remuneration may also be in the way of commission or percentage on the amount recovered or defended against, or on the value of property about which any action, suit, or transaction is concerned."

It will be observed that two subject-matters are dealt with. First a solicitor may contract with any person as to the remuneration to be paid for services rendered. Is the present

agreement within that part of the section? Then it goes on to enact that such contract may provide that the solicitor should receive a portion of the proceeds of the subject-matter of the action, or a portion of the moneys or property in respect to which the solicitor is retained and such remuneration may be in the nature of a commission on, or a percentage of, the amount recovered. This section was considered in *Taylor* v. *Mackintosh* (1924), 34 B.C. 56, by the Court of Appeal, consisting of MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A. The learned Chief Justice held that it was champertous for a solicitor to make a bargain with a client for a share in the fruits of litigation and that legislation permitting it was beyond the power of the Provincial Legislature; MARTIN, J.A., without discussing this point dismissed the appeal on another ground, while MCPHILLIPS, J.A. held that the legislation was *intra vires*. I do not understand the judgment of the learned Chief Justice to mean that the entire section is *ultra vires*. Apart therefore from the fact that a majority of the learned Justices did not so express themselves, I would hold that in any event the first part of the section permitting a contract in respect to remuneration for services rendered having, as it has, no reference to the further provision in respect to contracting for a portion of the proceeds of the subject-matter of the legislation is *intra vires*. One part of a section may be *ultra vires* and another part *intra vires*, if each part is a separate declaration of the intention of the Legislature. *Morden* v. *South Dufferin* (1890), 6 Man. L.R. 515.

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It was urged, however, that the contract in question is not within section 100 at all; that section 100 deals with a contract fixing remuneration for services rendered or to be rendered, not an agreement in respect to general statements of accounts and mutual releases such as we have here. I do not agree. I think this contract does fix the remuneration which the solicitors received for services rendered, and the burden of shewing cause why it should be set aside is on the appellant. Quoting the material parts of section 100, solicitors "may contract with any person as to the remuneration to be paid for services rendered." If the words were "in respect to" or "in regard to" services rendered one would say at once that this is such a contract. A

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contract "as to the remuneration to be paid" means the same thing. That being so, by section 101, more than three months having elapsed no application can be made to modify or cancel the contract. Section 101 reads as follows: [already set out in the judgment of MARTIN, J.A.].

In my opinion, on the facts disclosed in the material filed, this section, once the agreement is produced, effectively bars the application.

As, however, two of my brothers take a contrary view in respect to section 101 creating a bar and the matters involved are of some importance I will deal with the question on the merits apart altogether from the view expressed in regard to the limitations imposed by said section.

Referring first to a question of fact relied upon by the appellant, *viz.*, that he was not aware that the solicitors received the $25,934.44, taxed costs referred to, I would say that this contention is disproved by the evidence.

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Before referring to cases I would point out that all the English decisions cited are necessarily based on the English Acts of 1843, 1870 and 1881, dealing with the remuneration of attorneys and solicitors. They differ materially from our own Act. These decisions therefore are only of assistance insofar as they deal with general principles apart from these statutes. The Act of 1843, 6 & 7 Vict., Cap. 73, is too detailed and voluminous to outline. In the Act of 1870, 33 & 34 Vict., Cap. 28, it was provided that solicitors' remuneration might be fixed by agreement but by the same section (section 4) such agreements were not enforceable until examined by a taxing officer who, if he thought them unreasonable, might take the opinion of a judge thereon, by whom the amount might be reduced or the agreement cancelled and an order for taxation made. It is obvious that decisions based upon this statute are of no assistance.

An examination of the later Act of 1881, 44 & 45 Vict., Cap. 44, Sec. 8, shews that while a change was made the same remarks are applicable. Section 8(4) indicates that notwithstanding the agreement an order for taxation of costs might be made and the taxing officer could consider whether it was fair

and reasonable and certify his opinion to the Court, whereupon without any limitation as to time as in our section 101, the agreement might be cancelled or the amount payable thereunder reduced. The right to tax therefore, was not excluded by the agreement.

Decisions under the earlier Act of 1843, afford greater assistance than those under the later Acts, as the former did not provide for an agreement between solicitor and client. Decisions based upon it, would therefore be applicable if it should be found that the agreement in the case at Bar is subject to the ordinary rules in respect to setting aside agreements made between parties standing in such a relationship.

Turner v. *Hand* (1859), 27 Beav. 561, is in point. There the Master of the Rolls dismissed an application to tax costs brought three years after an agreement was made whereby the client accepted a general estimate of costs submitted to him. He states, at p. 564:

"What is a solicitor to do in such a case? He receives the money, he is careless of his vouchers, and is it to be permitted that after a lapse of three years he may be required to deliver his bill of costs and submit to have it taxed? I admit it would be better that a client should always have a bill of costs delivered, and, if he object to the amount, that he should take proceedings to tax it. But if a solicitor delivers an estimate, and the client says, 'I agree to the statement as to the amount due' . . . and signs a memorandum to that effect, he cannot be allowed to come three years afterwards for the delivery and taxation of the bill without any reference to what has taken place."

Stedman v. *Collett* (1854), 17 Beav. 608, was also decided when the Act of 1843 was in force, and is instructive for the same reason. It was there held that a settlement of a solicitor's bill for a fixed sum should not be disturbed if it was entered into fairly and with proper knowledge on both sides. It was put forward in argument (just as in the case at Bar) that in any event the defendant was entitled to have a bill of costs delivered and taxed in the ordinary way. Notwithstanding this claim a decree for specific performance of the agreement was made as fraud or pressure were not shewn, and further, the parties could not be restored to their original position. A faint suggestion of pressure was advanced in the case at Bar. It is not, however, worth examining.

Counsel for the appellant referred to *In re Webb, Lambert* v.

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Still (1894), 1 Ch. 73. There is in this report no reference to English statutes, although, I take it the Act of 1881 was in force. This case would seem to lay down sound principles of general application. Here the trustees of a will were also solicitors for the estate with the right under the will to charge for professional services. They wrote the residuary legatees enclosing a copy of their accounts as executors (but not enclosing a bill of costs) shewing the balance to be divided among them. They mentioned in the accounts sent payments made by them on behalf of the estate, adding that if they called at a certain time they would give any explanations required as to the accounts, and hand over cheques for the balance. The residuary legatees came in as requested and signed at the foot of the account a memorandum stating—"we have examined and approve of the foregoing account," received cheques for the balance and later executed a release discharging the solicitor trustees from all claims in respect to the residuary estate. About seven years afterwards, some of the residuary legatees started an action, alleging, among other complaints, that no particulars of the bill of costs had ever been furnished them and claiming a declaration that the release was not binding and an order for delivery and taxation of a bill of costs. Mr. Justice Romer refused to set aside the release and an appeal was taken. We have here a situation calling possibly for higher obligations than in the case at Bar. Lindley, L.J. points out at p. 79, that they ought to have told the legatees that they were entitled to particulars of their charges and if so disposed have the bill taxed, adding:

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"In their position of trustees and solicitors it was their duty in strictness to have given these persons the information which I have stated."

But he goes on to say, at p. 80:

"An account settled and a release executed cannot be set aside for the asking. What is necessary in order to set aside a settled account or a release, or both together, when the release proceeds on the footing of an account? It is essential to shew that there has been some injustice done—to shew that there has been some fraud, some pressure, some overcharge, something wrong to cloak up which the release has been obtained. Prove that, and the release cannot stand. If, then, it could be shewn in the case that any unfair advantage whatever had been taken of these persons, and if a single impartial competent witness had been called to say, looking at what is called the costs ledger, and looking at what was done, that £116 was an improper sum, I think, subject to the question of time, that these

residuary legatees would have been entitled to relief. But they do not do anything of the sort."

Wherein do the facts differ in the case at Bar? In the *Webb* case a general statement—not a detailed bill of costs, was sent to the legatees. In this case the appellant wrote to the respondents on August 15th, 1925, asking for a statement and complaining that he never heard of the payment of $25,000 odd, in respect to taxed costs. As a matter of fact, on the 23rd of August, 1917, respondents sent to the appellant a general statement of account to that date, accompanied by a letter shewing a balance due the solicitors of $13,587.99. There was no demand made for further details. Subsequent accounts were again considered in December, 1921, and after an oral discussion with Mr. Savage, an associate of the appellant, he agreed to the amount arrived at. Shortly afterwards, this settlement was discussed with the appellant, and he also agreed to it. This is disclosed in the material filed. I take it that the appellant is not disputing the statements made in these affidavits. He did not suggest that the defendants should submit to cross-examination. His contention was, conceding that these statements and figures were correct, he was yet entitled to a detailed bill because until received no one could say whether the settlement was fair or unfair. The same contention could have been made in the *Webb* case. The settlement in December, 1921, involved a payment to the appellant of $3,200 and that payment was made and accepted. Again a detailed bill of costs was not demanded. There were other letters written to the appellant dealing with the account in a general way. It was a few days after this that the contract by way of release was executed. The details of the settlement made would at that time be clear in his mind. It is evident therefore, that before the release was signed statements in as great, if not greater detail were furnished from time to time as in the case cited and no objection to lack of details was ever made. It is, of course, true that the appellant was never told that he might demand a detailed bill and have it taxed if he thought proper. It was suggested that such ought to have been done in the case referred to but notwithstanding the omission the release was not set aside. There the double relationship of solicitors and trustees made the suggestion a very reasonable

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one. Of course, if manifest injustice is shewn by the applicant, any settlement so arrived at will be set aside. A. L. Smith, L.J., stated at p. 82:

"It is admitted that Messrs. Still did not tell the beneficiaries that they were entitled to have a bill of costs, and that if they liked they might have it taxed. They did not do that; but I have always understood that to open a settled account gross error almost amounting to deceit must be established. If that be too high, it is quite clear that you cannot have a settled account opened by the Court merely for the asking, but there must be some ground for shewing that the man who seeks to open it after a lapse of time has through some grave error been damnified. I am not going to repeat what Lord Justice Lindley has said on that point; but it seems to me that there is no evidence on which we could hold that the £116, or the £19, or the £24 were excessive charges for the work done by the Messrs. Still."

There is therefore, no sufficient evidence offered to justify setting aside this settlement. It is not impossible to shew that charges are excessive until a detailed bill is rendered. That might have been shewn from the general statements rendered or in other ways. The Courts too have general knowledge of the costs which can be taxed in given circumstances.

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In re Baylis (1896), 2 Ch. 107, was also relied on by the appellant. We have the judgment of Lindley, L.J. again in this case, and the decision in *In re Webb, supra,* cannot be regarded as questioned. As pointed out by Lopes, L.J., and Kay, L.J., there was no binding agreement at all within the meaning of section 8 of the Solicitors Remuneration Act of 1881. It was an oral agreement. It is stated *obiter* by Kay, L.J., that if it had been in writing it would be open to question as the "costs charged enormously exceed the amount of the scale fee." This opinion was formed without the assistance of a detailed bill. In the present case a general view of the account in the light of the tariff shews to my mind that it was not unreasonable; certainly the appellant has not so shewn. It is true that Chitty, J., to whom the application was made in the first instance, stated that it was impossible to decide whether the agreement such as it was, was unfair or unreasonable until a proper bill for fees, costs and disbursements was delivered. That view, however, was not referred to on appeal.

I might also refer to *Belcourt* v. *Crain* (1910), 22 O.L.R. 591 at p. 592, to the judgment of Middleton, J. An agreement

was made for a fixed amount. It was held that the agreement was fair and reasonable, and on appeal his Lordship found that upon the evidence this finding should not be disturbed. It was not suggested that it was impossible to determine the point without a bill.

In my opinion, therefore, the application for an order for the delivery of a bill and for taxation should have been dismissed, not only on the ground that the application was not made within the three months referred to in section 101 of our Legal Professions Act, but also on the general law applicable to the facts disclosed even if said section should not be regarded as a bar. *Pro forma* the appeal should be allowed as, with deference, the proper course was not pursued below, but without costs, the summons being dismissed with costs.

Appeal allowed pro forma without costs; originating summons dismissed with costs.

Solicitor for appellant: *J. R. Green.*
Solicitor for respondents: *A. H. Douglas.*

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SHAW, SALTER & PLOMMER v. PHIPPS & COSGROVE.

Principal and agent—Solicitor—Personal liability—Employment of skilled bookkeeper—Fees so incurred—Disclosed principal.

SHAW, SALTER & PLOMMER *v.* PHIPPS & COSGROVE

A solicitor acting for his client to the knowledge of the other contracting party is in the same position as an agent in a commercial transaction; he speaks for his client, binds his client, but not himself.

Statement

APPEAL by defendants from the decision of GRANT, Co. J. of the 4th of February, 1926. The defendant solicitors acted for a partnership of seven men who had a contract with the Canada Timber & Lands Limited to log its timber limits on Toba River. Under the contract the Canada Timber & Lands Limited coming to the conclusion that the partnership was not operating in accordance with the contract took on the works and the partnership then brought action for damages against the Canada Timber & Lands Limited and recovered judgment, and damages were assessed by the registrar. The plaintiffs who are chartered accountants claimed $225 as a fee for writing up books of the Toba River Logging Company, preparation of amalgamated profit and loss accounts, and reporting and statement setting out result of logging operations and attendances at Court. They claimed their services were given at the instance of the defendants. The plaintiffs recovered on the trial.

The appeal was argued at Vancouver on the 25th of March, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Jamieson, for appellants: The law on this question will be found in *Gow* v. *MacInnes & Arnold* (1923), 33 B.C. 1. In this case there was a disclosed principal: see *Lee* v. *Everest* (1857), 26 L.J., Ex. 334; *Robins* v. *Bridge* (1837), 7 L.J., Ex. 49; *Wakefield* v. *Duckworth & Co.* (1915), 1 K.B. 218.

Latta, for respondents: The solicitor is responsible in addition to the client. The question is whether the solicitor undertook to be personally liable for the accounts: see *Porter* v.

Kirtlan (1917), 2 I.R. 138 at p. 148. Cosgrove's conduct shews he intended to render himself personally liable.

Jamieson, replied.

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MACDONALD, C.J.A.: I would allow the appeal. The principle involved is perfectly clear on the cases to which we have been referred. Where a solicitor acts for his client to the knowledge of the other contracting party, he is in the same position as a mere agent in a commercial transaction, speaks for his client and binds his client and not himself. The plaintiffs knew that Mr. Cosgrove was the solicitor of the plaintiffs in the *Clausen* v. *Toba River* litigation. In fact, Mr. Clausen, the principal business man of those plaintiffs, was present with Mr. Cosgrove at the time this statement was ordered. There is, therefore, no question that the general rule applies unless the solicitor has made himself, by contract, personally responsible. We have then to look to the evidence to see what circumstances or declarations or admissions have been made by the solicitor that he had so made himself personally liable. I can find none. The statement of Mr. Salter, who, as Mr. *Latta* himself said, gave the most positive evidence from the respondents' point of view upon what took place, simply says he met these two men, the solicitor and the client, that they ordered the statement to be prepared and he told them they would have to pay for it and that "He seemed to assent to it." It does not make much difference which because assuming that the solicitor ordered it, and assented, he was speaking on behalf of his client. We have not been referred to one admission that Mr. Cosgrove held himself out to be responsible for that debt, not one. There is a conversation between Salter, I think it was Salter, one of the firm, with the clerk of Mr. Cosgrove, who knew nothing about the transaction, in which the clerk said, "This bill is ridiculous." He might also well say that on behalf of the client. Now the further circumstance relied upon by Mr. *Latta* is the fact that the bill was rendered to the solicitors and that it remained in their possession for 16 months without any repudiation. I do not see anything calling for repudiation. The plaintiffs might send the bill to the solicitor expecting that the solicitor would see or endeavour to see that the principal would pay it. They

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might not have known Mr. Clausen's address, but they were dealing with his agents and they sent the bill to them. There seems to have been something done with regard to it during those 16 months, because it is said a representative of the plaintiffs, one of the plaintiffs in fact, did call several times at Mr. Cosgrove's office, before and after the bill had been brought before the taxing officer so that the matter was not entirely neglected; even if it had been neglected, how can that import that the solicitor had solemnly undertaken to become a principal to the contract of his client?

MARTIN, J.A.

MARTIN, J.A.: The circumstances here, in my opinion, are not sufficient to put this case outside the general rule laid down by the Court of Exchequer in *Lee* v. *Everest* (1857), 2 H. & N. 285, cited in *Gow* v. *MacInnes & Arnold* (1923), 33 B.C. 1 at p. 5, where this Court was of opinion that the circumstances there were sufficient to bring it within the rule. Therefore the appeal should be allowed.

GALLIHER, J.A.

GALLIHER, J.A.: I have been unable to find in the evidence that has been cited to us, and some that I have read myself in the appeal book not cited, that there is sufficient to take this case out of the general rule which seems to be laid down in the decided cases. I may say, that it seems a little strange, in a sense, that a solicitor goes to some person, who has absolutely no interest in the action at all, and requires his services as a witness to assist him in the case he is conducting for his client and the witness perhaps may not know the parties for whom the solicitor is acting or know anything about it, yet he is engaged to do certain work in connection with the matter, and to give evidence upon it which will assist the parties employing him in the action when it comes to hearing.

However, I am not making the law and I am bound by the authorities. Under the authorities I see no escape from it, that there is no evidence from which we can draw the almost conclusive inference that it was the solicitor who was contracting on his own behalf, or making himself responsible, at all events, and when one finds himself in such a position, one must be

guided by the authorities. I have to come to the conclusion that the appeal should be allowed.

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McPHILLIPS, J.A.: It is with some very considerable regret that I find myself not in the position of being able to affirm the judgment which is under appeal, and I cannot say that I have not some hesitation too, in arriving at the conclusion that the appeal must be allowed. But the difficulty in the way of the learned judge's judgment in the Court below being supported is this: as it occurs to me, in its highest form, the case could not be presented upon any different plane than Mr. *Latta* has presented it, that is to say that there was an intention at the time that the solicitor should pay. It could though only be deduced from circumstances but the circumstances rather repel that, in that this case has the singular feature of the client being present as well as the solicitor at the time the order was given for the work to be done, and that rather repels the idea that there was an intention on the part of the solicitor to accept responsibility personally for the work ordered to be done. There is nothing to indicate an intention upon the part of the solicitor to accept the burden of paying for this work, but when the account was rendered and the solicitor saw that the chartered accountants looked to him for the services they had rendered, it would seem to me there was some duty cast upon the solicitor to at once apprize them that they were not personally responsible for the indebtedness, and that all that could be done would be to refer the matter to the clients. That was not done and some 16 months elapsed. Every case has to be decided upon the special facts of that particular case and I would not think that there are elements in this case which would entitle one to come to the conclusion that there had been such conduct as would bring about the liability that is sought to be established here. Therefore, in my opinion, the appeal must be allowed.

McPHILLIPS, J.A.

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

MACDONALD, J.A.

Appeal allowed.

Solicitors for appellants: *Wilson & Jamieson.*
Solicitor for respondents: *T. D. M. Latta.*

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YOUNG v. CROSS & COMPANY AND O'REILLY.

Vendor and purchaser—Sale of land—Promoters of syndicate selling their own interest—Disclosure—Duty on vendor—Lapse of time—Materiality.

YOUNG v. CROSS & CO.

The defendants Cross & Company formed a syndicate in June, 1912, for the purpose of purchasing a block of land with a view to resale at a profit. On the formation of the syndicate the block of land was purchased by way of an agreement for sale and a first payment was made thereon. Cross & Company took an interest in the syndicate themselves and shortly afterwards sold their interest at a small profit to the plaintiff. Mr. Cross of the firm of Cross & Company and with whom the negotiations were carried on by the plaintiff died in 1923. The plaintiff brought action in 1926 to set aside the contract and for repayment of the moneys paid mainly on the ground of nondisclosure of the fact that the interest sold belonged to Cross & Company. The plaintiff in his evidence stated his only reason for buying was that the surveyor-general of the Province had taken an interest.

Held, that it does not appear that the vendor failed in any duty he owed the plaintiff; that his duty to disclose does not extend beyond the facts material to the contract, and the action should be dismissed.

ACTION to set aside a verbal contract entered into in the year 1912, to purchase an interest in a land syndicate and for repay-

Statement ment of the moneys paid. The facts are set out fully in the reasons for judgment. Tried by GREGORY, J. at Victoria on the 1st and 2nd of March, 1926.

Mayers, and *J. R. Green*, for plaintff.
Moresby, and *Lowe*, for defendants.

10th March, 1926.

GREGORY, J.: This is an action to set aside a verbal contract entered into by the plaintiff fourteen years ago, to buy an interest in a land syndicate and for repayment of the moneys

Judgment paid thereunder.

The action is primarily based upon representations made by one Cross now deceased, which representations, it is alleged, were false to the knowledge of Cross, and made with a view of inducing the plaintiff to purchase the said interest. The

allegations or representations are set out in detail in par. 4 of the statement of claim. At the trial no attempt was made to prove a single one of the allegations so set out and in fact, many of them were actually denied by the plaintiff upon cross-examination. In these circumstances it must be quite clear that he can have no right of action upon the ground of false representations.

There is, however, an alternative claim for rescission and repayment upon the ground of non-disclosure, it being asserted that Cross & Co. were the agents for the plaintiff and that in any case they were selling their own interest in the said syndicate. That they occupied a fiduciary position towards the plaintiff and were bound to make full and fair disclosure, etc. I can see no ground for the suggestion that Cross & Co. were the agents of the plaintiff. He never at any time specifically employed them, never paid them for doing anything for him and the only previous business transaction between them was when he bought a piece of property, Cross & Co. being the agents or sub-agents for Pemberton & Son, the vendors, who paid them their commission. It is attempted to support the agency claim through Exhibits 16 to 20 inclusive. I do not think they make it out. In the plaintiff's letter (Exhibit 18) he says: "When you think the second acre could be sold to advantage, I will ask you to sell it." And in Cross's letter (Exhibit 19) he says:

Judgment

"I note what you say in regard to the sale of the second acre and will advise you if there is any decided movement in that vicinity. Under ordinary circumstances, however, it would be wise for you to retain the second acre until you build as your building will enhance the value of the adjoining property."

This correspondence refers to the land bought from Pemberton & Son; if it refers to any agency it is one to be created in the future for an entirely different property. It is worth while I think to repeat par. 3 of the statement of claim, which sets up the agency, *viz.*:

"In the year 1912 the plaintiff came to the City of Victoria from Liverpool, and the said firm, through Charles T. Cross, verbally professed and represented to the plaintiff that the said firm was able, ready and willing to give to the plaintiff expert and honest advice and to act in the plaintiff's interest with reference to real estate investments in and about Victoria, as to which the plaintiff to the knowledge of the said Charles T. Cross was wholly ignorant and had no knowledge whatever."

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On the trial not the slightest effort was made by the plaintiff to substantiate this paragraph.

While I do not desire to cast the slightest reflection upon the integrity of the plaintiff, I can place no reliance upon his testimony as to what was said on any occasion. He seemed so vague, indefinite and uncertain. He repeatedly referred to his "memory not being good"—"not good after fourteen years," to his "impression," etc., and to his work in the war having injured his memory, etc. I can see no evidence of agency whatever, and speaking generally, I think it would be monstrous in such a case as this to brand a dead man—a prominent and respected business man, with fraudulent conduct, and more especially when the slightest diligence on the part of the plaintiff by reading the statements, etc., that he received during the life of Mr. Cross (who only died in October, 1923), he could have had all the information he has today, and when Mr. Cross was alive to meet any charge of false dealing.

There now remains the sole question, was the relation between Cross and the plaintiff such as required Cross to make it known to the plaintiff that he was selling him his own interest in the syndicate, etc.? If that fiduciary relationship existed, I agree with counsel for the defence that the onus of proving that full disclosure was made, is upon the defendant. There is no satisfactory evidence that it was not made, and on the other hand there is no evidence that it was. The known undisputed facts are that Cross & Co. got up the syndicate in June and took an interest in it themselves, and that they sold their interest to the plaintiff at a slight advance, *i.e.*, the plaintiff obtained his interest for the same price as other members of the syndicate plus about $150. At the time of the sale to the plaintiff only the first payment had been made, by the members of the syndicate.

Judgment

The principle of *uberrima fides* or superabounding faith applies to a certain class of contracts of which contracts of insurance and those where an agent for sale himself buys, are, perhaps the most conspicuous examples. It also applies to certain contracts for the sale of land where the vendor fails to disclose a defect in his title and to contracts between the pro-

moter of a company and the company. In such cases full disclosure is required and this regardless of whether the contract is in other respects a fair one or not. For lack of satisfactory proof of what Mr. Cross said to the plaintiff, the question must here be considered entirely apart from any statements alleged to have been made by Cross.

Mr. *Mayers* urged that the doctrine applies to the ordinary case of a vendor and purchaser and he referred to the language of Duff, J., at p. 73, in *Ball* v. *Gutschenritter* (1925), S.C.R. 68. In that case the Court held that in the circumstances no disclosure was necessary. The question was one of restriction in the original grant or defect of title. Mr. Justice Duff said:

"The vendor's duty of disclosure, broadly speaking, rests ultimately upon considerations analogous to those which give rise to the corresponding duty in the case of some other classes of contracts—insurance, for example. One of the parties to the negotiation in such cases may ordinarily be supposed to have exclusive cognizance of certain matters material to the contract."

Again:

"The general principle is that the vendor . . . . . must inform the purchaser of all material defects in his title which are within his exclusive knowledge," etc.

Judgment

In the present case there is no question of a defect in the title nor is it material to the contract who actually owned the property being sold. The plaintiff repeatedly stated that his only reason for buying was that Mr. Dawson was surveyor-general of the Province and that he had taken an interest.

The next case referred to was *Phillips* v. *Homfray* (1871), 6 Chy. App. 770 at p. 778. That was a case where in an action for specific performance the Court refused to compel a defendant to sell to the plaintiff, as it appeared that the plaintiff, who owned the adjoining land, had, without the defendant's knowledge, taken coal from under defendant's land. This, while not a question of defect of title, was clearly one where the knowledge was material to the contract, the plaintiff was seeking to obtain more than defendant knew he was parting with, *viz.*, his right of action to recover damages for the trespass.

In *Greenizen* v. *Twigg* (1922), 2 W.W.R 71, the Court held that the plaintiff who sold land to a syndicate had intentionally and fraudulently in his deed misstated the consideration so as to

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enable one member of the syndicate to make a secret profit on the transaction, and the transaction was set aside on defendant's counterclaim. Such a case has no resemblance to the facts in the present case.

In *Emma Silver Mining Company* v. *Grant* (1879), 11 Ch. D. 918, the vendors of a mine agreed to sell it to a company to be formed by defendant and that defendant should receive 20 per cent. of the allotted capital. By a secret agreement between the vendors' agent and defendant, described as agent for the intended company, the agent agreed to sell to defendant for the price named in the first agreement but no reference was made to the percentage defendant was to receive. The company was then formed, the memorandum of association, etc., was settled by defendant, and the object stated in the memorandum was to carry out the second agreement and no reference was made to the first agreement. *Held,* that defendant was liable for the secret profit he had made. There the nondisclosure amounted to a positive and fraudulent misrepresentation of fact to a company of which he was the acknowledged agent. There is nothing like that in the present case.

Judgment

I am also referred to *New Sombrero Phosphate Company* v. *Erlanger* (1877), 5 Ch. D. 73, and particularly to the language of James, L.J., at p. 118. That was a case where a syndicate bought property, promoted a company to purchase same and made a secret profit on their transactions and it was held on appeal that the contract of sale must be set aside and the syndicate should refund the purchase-money. There, too, the syndicate had suppressed facts and inserted in the prospectus misleading statements. That is not the case here. There is no suggestion that the syndicate did not obtain the property for the price at which it was sold, in fact the title passed directly from Mr. Bradshaw the owner to the syndicate, Mr. Dawson trustee. It might possibly be that Cross & Co. would have had to account to the syndicate as a whole for any commission they made on that sale, if the fact was improperly kept from them, or that the transaction could have been set aside if Bradshaw the vendor was a party to any deceit, but that is not this case. And in this con-

nection it may be observed that a serious attempt was made on the trial to prove that the whole property was only worth some $6,000, but it became evident eventually that counsel was misinstructed and that by far the most valuable part of the property was overlooked, this part being valued in the application to register at some $28,000.

Other cases referred to on the argument were: *Maddeford* v. *Austwick* (1826), 1 Sim. 89; *Fawcett* v. *Whitehouse* (1829), 1 Russ. & M. 132; *Hichens* v. *Congreve* (1828), *ib.* 150; but it is unnecessary to refer particularly to them, as they are much like the cases already discussed. In one a partner who superintended exclusively the firm's accounts, agreed to purchase the other's share of the business for a sum which he knew, from accounts in his possession, but which he concealed from his co-partner, was an inadequate consideration, and the agreement was set aside, and in the others it was held that a person acting for himself and others could not retain a private advantage which he had secretly obtained.

It does not appear to me that the defendants have failed in any duty which they owed to the plaintiff. There will be judgment for the defendants and costs of course will follow the event.

Action dismissed.

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1926

April 14.

VOGEL v. VANCOUVER ISLAND POWER CO.

Trespass—Cutting timber for clearing—Brushwood fire allowed to spread—Damages—Limitation of action—R.S.B.C. 1924, Cap. 271, Secs. 100 and 130.

VOGEL v. VANCOUVER ISLAND POWER CO.

In 1910 the defendant Company constructed a transmission line from Jordan River to Goldstream and it being necessary to pass through the plaintiff's property the Company, under agreement, with her, obtained the necessary right of way across her land. In 1924, deeming it necessary that the transmission line should be diverted where it crossed the plaintiff's property, and considering there was the right to do so under the agreement of 1910, the Company, through its engineer and employees, entered upon the plaintiff's lands and began cutting out the right of way for the proposed deviation, set fires to remove *debris* and allowed the fires to spread on plaintiff's land. In an action for damages resulting from the defendant's trespass, the defence was raised that the plaintiff had not given notice of this action to the Attorney-General within six months next after the doing or committing of the damage had ceased as required by section 130 of the Water Act.

Held, that although the Company had no leave or licence under the 1910 agreement to enter upon the plaintiff's land and construct a second pole line and its employees were negligent in their conduct of the fires used in clearing the right of way, it is entitled to the benefit of section 130 of the Water Act and the action must be dismissed.

Statement

ACTION for damages arising from the entry of the defendant Company on the plaintiff's land, for cutting down timber thereon and for starting fires during the Company's operations in clearing a proposed right of way through the plaintiff's land and allowing the fires to spread through her property. The facts are set out fully in the reasons for judgment. Tried by MACDONALD, J. at Victoria on the 8th to the 14th of April, 1826.

Maclean, K.C., for plaintiff.
Harold B. Robertson, K.C., and *A. D. King*, for defendant.

Judgment

MACDONALD, J.: In this action the plaintiff claims substantial damages from the defendant Company, on two grounds, one arising from the entry of the defendant Company upon her land and cutting down timber thereon, and the other ground being

based upon the setting out of a fire during operations carried on by the defendant Company in clearing a proposed right of way through the plaintiff's land, and then allowing such fire to spread through her property, with resultant loss. It appears that in 1910 the Company had constructed a transmission line in connection with its works and undertaking, from Jordan River to Goldstream, and then in 1924 it was deemed advisable and necessary that such transmission line should be diverted at certain points, and amongst others, at that portion of the line which crossed the plaintiff's property. When the line was constructed, in 1910, the defendant Company obtained an agreement from the plaintiff, then Mrs. Gordon, giving it an easement for the purpose of right of way across her land, and paid in consideration therefor the sum of $500. The agreement is badly worded in describing the course to be pursued in crossing the land; in fact if it be construed literally it is an absurdity. However, as applied, the defendant Company obtained what was considered the necessary permission to construct its line; and it thus remained until 1924. In the meantime, during these fourteen years no question had arisen, between the parties, as to the location then adopted by the defendant Company being sufficient for its purposes.

Judgment

In 1924 defendant Company through its engineer approached the plaintiff, armed with the agreement obtained in 1910, but not with a correct copy of such agreement, as it was registered. Horsey, the engineer, stated that the visit to the plaintiff was an act of courtesy on his part, and sought to convey the impression that he could have gone on the land and appropriated the requisite area for the deviated line, without the necessity of obtaining the permission from the plaintiff, as the owner of the property. I think it was necessary to obtain such consent, and that it was never obtained. Defendant Company, in my opinion, had no leave or licence to go upon the land obtained from the plaintiff and construct the second pole line in 1924. I think, however, that through the statements of Horsey as to the rights, possessed by the defendant Company in this respect, the plaintiff and her husband were, in a sense, overawed, and not as assertive in the matter as they might otherwise have been. They

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did nothing, however, which militated against their actual rights, or brought into play any principle of estoppel, which might operate against any right of action possessed by the plaintiff. Notwithstanding the want of any permission obtained by the defendant Company, its engineer and other employees entered upon the land of the plaintiff and began cutting out the right of way for the proposed deviation of its transmission line. And in these operations, carried on in pursuit of the general undertaking of the defendant Company, it resorted to fire to remove the slashing and debris resulting from the work being carried on.

The fire thus set out by the defendant, through its employees, upon the land thus appropriated for its use, was not safeguarded, and escaping to the neighbouring property of the plaintiff, caused damage. The fire being intentionally set out, the common law governs, and the principle enunciated in *Rylands* v. Fletcher (1868), L.R. 3 H.L. 330 applies. I might add further, in this connection, that the employees of the defendant Company, for whom it is responsible, were negligent in their conduct of the fires, used in clearing such right of way. Defendant is liable for the loss resulting from the fire, as well as the damage to the land taken for the right of way, unless the provisions of the Water Act, restricting the time for the commencement of this action, afford a relief.

Judgment

It is contended on the part of the defendant Company that sections 100 and 130 of the Water Act protect the defendant from liability, through the notice of action therein required to be given, not having been complied with. Assuming that want of the service of such notice has been proved, I do not think that as to section 100, it has any application upon the facts here presented. Section 130, however, has given me great concern, since this extraordinary provision was first drawn to my attention during the trial. It reads as follows:

"130. All actions or suits for indemnity for any damage or injury sustained by reason of the undertaking, operations, or works of any such licensee shall be commenced within twelve months next after the time when the alleged damage is sustained, or, if there is a continuance of damage, within twelve months next after the doing or committing of the damage ceases, and not afterwards; and the licensee and any other defendant may plead the general issue and give this Act and the special

matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act; but no such action or suit shall be maintained unless notice of action has been given to the Attorney-General within six months next after the time when the alleged damage is sustained, or, if there is a continuance of damage, within six months next after the doing or committing of the damage ceases."

In my opinion it is a veritable trap to the unwary, and if it can be utilized as now proposed, it means that the plaintiff having a real grievance against the defendant as a trespasser, and being unaware of this legislation, would have no redress by an action for damages, unless she notified a third party, namely, the Attorney-General, who is not interested, of her intended proceeding. Still, I presume that it would be submitted that the plaintiff, in common with other people is presumed to know the law; and thus the defendant corporation seeks the assistance of this legislation to avoid payment of damages which would ordinarily be assessed against it. It is beyond question that the Company, in going upon the plaintiff's land, and cutting out the proposed right of way, was doing so, in furtherance of its undertaking; but before taking these steps it should have either obtained the consent of the plaintiff, or taken proceedings required by the very Act which it has now invoked. I particularly refer to section 54, which stipulates that before any licensee may enter upon the lands of private owners, in case where such licensee has not the consent of the owner, he is required to file in the Land Registry office a plan of the lands, giving certain particulars outlined in such section; and, referring particularly to the situation here presented, stating whether the fee simple is sought, or an easement is required, and if an easement, the nature thereof, and the amount of compensation that is proposed to be given. Then there is a further requisite, that a notice shall be served upon the owner, of the intended entry, to which shall be attached a copy of the plan so filed in the Registry office. Defendant failed entirely to comply with these requisites, which, to my mind, are clearly conditions precedent to a proper entry upon the land. It entered upon the land in the month of July, 1924, and it was not until the month of April following its entry, and the injury suffered by the plaintiff, that it sought to utilize the provisions of the statute.

Judgment

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It then filed a plan in the Registry office at Victoria, which was improper still, in its description, as being under an Act which had then been repealed. But I find that eventually (accepting the endorsement upon such plan) it was accepted by the registrar, and thus became properly filed in the Registry office, though the copy which was served upon the solicitor for the plaintiff, was not in accordance with such plan as it was thus filed. Then, in the following October, a further filing of a plan took place; and service was sought to be made upon the plaintiff by serving her solicitor. It is not necessary for me to determine, as between the solicitor for the defendant and the solicitor for the plaintiff, as to which one of these gentlemen is correct upon the question of acceptance of service, because it is not material, to my mind, to the decision of this case.

I find that the damage to the plaintiff was done by the defendant Company while it was a trespasser though perhaps not an ordinary trespasser.

Judgment

It is contended on the part of the plaintiff that if I so find, then that neither section 100 nor section 130 can be invoked by the defendant, so as to escape the liability which would otherwise exist. Counsel for the plaintiff contends that the judgment in *Saunby* v. *London (Ont.) Water Commissioners* (1906), A.C. 110, destroys the benefit sought to be obtained by the defendant under these sections. Further, that a decision of such weight, and upon facts, it is submitted, similar to those in this case, would be effective, as against any conclusions which might be drawn from the recent judgment of the Privy Council in *Pribble* v. *B.C. Electric Ry. Co.* (1926), 1 W.W.R. 786. It is pointed out that in the argument in *Saunby* v. *London (Ont.) Water Commissioners, supra,* counsel for the respondents submitted, that the action could not be maintained in the absence of any notice of action, reference being made to the Acts under which the defendant Commissioners were executing their works near the City of London. No reference was made to such contention, as to such want of notice of action, in the judgment. Referring to the report in the Supreme Court of Canada (1904), 34 S.C.R. 650, the only one of the learned judges who refers to the question of notice of action is Mr. Justice Sedge-

wick, who points out that the judgment of the Court of Appeal, delivered by Mr. Justice Maclaren, deals fully with this contention, and cites authorities shewing that the statutory notice is not necessary where an injunction is sought, although damages at the same time be claimed. Referring, then, to the judgment in the Court of Appeal (1903), 2 O.W.R. 763 at p. 765, I find as follows:

"It is well settled that the provision requiring such notice is not applicable where an injunction is sought: *Attorney-General* v. *Hackney Local Board* [(1875)], L.R. 20 Eq. 626; *Sellors* v. *Matlock Bath Local Board* [(1885)], 14 Q.B.D. 928. This rule applies even when damages are also claimed: *Flower* v. *Local Board of Low Leyton* [(1877)], 5 Ch. D. 347; *Bateman* v. *Poplar District Board of Works* [(1886)], 33 Ch. D. 360."

Upon referring to the cases thus cited, that the rule requiring notice of action does not apply when damages are also claimed, in addition to an injunction, I find that the conclusive authority upon that point is *Flower* v. *Local Board of Low Leyton, supra;* and there (in an appeal from Malins, V.C.), Jessel, M.R. points out that the section, requiring notice of an action at law for damages, had for its object the giving of notice to a local authority, to make payment or tender compensation for any alleged damage. He does not consider that the notice of action, required by a provision of the Public Health Act, applies where an injunction is sought, even though damages might be claimed in addition thereto. He pointed out the fact that Courts of Equity are in the habit of giving damages to the hearing of the case, but the Courts of Common Law only to the issuing of the writ; and it was therefore usual to ask for damages in an equity proceeding, the result being that notice of action is not necessary where a plaintiff is seeking injunction but may be claiming damages as subsidiary to the claim for the injunction.

Judgment

Here the claim of the plaintiff is purely one of damages; no injunction is sought restraining the defendant in its actions nor a mandatory injunction for the purpose of compelling the defendant Company to remove the poles, upon the deviated line of right of way, off the plaintiff's land.

A similar action was brought in Ontario, as outlined in the case of *Lumsden* v. *Temiskaming and Northern Ontario Railway Commission* (1907), 15 O.L.R. 469. In that action it was

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decided that, in a somewhat similar provision to said section 130, the plaintiff's claim for damages sustained by the railway was barred by the statute, and that it made no difference, that the railway company had not filed the plans of their railway or taken the necessary steps to compensate those whose lands or interests they entered upon or affected. It appears, according to the statement of facts, that the defendant had entered upon the timber limits of Lumsden and cut down certain timber off the right of way, though admittedly done in pursuance of the construction of the projected railway. Moss, C.J.O., in his judgment says, after referring to *McArthur* v. *Northern and Pacific Junction R.W. Co.* (1890), 17 A.R. 86, that while the non-compliance with the requirements as to plans and other preliminaries, might operate to prevent the defendants from contending in an action brought against them, that they were not trespassers, the provisions as to limitation of time within which the action is to be brought, apply equally as in other cases.

To meet this defence of want of notice of action, it was then contended by counsel for the plaintiff that the Court should apply very strict construction to this provision. I readily accede to this proposition; but I cannot see any difference between the wording of the section thus sought to be utilized by the defendant, and other sections which have been dealt with, in parallel cases. I might add that the wording of this particular section, particularly the use of the word "undertaking," seems to be broader than that usually to be found, principally pertaining to railway companies. The section I consider, in the *Pribble* v. *B.C. Electric Ry. Co.* case, *supra,* is similar to the one in question, particularly indicating that two points are covered in both these sections, namely, the limitation of action, as well as the mode of pleading that may be adopted by the defendant. The absurdity which would ensue, should the section be utilized in the manner contended for by the plaintiff, is discussed as applying to the section referred to in the *Pribble* case, in the latter part of the judgment. Further, the matter of dividing the section into two portions is discussed; it is pointed out that the matter of pleading, in the form indicated, is exclusively an advantage, and is independent of the merits of the case, or any substantive defence.

Judgment

which might be capable of being proved under it. The judgment then adds that the two limbs of the section are independent of one another, although linked together by a simple copulative "and."

The result is that the argument presented, that the notice of action required by this section is controlled by the provision as to pleading, in my opinion will not prevail.

I thus come to the conclusion that the *Pribble* case covers not only actions brought arising out of contract, but also involving torts. Applying that conclusion to this particular case, I find that the defendant Company, though trespassers at the time when the damage ensued to the plaintiff, are entitled to the benefit of section 130, as a defence to this action. I have already sufficiently expressed myself as to the terms of such a provision contained in a public Act and being capable of being utilized by a private corporation.

Only one result can follow from this conclusion, and that is that in this action for damages, and irrespective of any claim that the plaintiff might have outside this action, it is dismissed with costs.

Action dismissed.

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QUEEN INSURANCE COMPANY OF AMERICA v. BRITISH TRADERS INSURANCE COMPANY, LIMITED.

QUEEN INSURANCE CO. OF AMERICA v. BRITISH TRADERS INSURANCE CO.

Insurance, fire—Limits of insurance—Amount insured over limit—Contract with other company for re-insurance—Evidence of reinsurance—Liability.

The plaintiff Company insured the National Canners Limited for $67,500, but having limited its insurance on each risk at $37,500, under contracts of reinsurance $25,000 of the additional amount was reinsured on the 14th of July, 1925, with the California Insurance Company and $5,000 with the Pacific Coast Fire Insurance Company. On the 17th of July following, correspondence commenced between the plaintiff Company and defendant Company as to the defendant accepting reinsurance of the plaintiff on the National Canners Limited and on the 23rd of July it was agreed that the defendant would accept a line of $15,000 of reinsurance on said risk of which the plaintiff would forward commitments in the course of a week or so. On the evening of the 31st of July, the accountant of The National Canners Limited telephoned the plaintiff's agent in Vancouver to place an additional $20,000 on the stock-in-trade of the Company. It being after hours the agent made a note of the arrangement leaving it until the following day to issue the policy. That night the National Canners Limited was destroyed by fire. It appeared that in the face of the correspondence between the plaintiff Company and defendant Company that terminated on the 23rd of July the manager of the plaintiff Company's main agents in Victoria instructed his clerk that in case of further insurance for the National Canners Limited, the first $15,000 should be reinsured in the British Traders Insurance Company, and the next $5,000 in the Pacific Coast Fire Insurance Company, and the main agents were empowered to issue policies on behalf of the British Traders Company. The policies were duly issued by the agents in the names of the British Traders Insurance Company and on the Pacific Coast Company. In an action to recover $12,812.87 from the British Traders Company on its policy so issued:—

Held, on the facts, that the defendant Company was liable.

Statement

ACTION to recover $12,812.87, the amount payable under an insurance policy for a loss by fire. The plaintiff claims that the British Traders Insurance Company was responsible for the loss under a contract by which said Company reinsured the Queen Insurance Company up to the amount of $15,000 against the loss in question. The facts are set out in the reasons for judg-

ment. Tried by McDONALD, J. at Vancouver on the 22nd of April, 1926.

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QUEEN INSURANCE CO. OF AMERICA *v.* BRITISH TRADERS INSURANCE CO.

Davis, K.C., and *Ghent Davis,* for plaintiff.
Mayers, for defendant.

22nd April, 1926.

McDONALD, J.: The plaintiff, Queen Insurance Company, carries on a fire-insurance business in British Columbia. Its general agent for the Province is Rithet Consolidated Limited, whose manager is H. T. Barnes and whose insurance clerk is F. W. Waller. Messrs. Horne, Taylor & Co. are agents for the Queen Insurance Company at Vancouver with practically unlimited authority to take risks and issue policies. Burrard Agencies Limited, whose manager is J. H. Irving, is also an agent for the Queen Insurance Company at Vancouver, also with full authority to take risks and issue policies though the practice has been that on account of Mr. Irving's lack of experience in writing policies the policies in Vancouver are actually filled out by Horne, Taylor & Co. and countersigned and issued by Burrard Agencies Limited.

Judgment

The defendant British Traders Insurance Company, Limited, also carries on a fire-insurance business, its head office for British Columbia being at Vancouver, and conducted by C. R. Elderton. Rithet Consolidated Limited above mentioned is the agent of British Traders Insurance Company at Victoria with general authority to undertake risks and countersign and issue policies. The National Canners Limited is a corporation carrying on a canning business on Central Street in the City of Vancouver. Its insurance was placed through Burrard Agencies Limited with the Queen Insurance Company and on the morning of 31st July, 1925, the amount so carried was $67,500. Inasmuch as the limit of insurance, which the Queen Insurance Company wished to carry on the risk in question was $37,500, the additional $25,000 had been reinsured on or about the 14th of July, 1925, with the California Insurance Company. About 6.15 o'clock on the evening of the 31st of July, 1925, Mr. McGregor, the accountant of National Canners Limited, over the telephone, arranged with Burrard Agencies Limited, through Mr. Irving,

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to place an additional amount of $20,000 of insurance upon the stock-in-trade of the Company. Ordinarily, this would have been at once reported to Horne, Taylor & Co. so that they might write up a policy but, it being after hours, Mr. Irving made a note of the arrangement leaving it until the following day to have the policy issued. That night the premises of National Canners Limited were destroyed by fire. On the following day, Mr. Barnes came to Vancouver, made a full investigation of the circumstances and, on behalf of the Queen Insurance Company, honestly and frankly admitted that the Queen Insurance Company was liable and must pay the loss. Rithet Consolidated Limited accordingly on Monday, 3rd of August, issued a policy, dated 31st of July, covering the risk of $20,000. After adjustment the loss under this policy was paid and of the amount so paid by the Queen Insurance Company it now seeks to recover $12,812.87 from the British Traders Insurance Company, under an alleged contract of reinsurance.

Judgment

Before considering the question of whether or not such a contract of reinsurance did exist, it may be mentioned that one line of defence taken in the pleadings, and at the trial, was that there was no contract of insurance binding Queen Insurance Company; that Rithet Consolidated Limited, McGregor and Irving were guilty of fraud under a scheme which practically amounted to this: That Rithet Consolidated Limited, in order to assist its friend, National Canners Limited, admitted liability on behalf of the Queen Insurance Company, which liability did not in fact exist, with the fraudulent intent thereupon to foist that loss upon British Traders Insurance Company, Limited. This is a very serious charge to be spread upon a record as against business men who, so far as appears and so far as one can judge from their conduct in the witness box, are men of high standing and of undoubted integrity and I think it is due to these men to say that there is not one tittle of evidence to throw even the slightest suspicion upon the honesty of anything they did throughout the whole transaction. Having this in mind, I stated, during the argument, that I had not the slightest doubt but that the Queen Insurance Company, under all the circumstances, was liable for the loss and that it

had done the only honest thing it could do when it paid the loss.

As I view the case, the only question of moment to be considered is, whether or not there was in fact, prior to the loss, a binding contract by which British Traders Insurance Company reinsured the Queen Insurance Company up to the amount of $15,000 against the loss in question. That question may be considered one of some difficulty but upon the best consideration, which I have been able to give the case, my conclusion is that such a binding contract did in fact exist. As mentioned above, on or about the 14th of July, Rithet Consolidated Limited had reached the limit which the Queen Insurance Company was willing itself to carry on National Canners Limited. It was, however, anticipated that further applications might come in from time to time and accordingly Mr. Barnes, on the 16th of July, saw Mr. Elderton, told him that Queen Insurance Company was carrying the insurance on National Canners Limited and asked if British Traders Insurance Company would "give [Queen Insurance Company] a line of reinsurance." Mr. Barnes's recollection does not seem to be absolutely clear as to whether a specific amount of such reinsurance was mentioned but it seems to me that that is not of importance. On the 17th of July, Rithet Consolidated Limited wrote British Traders Insurance Company, Limited, as follows:

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"*National Canners, Limited*

"This property is not yet shewn on Goad's map, but is situated just south of the Canadian National Union Station on Main St. It is a new plant and they had a very successful season last year and practically operate the year round. The business is controlled through the Burrard Agencies Ltd. and is owned by friends of ours.

"The writer spoke to Mr. Elderton about this line yesterday and he intimated that he would be quite willing to accept a reinsurance of the Queen on this risk and we should be glad if you would kindly look into the matter and let me know how much reinsurance you would accept on behalf of the Queen, which has at present $35,000.00 on the line."

This was replied to in a letter of the 20th of July reading as follows:

"*Re National Canners Block 84A Vancouver*

"I duly received your letter of the 17th instant in reference to the plant of the above firm, and shall be glad to accept a line of $15,000.00 as reinsurance of the 'Queen.' Will you kindly advise me when the Company is bound on the risk."

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And the last mentioned letter was replied to by a letter of the 23rd of July reading as follows:

"National Canners, Ltd.

"We thank you for yours of the 20th instant advising that you are in a position to accept a line of $15,000.00 as reinsurance of the Queen on the above risk.

"We hope to be able to forward some commitments in the course of the next week or so."

On the completion of this correspondence, Mr. Barnes spoke to Mr. Waller, his insurance clerk, and shewed him the correspondence and instructed him that as to any further insurance taken by the Queen Insurance Company from National Canners Limited the first $15,000 so taken should be reinsured in British Traders Insurance Company. Mr. Waller made a note in his block sheet to this effect and put a note upon his file. It might be mentioned that prior to this, following the reinsurance of $25,000 in the California Insurance Company, $5,000 had been reinsured in Pacific Coast Fire Insurance Company who had arranged to take $10,000 of this reinsurance if offered. On Mr. Barnes's return from Vancouver on Sunday, August 2nd, he saw Mr. Waller and instructed him to issue a policy of British Traders Insurance Company Limited reinsuring the Queen Insurance Company and that policy was issued and signed by Rithet Consolidated Limited on Monday, 3rd of August, 1925. Of the $20,000 policy issued by the Queen Insurance Company the other $5,000 was reinsured in the Pacific Coast Fire Insurance Company to whose credit, be it said, that immediately the circumstances were brought to the attention of their manager, Mr. Greer, the loss, in respect of such reinsurance, was paid without demur.

There is no question of course of the power of Rithet Consolidated Limited to issue and countersign policies on behalf of British Traders Insurance Company but Mr. Barnes expressed the view (whether mistaken or otherwise) that he could not issue a policy of reinsurance except by the consent of British Traders Insurance Company Limited. Having obtained that consent, as is shewn by the letters which passed and the conversation which took place, and having, prior to the loss, allocated to British

Traders Insurance Company, Limited, pursuant to such consent, the first $15,000 assumed by the Queen Insurance Company upon the stock of National Canners Limited, the issuing of the policy pursuant thereto was an act which Mr. Barnes, in my opinion, not only had power to do but which it was his duty to do, and the plaintiff, Queen Insurance Company, is entitled to recover from British Traders Insurance Company the amount of $12,812.87. It follows that the counterclaims must be dismissed.

Judgment for plaintiff.

HEIDNER & CO. v. THE "HANNA NIELSEN."

Admiralty law—Practice—Interrogatories—Custom alleged—Inquiry as to instances of its occurrence.

In an action arising out of damage to a cargo the defendant in paragraph 7 of his defence pleaded "that it is the custom for vessels engaged in trading between ports on Puget Sound and Europe to touch at various ports on the west coast of the United States for the purpose of loading cargo and to touch at various ports in Europe for the purpose of discharging cargo and that the plaintiff was aware of said custom at the time of the shipment and consented and agreed that the said vessel should, if those in charge of her so desired, call at such places for such purposes."

The plaintiff's application to administer interrogatories included the question: "What instances of the custom alleged in paragraph 7 of the defence have occurred and when?" Objection was taken on the ground that to allow it would compel the defendant to disclose evidence of its defence.

Held, that the rule applying is whether the answers to the interrogatories would disclose anything material to enable the plaintiff either to maintain his own case or to destroy the case of his adversary. Applying this principle here the information sought by the plaintiff is both material and calculated to destroy the defensive case set up and once that position is reached, the objection that the defendant's evidence is necessarily in part disclosed, vanishes.

Statement

APPLICATION by plaintiffs to administer interrogatories. Objection was taken by the defence to one of the questions par-

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ticulars of which are set out in the head-note and reasons for judgment. Heard by MARTIN, Lo. J.A. at Vancouver on the 30th of March, 1926.

Mayers, for plaintiffs.
Griffin, for defendant.

17th April, 1926.

MARTIN, Lo. J.A.: This is an application to administer interrogatories and objection is taken to one of them, *viz.*:

"What instances of the custom alleged in paragraph 7 of the defence have occurred and when?"

That paragraph is as follows:

"In the alternative and with further reference to paragraphs 3 and 4 of the statement of claim the defendant says that it is the custom for vessels engaged in trading between ports on Puget Sound and Europe to touch at various ports on the West Coast of the United States for the purpose of loading cargo and to touch at various ports in Europe for the purpose of discharging cargo, and that the plaintiff was aware of said custom at the time of the shipment and consented and agreed that the said vessel should, if those in charge of her so desired, call at such places for such purposes."

Judgment

This sets up a very wide, not to say sweeping custom and it is obvious that in order to prepare to meet it adequately at the trial, in the unrestricted shape in which the defendant has chosen to put and keep it upon the record, the plaintiff will be compelled to incur great expense to an extent which cannot now be foreseen or even estimated, and it is to avoid such consequences, so far as possible, that the said interrogation is proposed. The defendant, a Norwegian ship, objects to it on the ground that to allow it would be to compel the defendant to disclose the evidence of its defence and cites *Kennedy* v. *Dodson* (1895), 1 Ch. 333 at p. 341; *Knapp* v. *Harvey* (1911), 2 K.B. 725 at p. 732 and *The Shropshire* (1922), 38 T.L.R. 667, while the plaintiffs cite *Tucker* v. *Linger* (1882), 21 Ch. D. 18, 34; *Johnstone* v. *Earl Spencer* (1885), 30 Ch. D. 581, 596; *Hennessy* v. *Wright* (1888), 24 Q.B.D. 445(*n*) at p. 447; *Sea Steamship Co.* v. *Price, Walker & Co.* (1903), 8 Com. Cas. 292, 295; and *In re Chenoweth* (1902), 2 Ch. 488, 496, and I have consulted many others, including, *e.g.,* those cited in Taylor on Evidence, 11th Ed., Vol. 2, pp. 817-8 and *Fleet* v. *Murton*

(1871), L.R. 7 Q.B. 126, and *Southwell* v. *Bowditch* (1876), 1 C.P.D. 374: the result is well summed up by Taylor, *supra*:

"In all these cases [of custom or usage of trade or business] it is the fact of a general usage or practice prevailing in the particular trade or business, and not the mere judgment and opinion of the witnesses, which is admissible in evidence, and unless the witnesses can state instances of the usage as having occurred within their own knowledge, their testimony will seldom be entitled to much weight."

As Lord Justice Vaughan Williams says in *Knapp* v. *Harvey*, *supra*, p. 728, "In regard to the admissibility of interrogatories there is always great difficulty in laying down any absolutely hard and fast rules," and the decisions of the Court of Appeal in England are impossible, in my opinion and with all respect, to reconcile wholly, doubtless owing to the fact that the matter of the reasonableness of the interrogatory always depends upon the particular circumstances of the case and hence an Appellate Court is reluctant to interfere with the discretion exercised below, as the Lord Justice Williams points out *supra*, and as Lord Justice Lindley says in *Kennedy* v. *Dodson*, *supra*, p. 340:

"Under ordinary circumstances we should not think of interfering with the decision of the judge in the Court below in a matter which is very much a matter of discretion."

Judgment

As to the general purpose of interrogatories, the unanimous decision of the Court of Appeal in *Hennessy* v. *Wright* (1888), 24 Q.B.D. 445(*n*) is a safe guide to the English practice which is the same as our own, and as it has not been overruled, despite later observations by certain judges, I adopt it in the language of Lord Esher, M.R., with Lords Justices Lindley and Lopes concurring, at p. 447, as follows:

"The objection taken by the defendant is, that the answers to the interrogatories in question cannot disclose anything which can be fairly said to be material to enable the plaintiff either to maintain his own case or to destroy the case of his adversary. It must be admitted that, if the answers could be material for either of these purposes, the interrogatories ought to be answered, but I think it must equally be admitted that, if the answers could not be material for either of these purposes, we ought not to order the defendant to answer. The question, therefore, is, whether the answers to the interrogatories objected to could, in our view, be material for either purpose."

The Shropshire case, *supra*, cited by the defendant's counsel really confirms this view because the Court said, inferentially, that interrogatories which "disprove the case of the defendant" were permissible.

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Applying then this clear principle to the present case, it cannot be denied that the information sought by the plaintiff is both material and calculated to destroy the defensive case set up by his adversary, and once that position is reached then the objection that the defendant's evidence is necessarily in part disclosed vanishes and is reduced to other valid grounds, such as that the names of witnesses cannot be disclosed as admitted in *Knapp* v. *Harvey, supra,* in which case, however, it is to be noted that an order had been made compelling the plaintiff to give particulars of the "specific occasions" upon which he relied to prove that defendant's dog had bitten other persons before biting the plaintiff: the Court refused to order interrogatories disclosing the names of the persons who had been bitten because, bearing in mind the information already obtained by the particulars, it came to this conclusion, p. 730:

> "*Being of opinion that, having regard to the information already given* by the particulars, the sole object of putting these interrogatories is to get the names of the plaintiff's witnesses, I am not disposed in the present case to depart from the rule that it is not admissible to put interrogatories asking the names of persons for the mere purpose of getting the names of the witnesses whom the other party is going to call at the trial. It is admitted that there is a limitation to the right of administering interrogatories of this kind. In my opinion, where a party to an action is asking for the names of persons who will be witnesses for his opponent, it lies on him to shew that it is necessary for him to ask their names for the purpose of establishing some material fact, not necessarily a fact directly in issue, but some fact that is material to the proof of his case."

Judgment

Nothing of that kind is sought by the interrogatory before me: ships are not witnesses, and what is desired is in substance nothing more than "particulars of the specific occasions" upon which certain vessels deviated from their voyages from the neighbouring ports of Puget Sound so as to establish the custom relied upon; nor does this infringe the further sound rule that one party cannot be permitted to "see the brief of the other side in order to know exactly what they are going to produce," in other words, discover the details of the evidence—*Benlow* v. *Low* (1880), 16 Ch. D. 93, 95, 98; and see also *Osram Lamp Works, Limited* v. *Gabriel Lamp Company* (1914), 2 Ch. 129.

Upon the whole circumstances of the case I am of opinion

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that it is both reasonable and just that the interrogatory be allowed.

I have not overlooked the submission that it may not be easy or convenient for the defendant's owners who are said to be in Norway, to obtain the information in support of the very broad defence they have elected to set up, but that inconvenience is of their own making and cannot, from any aspect, debar the plaintiffs from their right to be put in a position to meet the said plea; and fortunately the means of communication of all kinds between this port and Puget Sound are frequent and rapid, so that the inconvenience may not be so great as is at present anticipated.

Application granted.

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REX v. MAYALL

Criminal law—Customs—Smuggling—Liquor found in captain's room on steamship—R.S.C. 1906, Cap. 48, Secs. 20, 116, 190 and 206—Can. Stats. 1925, Cap. 39, Sec. 1.

To constitute the offence of "smuggling or clandestinely introducing into Canada any goods subject to duty under the value of two hundred dollars" under section 206 of the Customs Act, it is not enough that the party charged had such goods in his cabin on board a boat docked in Vancouver Harbour, it must be shewn that the accused intended to defraud the revenue and had actually landed or made an attempt to land the goods for that purpose.

Two days after the Empress of Canada (a steamship coming from Japan) docked in Vancouver harbour, revenue officers found a small quantity of Scotch whisky and gin in the drawers of the Captain's cabin. A charge preferred against the captain with unlawfully smuggling said goods into Canada contrary to section 206 of the Customs Act was dismissed.

Held, on appeal, affirming the decision of the magistrate that the Act is manifestly intended to apply to goods which are going to be landed and distributed throughout the country and has no application to goods intended for exclusive use on board the vessel.

APPEAL by the Crown to the County Court of Vancouver

Statement

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Statement

from the decision of the police magistrate dismissing a charge against Captain Mayall of unlawfully smuggling into Canada a quantity of whisky and gin in bottles contrary to the provisions of section 206(*a*) of the Customs Act as re-enacted by section 1, chapter 36, of 1925. The facts are that the Empress of Canada (of which the accused Captain M. D. J. Mayall was master) arrived in Vancouver on the 8th of February, 1926. On the 11th of February following, while Captain Mayall was on shore, certain officers of the customs force made a search of the ship. The captain's cabin was locked but his cabin boy furnished the officers with a key. They entered the cabin and searched the drawers which were all unlocked and found some bottles of Scotch whisky and gin which they seized and took ashore. The steamship sailed without any further action being taken but on its return an information was laid against the captain as above stated. The appeal was argued at Vancouver before CAYLEY, Co. J. on the 10th of May, 1926.

Brown, K.C., for the Crown: The case is based on the interpretation of section 116 of the Customs Act. The liquor arrived within the Port of Vancouver on board the Empress of Canada and not having been entered upon the ship's manifest or otherwise reported as required by the Customs Act, the owner of the goods thus found is *ipso facto* guilty of smuggling.

Argument

F. G. T. Lucas, for accused: There was no importation of goods nor intended importation of the goods. Section 116 of the Customs Act does not apply to goods concerning which there was no intention to import into Canada in the usual course of business, that is to say, by actual landing from the ship at a port of entry: see *Canada Sugar Refining Company* v. *Reginam* (1898), A.C. 735. In order to constitute the offence or crime of smuggling it is necessary for the prosecution to prove an intent or *mens rea*. For the definition of smuggling see Halsbury's Laws of England, Vol. 9, p. 522; *Frailey* v. *Charlton* (1920), 1 K.B. 147.

Judgment

CAYLEY, Co. J.: Circumstances in a case like this surrounding the action which is complained of should always be gone

into. The party before the Court spends most of his life on board his boat, it is a second home to him and he lives in his cabin and necessarily such objects as contribute to his convenience or comfort or as in this case made free to friends, passengers and so forth on his boat, there must be many occasions upon which an officer of a boat will have dutiable goods in his cabin there for the purposes I have mentioned, without it being supposed for a moment that he is engaged in the smuggling business. Smuggling, after all, has a nasty sound to it. It means, in effect, that the man is trying to defraud the revenue, knowingly and wilfully, and the laws are stringent enough in regard to such infractions without trying to extend them to cover a case where no intention whatever is shewn or presumed or suspected of trying to land goods. The cases are very indefinite in regard to when duty becomes payable on goods. They generally content themselves with saying "either land or come into port" meaning, I presume, that the terms are interchangeable, but if coming into port means the same thing as "to land," why, then one must come to the conclusion that no smuggling is contemplated where it is never intended to land the goods. The reason why I point this out is that in the case of *Frailey* v. *Charlton,* which has been cited to me the words are used interchangeably. *Frailey* v. *Charlton* is a cause decided in 1920 (1 K.B. 147), and the language used there by the judges make it evident they consider the act of importing or bringing into the United Kingdom any prohibited goods to be "discharging from the ship on to the shore." We find the same thing in the other case cited to me, *Canada Sugar Refining Company* v. *Reginam* (1898), A.C. 735. There the actual words are used by one of the judges and the words are to be found in the language of Lord Davey on p. 740, where it says,—

Judgment

"it was contended that the goods were not imported within the meaning of the Tariff Act until they were landed or at any rate arrived within the limits of the Port of Montreal,"

shewing that in the opinion of Lord Davey there might be a difference between the two, but which meaning was to prevail is not apparent from the Act, and that I find is the case in the present Act. It is not clear from the Act that duty was due *ipso facto* as soon as the vessel entered the three mile limit,

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which is practically the contention in this case. And even if it were to be interpreted as strictly as that it would not make very much difference in the case before me where there is nothing more to be imputed to the party who is charged than a laxity which might easily have been dealt with in the spirit indicated by section 190 of the Customs Act, "if, after a master of a vessel has made his report inwards, any goods are found on board of such vessel or landed therefrom, which have not been reported, such goods shall be seized and forfeited, unless it appears that there was no fraudulent intention, in which case the master shall be allowed to amend his report." That, I take it, is the spirit in which an action of this kind should have been considered. It may be possible at this time that certain customs investigations which are going on at Ottawa made it necessary, politically, to press certain actions which otherwise would never have been brought at all. That is no reason why a person who seems to be perfectly innocent of any intention to defraud the revenue or to import into Canada or to smuggle goods of the nature in question here should be penalized.

Judgment

Counsel for the Crown has read to me the dictionary meaning of the word "import." "Import" means "to carry into a country from abroad." I cannot interpret a bottle of whisky in a staff captain's cabin in a vessel lying at a wharf as disclosing any intention to carry into Canada goods from abroad when I consider that that staff captain spends most of his time in that cabin or otherwise in carrying on the duties of his position. "Smuggling" has also been defined to me by counsel for the Crown as "carrying into a country without paying duties." Again I do not see that having a bottle of whisky in your cabin can be interpreted reasonably as "carrying into a country a bottle of whisky without paying duties."

It has been said that there was no *mens rea* necessary to be shewn by the Crown. I think there is. These bottles of whisky were in an open drawer in the accused's cabin. There was no attempt whatever to conceal them from any person who under the authority of the law or under any other right, such as his cabin boy's right, might enter the cabin. I am not going to assert that there may not be a certain laxity on the part of

officers and members of a crew in Trans-Pacific vessels when they arrive at the Port of Vancouver as I imagine that such laxity may occur in every port in the world on every line. It is possible that these bottles would not have been unreported. It would have been safer and more cautious if they had been, but I cannot rid my mind of the suspicion that the customs officers were perfectly well aware that the officers of any Trans-Pacific boat are liable to have liquor in their cabins. If they had at any time previously thought it necessary to report that or to investigate or to search they would have done so, and not having done so in the past the laxity would be continued without any intention whatever on the part of those guilty of it of breaking the revenue laws of the country.

I agree with the police magistrate in his conclusions in regard to the interpretation of the Act generally. The Act generally speaks of landing goods and is manifestly intended to apply in all to the goods which are going to be landed and distributed throughout the country. If the Act has any other intention than that it ought to express it. Section 20 of the Act makes it abundantly clear that this landing—this section reads as follows:

Judgment

"If any goods are brought in any decked vessel, from any place out of Canada to any port of entry therein, and not landed, but it is intended to convey such goods to some other port in Canada in the same vessel there to be landed, the duty shall not be paid or the entry completed at the first port, but at the port where the goods are to be landed, and to which they shall be conveyed accordingly under such regulations, and with such security or precautions for compliance with the requirements of this Act, as the Governor in Council, from time to time, directs."

Clearly, if the other sections of the Customs Act are to be read in the light of this section landing the goods is the essence of the Act and I should interpret it to be so in all smuggling cases. I think the police magistrate must have had that section in mind when he was giving his judgment.

The appeal is dismissed. Whether I can give costs or not is another question. Counsel can speak to that on another occasion. In regard to the liquor; I have no authority to do anything except to deliver it to the customs and I think it should be returned to the cabin where it was taken from.

Appeal dismissed.

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March. 18.

MORSE v. HURNDALL

MORSE v. HURNDALL.

Practice—Pleadings—Statement of claim—Amendment—Written agreement set up—Partnership—Accounting—R.S.B.C. 1924, Cap. 191, Secs. 3 and 4(c) (iv.).

The plaintiff brought action against the defendant for a balance due on money loaned. The evidence on discovery disclosed that the parties had entered into a written agreement with M. whereby they agreed to provide M. with capital up to $2,000 to carry on a lumber business on premises upon which M. had obtained a lease, and to provide him with sufficient logs to enable him to operate the mill at full capacity, M. in consideration therefor agreeing to pay the plaintiff and defendant two-thirds of the net profits. The plaintiff then moved and obtained an order to amend the statement of claim by setting up alternatively that the plaintiff and defendant carried on a partnership with the object of financing M. in the operation of a sawmill and for an accounting of the partnership dealings.

Held, on appeal, reversing the decision of HUNTER, C.J.B.C. (MARTIN and GALLIHER, JJ.A. dissenting), that the agreement only defined the rights of plaintiff and defendant as against M. and M.'s rights against them. There was no mutual undertakings as between themselves and no partnership. The order should therefore be set aside as embarrassing. The plaintiff should, however, have leave to make a proper amendment and the defendant should have leave to plead in answer to it.

APPEAL by defendant from an order of HUNTER, C.J.B.C. of the 12th of February, 1926. The plaintiff claimed that between the months of January and August, 1924, he had advanced the defendant by way of loans various sums amounting in all to $2,882.84, that he had received in repayment various sums from the defendant amounting in all to $1,474.82 and that there was a balance due to him of $1,408.02. Upon the examination of the plaintiff and the defendant for discovery it appeared that in November, 1923, they had entered into a written agreement with one William C. McClellan who had acquired a lease from the Pacific Lumber and Trading Company Limited of its mill and other buildings, machinery and equipment on its premises in Vancouver, to finance him by lending him $2,000 and providing him with sufficient logs to enable

Statement

him to operate the mill to full capacity, McClellan agreeing to pay them two-thirds of the profits of the mill business. The plaintiff then obtained an order allowing him to amend his statement of claim by adding:

"(5) Alternatively the plaintiff claims that from about the 19th of November, 1923, the plaintiff and defendant carried on a partnership business with the object of financing one William C. McClellan in the operation of a sawmill at the said City of Vancouver under a certain agreement of co-partnership in writing executed by the parties thereto on or about said 19th November, 1923. The said operations have since ceased and the partnership has expired."

And by claiming in the alternative:

Statement

"(a) For an accounting of the partnership dealings and transactions referred to in paragraph 5 hereof between the plaintiff and defendant, and a direction that the affairs and business of the said partnership be wound up and settled under the directions of this Honourable Court;

"(b) For the purpose aforesaid that all proper directions be given and accounts taken."

The appeal was argued at Vancouver on the 17th of March, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Wood, for appellant: The amendment allowed creates an entirely different cause of action. These two parties were joint adventurers with McClellan in the mill business, but this does not constitute a partnership between them: see sections 3 and 4(*c*) (iv.) of the Partnership Act. They must be carrying on business with a view to profit: see *Hallvorson* v. *Bowes* (1912), 2 W.W.R. 586 at p. 590; *Pooley* v. *Driver* (1876), 5 Ch. D. 458 at p. 472. On the subject of agency see Halsbury's Laws of England, Vol. 22, p. 24; *Hickman* v. *Cox* (1856), 18 C.B. 617; Lindley on Partnership, 9th Ed., 57; *Horne* v. *Gordon* (1909), 42 S.C.R. 240.

Argument

Mayers, for respondent: Little attention is paid to pleadings now. The question of whether there was a partnership can be argued and decided at the trial. There is simply the agreement to consider: see *Bushby* v. *Tanner* (1924), 34 B.C. 270.

Wood, replied.

Cur. adv. vult.

18th March, 1926.

MACDONALD, C.J.A.

MACDONALD, C.J.A. (oral): The order appealed from was a

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Chamber order allowing an amendment of the statement of claim by pleading in the alternative as follows: [already set out in statement].

In that agreement, there is no mutual undertakings between the plaintiff and defendant at all. They were not defining their own rights of partnership or otherwise; they were defining their rights against McClellan and McClellan's rights against them. So that although plaintiff alleges a partnership under that agreement I fail to find one. I think, therefore, the order should be set aside as embarrassing; the learned judge should have dismissed the application. I think, however, it is a proper case for an amendment if the plaintiff desires to allege a verbal partnership agreement. In allowing the appeal, and in setting aside the order below, both with costs, I would give leave to the plaintiff to make any proper amendment and to the defendant to plead in answer to it.

MACDONALD, C.J.A.

MARTIN, J.A. (oral): This is an appeal from an order made by the learned judge below, Chief Justice HUNTER, in Chambers, whereby he allowed the plaintiff to amend by setting up a partnership agreement. Now, of course, looking at an amendment of that description the first thing one has to bear in mind is this, that the allegations set up are not in issue at all. No question of fact arises and we must then look solely to the pleadings to see what the cause of action is that they bring forward. Now, the cause of action that was so brought forward before the learned judge below is this: "The plaintiff claims that from about the 19th of November, 1923, the plaintiff and defendant carried on a partnership business with the object of financing one W. C. McClellan in the operation of a sawmill at the said City of Vancouver. . . ." I pause here for a moment, because it can not be said that is, in itself, not a complete allegation, from any aspect whatever, of a cause of action; a partnership carried on between the two parties, *i.e.*, for the definite and special purpose of financing another person in operating a sawmill. I do not suppose anyone would say that is not a perfectly sound cause of action, from any aspect whatever. How is that nullified and reduced so that it becomes

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embarrassing? It is suggested that these words which follow on have that effect:

"Under a certain agreement of co-partnership in writing executed by the parties hereto on or about the said 19th of November, 1923."

Now, that, as I regard it, is simply one thing, and one thing only, *viz.*, that these parties, the plaintiff and defendant, the sole members of this first and bi-partite partnership, entered into a partnership, not in writing. There is no allegation it is in writing and there is nothing to compel the plaintiff to allege that the partnership is verbal or in writing. That is a matter for particulars later on to define, and all that is stated here is this, that it is descriptive of the enterprise to which this bi-partite agreement was directed, "under a certain agreement of co-partnership in writing executed by the parties thereto," *i.e.*, an agreement with an additional person, thereby forming a tri-partite partnership, and we are now called upon to look to that second partnership agreement, the co-partnership agreement, and it is clearly one between three parties, a tri-partite agreement for all three of them to operate a sawmill in co-partnership. Let us suppose, for a moment, that was in fact an entirely erroneous allegation and there was not a co-partnership at all; but if so that is only a question for proof. Lord Justice Bramwell said in *Turquand* v. *Fearon* (1879), 40 L.T. 543 at p. 544, and Lord Justice Thesiger agreed:

MARTIN, J.A.

"In my opinion there is really no pretence for an appeal on the grounds put forward here. It comes to this, that because a man makes an untrue statement, or what is supposed to be an untrue statement, in his pleadings, that statement is to be struck out as embarrassing. His remedy is clearly to take issue upon it."

And Lord Justice Thesiger points out:

"Now, an agreement is not, strictly speaking, a fact; it is an inference of law from facts."

We have it, therefore, here, in the clearest possible language that a bi-partite partnership is set up for the purpose of carrying out as between two persons a larger enterprise which they, with another person, had entered upon. With all respect, I cannot see from any point of view how anybody is embarrassed by such a statement. As I say, supposing that tri-partite agreement turned out to be nothing at all, and no written agreement was in existence, and no partnership agreement, but only one

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between these two parties to the special agreement, and ten people, if you like, instead of two, that would not affect the matter at all because it would be an immaterial allegation. But even if it was a material allegation, as the Court of Appeal decided in *Turquand* v. *Fearon* it is not to be struck out as embarrassing but left upon the record as a question for ultimate proof.

Then there is another matter. Even supposing there should be any doubt upon the point—and that there is doubt upon it will be soon made manifest (because I understand one, at least, of my brothers agrees with me and the learned judge below appealed from, whose judgment must not be lightly set aside in a case of this kind) then we have a question as to whether or no any embarrassment has actually occurred, seeing that three judges take one view and three another. Lord Justice Pickford in the *Mayor, &c., of City of London* v. *Horner* (1914), 111 L.T. 512 at p. 514, deals with a situation of that kind when he says:

"In order that allegations should be struck out from a defence upon that ground [of embarrassment], it seems to me that their irrelevancy must be quite clear and, so to speak, apparent at the first glance."

MARTIN, J.A.

The only thing "apparent at the first glance" here is that three judges view this matter one way and three others view it another. We have, then, fortunately, a guide from the very highest source as to what ought to be done in a case of that kind in *Russell* v. *Stubbs, Ld.* (1913), 2 K.B. 200, n., a decision of the House of Lords on an appeal from the Court below. The first request was that certain pleadings should be struck out as tending to embarrass and prejudice the fair trial of the action, and as regards that application the Earl of Halsbury, at p. 206 said this (and Lord James, I may say, and Lord Robertson and Lord Collins, concurred in it, and I do not suppose anybody would suggest it would be easy to find a more safe guide for us to follow than such illustrious judges) and Lord Loreburn also took the same view, so it was the unanimous decision of the five members of the House of Lords:

"I for myself rather deprecate any sort of iron rule which prevents a learned judge doing what he may think to be justice in a particular case by any set of rules which are supposed to have been agreed to. That which is within his discretion and which is essentially a matter applicable

to the particular case in hand must be looked to by him. It has been looked to by the very learned judges whose judgment we have before us on this occasion, and I for myself certainly should not think of interfering with the discretion they have exercised."

Therefore I would dismiss the appeal.

GALLIHER, J.A. (oral): I am in accord with my brother MARTIN.

MCPHILLIPS, J.A. (oral): I would allow the appeal. I think one of the difficulties found in this case was the procedure adopted. It was quite novel to me, when you move for an amendment to pleadings in Chambers that you should in your Chamber summons set out in concrete form the amendment you propose to make and that the order itself then, which is the order under appeal here, should in concrete form set forth the amendment. That is not in the interest of the due administration of justice, because it ties the hands of the learned judge at the trial. If any exception is taken to this, why, of course, he will be immediately affected by the fact that the Court of Appeal has given its seal of authority to this pleading. That should not be. The ordinary way to get an amendment is upon facts which will appeal to the judge in Chambers. Then leave will be granted, but the leave is generally granted in these terms, that the plaintiff or defendant, as it may be, will have leave to amend as he may be advised. We well know what that means. It means counsel will advise on the pleading. Then the pleading, in due course, comes in and if, in this particular case, it had come in in this way as indicated by the learned counsel for the appellant, there would not be the embarrassment which exists here. Supposing then, the pleading as amended did not set up a cause of action, the point of law could be taken that the plaintiff in his pleading does not shew any cause of action and you could go down upon the point of law and determine that question. But would it be open if this Court of Appeal puts its seal of authority upon the pleading which is set forth in the order under appeal from the Chief Justice of the Supreme Court? The answer of the judge below would be "I am precluded; this pleading must be taken to be correct; must be deemed to be in proper form, must be held to be sufficient and

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constitutes a sufficient cause of action." I cannot, with the closest analysis that I can give to it, refrain from saying that written right across this pleading is the statement that there is a partnership between the plaintiff and the defendant and that it is evidenced by the agreement referred to because it reads "Under a certain agreement of co-partnership in writing executed by the parties hereto"—that must be the plaintiff and defendant—"on or about the said 19th of November, 1923. The said operations have since ceased and the partnership has expired."

Now, when we turn to the writing, the writing in my opinion does not establish anything which would indicate that there was a partnership created, and if there was no partnership created, then this amended pleading, in the form in which it is, is wrong, and is unquestionably embarrassing. The pleading, as I indicated at the start, should not come here in this form at all. It should come in in the ordinary course, after leave was granted to make the amendment. Then there is no difficulty in the Court below, and the learned trial judge is at large and is not handicapped as he otherwise would be, by the decision of this Court, which is absolutely binding upon him. In the Court below the facts would be adduced, and the facts being adduced, even then the case is not entirely in the hands of the parties; the ends of justice are not really carried out by a war of manœuvre between counsel. No, the ends of justice are only sufficiently and properly carried out when the learned judge himself applies his mind to the facts and gives relief if relief is possible under our jurisprudence, or, if a well founded defence is made out then the action would stand dismissed, the judge should not be incommoded by an order such as I find here.

MCPHILLIPS, J.A.

I have no hesitation in considering that this difficulty was brought about in the main by wrong procedure. Now, with regard to the lax pleadings which exist today I only call attention to what Lord Parker of Waddington said in *Banbury* v. *Bank of Montreal* (1918), A.C. 626. Lawyers may differ as to the best form of procedure. I happened to be trained under a practice of strict accuracy in pleading and precise legal statement so much so that at times it was a war of manœuvre and it was a question of generalship and the greatest general succeeded, the

most astute lawyer prevailed. The action, if tried out, might have disclosed merits and might have been established. In this war of manœuvre a demurrer would be filed and the action in many instances would be disposed of in that way. Now, according to the wisdom of Parliament, first in England, the Judicature Act was introduced and the litigants themselves may conduct their own cases if they choose. And all that they are called upon to set forth in their pleadings is a statement of the facts, not evidence, but just a statement of the facts upon which reliance is placed. The trial judge is entitled to make all proper amendments necessary in the interests of justice, but as Lord Parker of Waddington pointed out, it is a well-known fact now that cases go down to trial and very often the pleadings are not read or even referred to, the evidence is adduced and upon that evidence, if the case is made out, judgment follows, and if it is necessary to make any amendment of the pleadings to conform to the evidence which establishes a cause of action, we have intimated that there ought to be an actual amendment in the Court below and counsel should be required to hand it in so it should be a matter of record when it comes to us; sometimes this is not done.

MCPHILLIPS, J.A.

I, therefore, have no hesitation whatever in allowing the appeal. I cannot approve the method of making an amendment to pleadings as carried out in the present case. It constitutes embarrassment.

MACDONALD, J.A.

MACDONALD, J.A. (oral): I do not find in the clause referred to, the allegation of partnership relied upon between the plaintiff and defendant, either verbally or in writing, or partly verbally and partly in writing, and I therefore allow the appeal with liberty to file a proper amendment.

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

Solicitor for appellant: *H. S. Wood.*
Solicitors for respondent: *Wilson & Jamieson.*

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1926

April 14.

GARRISON v. THOMSEN & CLARKE TIMBER COMPANY, LIMITED.

GARRISON v. THOMSEN & CLARKE TIMBER CO.

Company—Contract—Made by president and general manager—Authority—Renunciation before breach—Adoption of by other party—Right to damages.

The plaintiff entered into a verbal agreement with E. (the president and general manager of the defendant Company) in the summer of 1923 whereby he agreed to remove the marketable poles from the company's limits, the company to haul the poles to salt water on its logging-trains, and the company was to receive 20 per cent. of the price received by the plaintiff for the poles. The agreement was reduced to writing and signed by E. and the plaintiff on the 1st of November, 1923. Some poles were cut before that date but none were removed until after the 10th of May, 1924, upon which date the Company wrote the plaintiff renouncing the contract on the ground that E. had no authority to make it. Up to this time the plaintiff had cleared roads and cut a quantity of logs near them. He did not abandon his rights under the agreement with E. but in order to cut losses entered into a new agreement with the Company whereby he should cut the poles near his constructed roads and the Company should haul the poles and he should pay $1 per pole for those removed.

Held, that E. had authority to make the contract and that the plaintiff's action in entering into a new contract as to the cutting and removal of the poles did not preclude him from an action for damages for breach of the first contract.

Statement

ACTION for damages for breach of contract. The facts are set out in the reasons for judgment. Tried by MCDONALD, J. at Vancouver on the 7th of April, 1926.

Walkem, for plaintiff.
Mayers, and *J. H. Lawson*, for defendant.

14th April, 1926.

Judgment

MCDONALD, J.: The defendant Company was incorporated on July 9th, 1923, under the name Esary Timber Company Limited which name was afterwards changed to its present name in or about January, 1924. The directors were James D. Esary, president; M. Thomsen, vice-president, and H. B.

Clarke, secretary-treasurer. The principal object of the Company was to acquire certain extensive timber limits on Vancouver Island, and to carry on logging operations thereon. On 13th August, 1923, Esary, who had purchased the limits in trust for the Company, and had transferred them to the Company, was appointed manager and thenceforth, until he sold his shares on or about November 15th, 1923, to Thomsen & Clarke, he was entrusted with the management and control of the logging operations of the Company on Vancouver Island, the other two directors living in Seattle, Washington, and taking no active part in the operations, they having taken shares in the Company as an investment and not intending to take part in the details of management. Sometime in the summer of 1923 Esary made a verbal contract with the plaintiff (his nephew) whereby the plaintiff agreed to remove the marketable poles from the limits, the Company to haul the poles to salt water on its logging-trains and to receive in payment for the poles 20 per cent. of the price received by the plaintiff on sales of poles made by him. This agreement was reduced to writing and signed by the plaintiff and by Esary as president of the Company on November 1st, 1923. It was not under seal. Some poles were cut prior to and some after November 1st, 1923, but none were removed or shipped until after May 10th, 1924. On the latter date the Company wrote the plaintiff a letter definitely renouncing the contract, and declining to be bound thereby, taking the ground that Esary had no authority to make it, and this action is brought for damages for such breach.

Judgment

The first question to be decided is, whether or not Esary had such authority. In my opinion, he had. The taking out of the poles in advance of the larger logging operations was a usual course to pursue. Sometimes they are taken out by the logging Company and sometimes by a pole-contractor, but in any event the taking of them out is merely incidental to the logging operations. We have it in evidence that of a total investment of some $2,000,000 the Company might expect to receive some $126,000 for its poles. It is admitted that Esary's fellow directors knew he had made a contract with the plaintiff to remove the poles, but there is a conflict of evidence as to whether they knew the

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GARRISON v. THOMSEN & CLARKE TIMBER CO.

exact terms of that contract prior to January, 1924. Inasmuch as the plaintiff knew of no exceeding by Esary of his authority (if such there was), the Company would still appear to be bound: *Thompson* v. *Brantford Electric, Etc., Co.* (1898), 25 A.R. 340.

In any event, under the articles of association of the Company, Esary as a director might have had the authority, and the Company under circumstances such as we have here would be bound by a contract made by him on its behalf. See the authorities cited by IRVING, J.A. in *Doctor* v. *People's Trust Co.* (1913), 18 B.C. 382. It was also contended that the contract was procured by fraud but there is absolutely no evidence of this. It follows that, in my opinion, the Company was wrong in renouncing its contract in May, 1924. But it is contended that even if this be so, still no action lies, inasmuch as the plaintiff acquiesced in the breach and chose to abandon his contract; and in the alternative that the breach (if any) was anticipatory and the plaintiff in order to found an action must have agreed to the contract being put an end to, "subject to the retention by him of his right to bring an action in respect of such wrongful rescission," as it is put by Lord Esher, M.R. in *Johnstone* v. *Milling* (1886), 16 Q.B.D. 460 at p. 467. It is contended that if the plaintiff intended to claim damages he ought to have taken the position taken by the plaintiffs in *Clausen* v. *Canada Timber and Lands Ltd.* (1923), 3 W.W.R. 1072. In my view that is just what he did do. Of course, he did not write a letter; but he found himself in this position. He had a quantity of poles cut and some roads made adjacent to other poles. On ascertaining from the Company that it intended to maintain the position it had taken he accepted the inevitable. He did not abandon his rights but he made a new arrangement, with a view to minimizing his damages, whereby it was agreed that he should cut the poles near his constructed roads and that the Company would haul the poles already cut and those to be so cut and that he should pay not 20 per cent. of his selling price, as provided by his contract, but $1 per pole for the poles so removed. After considerable bickering and bargaining the Company paid the cost of hauling part of these

Judgment

poles, while as to a large quantity the plaintiff agreed to pay and did pay such costs though his contract provided that the costs of hauling should be borne by the Company. In my view though the plaintiff wrote no letter as the plaintiff's solicitor did in *Clausen's* case, *supra,* he did

"adopt [the] renunciation of the contract by so acting upon it as in effect to declare that he too [treated] the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation":

see judgment of Lord Esher, M.R., *supra,* at p. 467.

Judgment

There will be judgment for the plaintiff with a reference to the registrar to ascertain the amount of the damages.

Judgment for plaintiff.

IN RE CHINESE IMMIGRATION ACT AND YOUNG SUE HING.

Immigration—Chinese woman seeking entry into Canada—Controller—Inquiry—Jurisdiction—Order for deportation—Appeal—Habeas corpus.

Where a person of Chinese origin applies for entry into Canada the authority of the official dealing with the question of immigration is absolute, subject to appeal under the Acts controlling immigration. The Court has no right to interfere with the acts of immigration officials refusing admission to Chinese who have not yet acquired a domicil in Canada.

APPLICATION for a writ of *habeas corpus.* The applicant, a Chinese woman, sought to enter Canada and the controller exercising his authority under section 10 of The Chinese Immigration Act, 1923, held an inquiry and ordered that she be deported. The facts are fully set out in the reasons for judgment. Heard by MACDONALD, J. in Chambers at Victoria on the 28th of April, 1926.

Statement

Stuart Henderson, and *T. M. Miller,* for the application.
Jackson, K.C., for the Crown.

MACDONALD, J. (In Chambers)

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IN RE CHINESE IMMIGRATION ACT AND YOUNG SUE HING

Judgment

MACDONALD, J.: Upon this application for *habeas corpus* it is quite apparent that, when the applicant sought to enter Canada, the controller, exercising his powers in the matter, utilized section 10 of The Chinese Immigration Act, 1923. He may have had also in mind, section 32. The result was, that having authority under said section 10, he held a preliminary hearing, and also held a subsequent hearing at which the applicant was represented by counsel and afforded every opportunity of shewing she had a right to enter Canada. No doubt the Criminal Code to some extent might have been applicable, as to the attempt to enter, being of a fraudulent nature; but even if it had not been, he would have complete authority to invoke the provisions of section 10, if the party seeking to enter Canada claimed that he or she was entitled to enter, on some other ground, not of a fraudulent nature. Upon the conclusion of the investigation he very properly intimated what his decision was—the applicant being represented by counsel—and such decision was that she should be deported. He also then made it plain to her counsel that she was at liberty to utilize the provisions of section 12 of this Chinese Immigration Act, by way of taking appeal from his decision. It is admitted an appeal was taken. The very basis of this application to the Court must be, that a decision in the appeal has been rendered, because if the decision of the minister has not yet been rendered, then there is no complaint to make as to detention, because the appeal launched has not been disposed of, and this Court would not undertake under such circumstances to interfere.

Speaking generally, I have given decisions and there are other decisions along the same lines, that when Chinese apply for entry into Canada, the authority of the official dealing with that question of immigration is absolute, subject to appeal under the Acts controlling such immigration. To my mind the Court has no right to interfere with the acts of immigration officials, who have refused admission to Chinese, who have not yet acquired a domicil in Canada, and entitled to the enjoyment of rights possessed by Canadian citizens.

It is worthy of note that under form B, of the general Immigration Act, the authorities have seen fit to carefully guard,

against any admission, that there is any right existing outside of the provisions of the Act, as to immigrants intending to enter Canada. And then, again, I notice that at the end of form B, page 40 of the compilation of the Immigration Act, it says, "If you claim to be a Canadian citizen or to have acquired Canadian domicil, you have the right to consult counsel and appeal to the Courts against deportation." It is to be noted that emphasis is laid upon the idea that it is only people who are Canadian citizens, or who have acquired Canadian domicil, who have this privilege. And then it goes on to say what redress is open to a party, who has not Canadian citizenship, *viz.*, he "may appeal to the minister of immigration and colonization against any decision of the Board of Inquiry or officer in charge whereby you are ordered to be deported unless such decision is based upon a certificate of the examining medical officer that you are affected with a loathsome disease or a disease which may become dangerous to the public health."

Following this procedure the Chinese get this privilege. If the decision of the controller is not satisfactory, as apparently it was not in this case, then the party complaining lodges his or her appeal, and there then is an appeal which is presented to the minister for decision.

Judgment

And again speaking generally, I think the policy is, that these controllers of immigration are appointed at important points throughout Canada, and vested with what we might term, judicial authority, to deal with questions which arise as to parties seeking to enter Canada. Then again, the trend of the legislation is, that if it be contended, that one of the controllers has acted improperly, there should be an appeal from his decision, as in this case, to the minister of immigration and not to the Courts.

Along the same lines, as indicating the manner in which the Privy Council has dealt with summary trials, and how a magistrate may be absolutely wrong in his decision, even to the extent that he may adjudicate without evidence, and still his decision is not capable of review, if acting within his jurisdiction—I refer to a portion of the well-known judgment in *Rex* v. *Nat Bell Liquors, Ld.* (1922), 2 A.C. 128 at p. 151:

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IN RE CHINESE IMMIGRATION ACT AND YOUNG SUE HING

"It has been said that the matter may be regarded as a question of jurisdiction, and that a justice who convicts without evidence is acting without jurisdiction to do so. Accordingly, want of essential evidence, if ascertained somehow, is on the same footing as want of qualification in the magistrate, and goes to the question of his right to enter on the case at all. Want of evidence on which to convict is the same as want of jurisdiction to take evidence at all. This, clearly, is erroneous. A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not. How a magistrate, who has acted within his jurisdiction up to the point at which the missing evidence should have been, but was not, given, can, thereafter, be said by a kind of relation back to have had no jurisdiction over the charge at all, it is hard to see."

Judgment

The judgment then proceeds to the same effect. I merely refer to this, to shew that, if in this case there was even what might appear to be on critical discussion, rather imperfect evidence, still the conclusion of the controller would not be subject to review, at any rate by the Court—it would of course be reviewable by the minister, who constitutes the Court, appointed for that purpose.

If time permits I might extend my remarks further, but I think it is unnecessary. The application is dismissed.

Application dismissed.

EVANS v. MARTYN.

MACDONALD, J.

1926

March 30.

EVANS v. MARTYN

Slander—Variance between words charged and proved—No amendment of pleading—Essential words—Clear proof required.

In an action for slander the plaintiff alleges that the defendant stated in the presence of W. and I. "that Evans is a damn thief. He stole the engine and I will get him in gaol for it." The evidence of W. was that the defendant referred to the plaintiff and his character in most opprobrious terms but there was nothing said that could have any reference to the stealing of an engine.

Held, that there was such variance between the words charged and those proved, that the plaintiff could not succeed.

The plaintiff further alleged that the defendant spoke and published, in the presence of B. the following words: "I have to have the engine and there is only one word to describe the keeping of Government property, and that is theft and if he [Evans] does not hand over the engine at once, I will have him arrested and you can tell Evans all I have said." In his evidence B. asserted, at the outset, that the defendant's conversation was practically as outlined in the statement of claim, but on cross-examination he waivered and only "thought" that the defendant mentioned an engine but was not sure.

Held, that clear proof of the essential words, constituting the slander should be afforded, and in view of the flat contradiction of the defendant, and the situation then existing between the parties, there is not the requisite proof to support this paragraph of the statement of claim.

ACTION for slander. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 18th of March, 1926. Statement

Evans, and *A. H. Miller*, for plaintiff.
Jamieson, for defendant.

30th March, 1926.

MACDONALD, J.: Plaintiff complains that he was defamed by the defendant upon two occasions and seeks in this action of slander to obtain vindication of his character.

He alleges that, on the 27th of June, 1925, the defendant stated, in the presence of J. B. Weir and W. G. Iverson "that Evans [meaning the plaintiff] is a damn thief. He stole the engine and I will get him in gaol for it." Weir was called, in Judgment

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support of this statement, and failed to prove that the defendant had spoken these words. There is discrepancy as to when a certain conversation took place between the defendant and Weir, still, I have no doubt that both had in mind the same conversation, when giving their evidence. Further, I am satisfied that the defendant referred to the plaintiff and his character in such opprobrious terms as to impress his remarks upon Weir, who is a disinterested person. This is emphasized by a statement of Weir that he considered such reference to the defendant as unjustified. The difficulty arises from the fact that any words spoken by the defendant to Weir, at the time, did not, and could not, under the then existing circumstances, have had any reference to the stealing of an engine. Weir was clear on this point. He stated that the right of the plaintiff to exercise and hold a lien upon such engine had been already conceded by the defendant, as industrial commissioner, so it was no longer a matter of dispute. Defendant, at the close of plaintiff's case, moved for a dismissal of the action. There was no application made to amend the statement of claim to conform with the evidence. It was not even suggested that such a course as amendment might be adopted upon any terms.

Judgment

The plaintiff presumably, with the knowledge of the evidence at his disposal to support his claim, did not frame his pleadings in accordance with the evidence adduced at the trial. The effect of the plaintiff's charge is, that the defendant said, in the presence of two persons, only one of whom was called at the trial, that the plaintiff was a thief, through having stolen an engine and the defendant would have him put in gaol on account of such theft. He thus restricted the slander and failed to support it in the evidence. If the evidence of Weir were accepted in its entirety there would, in my opinion, be such a substantial variance between the words charged and those proved, that the plaintiff cannot succeed upon this branch of his case. The defendant was entitled to know the precise charge against him, as he could not shape his case until he knew: see Lord Coleridge, C.J. in *Harris* v. *Warre* (1879), 4 C.P.D. 125 at p. 128. When this requisite of precision is followed then defendant has a right to expect it will be borne out in the

evidence. The necessity of the proof afforded, thus adhering to the charge as alleged, as well as the result which ensues upon failure, are both fully discussed in Spencer Bower on Actionable Defamation, 2nd Ed., at pp. 182-4. An exemplification of such necessity and the strictness applied is shewn in *McNaught* v. *Allen* (1851), 8 U.C.Q.B. 304.

Then, in the second place, the plaintiff complains, that subsequently, on the 5th of August, 1925, the defendant spoke and published in the presence of William Beck the following words:

"I have to have the engine and there is only one word to describe the keeping of Government property and that is theft and if he [meaning the plaintiff] does not hand over the engine at once, I will have him arrested and you can tell Evans [meaning the plaintiff] all I have said."

Beck was called as a witness and lent support to this statement. Defendant admitted having had a conversation with Beck at Vancouver over the long distance telephone from Victoria but stated that it was later in the month. He definitely and categorically denied having made the statements referred to or even words to the like effect. Beck, in giving his evidence, had, at the outset, asserted that such conversation was practically, as outlined in the statement of claim, and that it referred particularly to an engine, as having been the subject of theft on the part of the plaintiff. Upon cross-examination he wavered on this point however, and only "thought" that the defendant mentioned an engine and he was not sure. He seemed to be in the frame of mind, referred to by Lord Abinger, C.B. in *Harrison* v. *Bevington* (1838), 8 Car. & P. 708 at p. 710, where he says, in an action of slander, you cannot have an "impression," as to the words complained of. Clear proof of the essential words, constituting the slander should be afforded and is not forthcoming. There is always the danger of words in a conversation being misunderstood or misconstrued and this danger is increased, where the conversation is by long distance telephone. The precise words complained of are material, not only as to shewing a cause of action, but so that they may be considered, in the light of evidence adduced, to support their utterance. It is not sufficient to give the substance or purport of the slander complained of. See Odgers on Libel and Slander, 5th Ed., 623. I do not think that in view of the flat contradic-

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tion of the defendant and the situation, then existing between the parties, as to the engine, that the plaintiff has given the requisite proof to support this paragraph of his statement of claim.

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Judgment

Referring generally, as to plaintiff's complaint of being defamed by defendant, I think it is a fair presumption that the plaintiff, feeling his position secure, as to being entitled to take and hold the engine, considered that he could successfully meet any allegation of stealing it. He thus, did not fear a plea of justification and felt warranted in bringing this action against defendant alleging that he had made statements, that plaintiff had stolen such machinery. Whether this be a proper conclusion or not, as to his feelings, it would appear so from his pleading. He has failed in proving that his complaint, as framed, was well founded. The result is that the action is dismissed with costs.

Action dismissed.

CAPTAIN J. A. CATES TUG AND WHARFAGE CO. LTD. v. THE FRANKLIN FIRE INSURANCE COMPANY.

MURPHY, J.

1926

March 12.

CAPTAIN J. A. CATES TUG AND WHARFAGE CO. v. FRANKLIN FIRE INS. CO.

Insurance, marine—Tug boat—Time policy, and disbursements and earning policy—Constructive total loss—Notice of abandonment—Acceptance of by underwriters—Evidence.

In marine insurance, underwriters, although insisting that they will not accept a preferred abandonment, will nevertheless be held to have accepted (a) if they do any act that alters the rights, the conditions and the interests of the owner; and (b) if they do any act which can only be justified under a right derived from abandonment.

ACTION to recover the amount of a time policy on the tug boat "Radius" for $24,000 and also of a disbursements and earning policy for $6,000. The facts are set out in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 17th of February to the 8th of March, 1926.

Statement

Griffin, and *Sidney Smith,* for plaintiff.
J. A. MacInnes, for defendant.

12th March, 1926.

MURPHY, J.: In the early morning of August 26th, 1925, the tug "Radius" owned by plaintiff Company was sunk in the First Narrows as a result of being in collision with the steamship Anyox. Defendant Company carried a time policy on the "Radius" for $24,000 and also a disbursements and earning policy for $6,000. The disbursement policy was payable only in the event of total loss actual or constructive. Captain Cates is the manager and virtual owner of plaintiff Company. I find that, on hearing the extent of the disaster, Cates decided to make no investigation but to abandon the "Radius" to the defendant Company as a constructive total loss. He did not, however, notify them of this intention on that day but wrote (Exhibit 12) informing them of the accident. During the course of the day he consulted his solicitor and, on August 27th sent defendant Company a formal notice of abandonment (Exhibit 14).

Judgment

MURPHY, J.

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CAPTAIN J. A. CATES TUG AND WHARFAGE CO. *v.* FRANKLIN FIRE INS. CO.

Agents of defendant Company have an office in Vancouver and letters written between the parties would be received in due course of mail at the latest the day after being mailed. Defendant's agents heard of the disaster early in the morning of August 26th either from Cates or through the newspapers. They took immediate steps by employing Capt. Cullington to look after the matter. I find they, at this time, intended that Cullington should act for both the owners and themselves. Cullington got in touch with The Vancouver Dredging & Salvage Co. Ltd., of which Cribb is manager. A conference took place at Cullington's office at which Cribb, Cullington, Cates and the captain and engineer of the "Radius" were present. It was decided to go to the First Narrows and investigate. Cates did not go on this trip. Whilst he assumed an attitude at this conference, consistent with his decision to abandon the vessel as a constructive total loss, he did not, I hold, make his position absolutely clear to Cullington.

On August 27th, defendant's agents wrote (Exhibit 13) to Cates in which they stated that Cullington was on the job on behalf of both parties. Cates did not reply owing to his having before its receipt mailed (Exhibit 8) his notice of abandonment.

Judgment

Exhibit 8 was not answered until September 2nd when defendant's agents wrote (Exhibit 15) declining to accept abandonment at this stage and stating their belief that the vessel was not a constructive total loss. In the interval the Salvage Company of which Cribb is manager, on instructions from Capt. Cullington, had located and partially raised the "Radius" and it was clear that barring accidents she would shortly be beached. She was in fact beached on September 2nd or 3rd, temporarily repaired and by Cullington's instructions towed to plaintiff's wharf. One of plaintiff's tugs was used to do this towing. The vessel was then hauled out on the ways for inspection. On September 4th, a conference took place between Macaulay of the firm of defendant's agents, Cullington and Cates at Macaulay's office. The object was to induce Cates to consent to the taking down of the engine to ascertain what damage it had sustained. Cates rigidly adhered to the position that the vessel was the property of the insurers by virtue of his abandonment of her

and refused to have anything to do with the proposed dismantling. The conference was, therefore, adjourned to September 8th. On that day a further discussion between the same parties occurred following which Cullington employed the firm of Lucas & Ferrier to partially take down the engine. There is a conflict of evidence as to whether Cates modified his attitude of September 4th or not. In my view of the case, it is not necessary to determine this point further than to find as I do find that Macaulay and Cullington clearly understood that Cates was persisting in his abandonment of the vessel. It was equally clear to Cates that defendant was persisting in its refusal to accept the abandonment. Some time previous to the September 8th conference, Cribb, in consequence of rumours he had heard, stated to Cullington that he had heard the "Radius" was for sale and requested that if such were the case his firm be given a chance to bid for her purchase. Cullington replied that he did not think she was for sale but if she should be he would give Cribb's Company the desired opportunity. Capt. Cullington died before the trial of the action. In some way, not clear to me on the evidence, it came about that Cribb, on behalf of his firm, did make a verbal offer of $12,500 for the "Radius" to Cullington. In this sum was included an amount of $6,500 due to Cribb's Company for their salvage operations by virtue of a contract made with them by Cullington. As stated, so far as I can make out, this verbal offer had been made to Cullington previous to the conference of September 8th in Macaulay's office. It was not, however, communicated to Cates then or at any other time until after this litigation was begun.

Judgment

Following the interview of September 8th this offer was communicated by Cullington to Macaulay. Macaulay instructed Cullington to have Cribb put same into writing. Cullington carried out Macaulay's instructions. In consequence Cribb wrote and forwarded to Cullington (Exhibit 26) being an offer of $12,500 (from which the $6,500 salvage claim was to be deducted if the offer was accepted) "for the purchase of the wrecked tug-boat 'Radius.'" Exhibit 26 was written on September 8th. Cribb had to leave Vancouver some three weeks or so after this date. Before going, as the funds his Company

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CAPTAIN J. A. CATES TUG AND WHARFAGE CO. v. FRANKLIN FIRE INS. CO.

intended to use to buy the "Radius" in case their offer to purchase was accepted, had been diverted to other purposes he left instructions that a formal written withdrawal of said offer be sent to Cullington. This was accordingly done by Exhibit 50 dated October 7th. Exhibit 50 states that whilst the Vancouver Dredging & Salvage Co. Ltd. understand that their offer has been refused, they desire to have their withdrawal thereof a matter of record. It is clear, therefore, that the Salvage Company understood that it had been requested to make a *bona fide* offer to purchase and that after the lapse of a month from the time when it did make such offer it felt that it might still be bound by an acceptance thereof. I hold that Macaulay's request for this bid must be held to have been made exclusively on behalf of defendant Company for when he made it he knew Cates was persisting in his attitude that he had abandoned the vessel. That position Cates definitely assumed and communicated to defendant's agents by his letter of August 27th and I hold that he did nothing at any time thereafter that could lead said agents to believe he had varied therefrom. Indeed I do not understand it to be urged that Macaulay, in making his request was in any way acting for Cates. Such contention could not well be made in face of the fact that such offer was not communicated to plaintiff until after action brought. Macaulay explains that his object was not to offer the vessel for sale but to obtain evidence of her value in view of possible litigation involving the question of her constructive total loss. A perusal of Exhibit 26 and Exhibit 50 will shew that the Salvage Company did not so understand the situation. Further, it is to be observed that if such was his intention what was done did not carry out what he purposed. There is no evidence that Cullington in any way departed from Macaulay's instructions. The intention to obtain evidence would be implemented, not by requesting an offer to purchase the vessel but by asking the Salvage Company to value her as she was and, in doing so, to make their valuation from the standpoint of a prospective purchaser. Finally, in view of the decisions hereinafter referred to, I doubt that the Court can in a case, such as the one at Bar, receive evidence of intention to explain a clear cut act.

Judgment

Macaulay's instructions to Cullington, and the consequent coming into existence of Exhibit 26 and Exhibit 50 must, in my opinion, be held to constitute an act which can only be justified under a right derived from abandonment. If so, then I feel bound to hold that this is decisive evidence of acceptance of abandonment by defendant Company despite its disclaimer.

That underwriters although insisting that they will not accept a proffered abandonment, may so act that they will be held to have in fact accepted follows, in my opinion, from the law as laid down in *Shepherd* v. *Henderson* (1881), 7 App. Cas. 49, particularly at pp. 63-4 and *McLeod* v. *Insurance Co. of North America* (1901), 34 N.S.R. 88 at pp. 111, 112 and 113.

If I apprehend what is there stated aright, underwriters, although expressly refusing acceptance of abandonment, will nevertheless be held to have accepted first if they do any act that alters the rights, the conditions, and the interests of the owner—a principle of Admiralty law akin to the ordinary doctrine of estoppel—and second if they do any act which can only be justified under a right derived from abandonment. The facts herein I think fall within the second principle. It is true that the illustration given in the cases is that of selling the ship, but the second proposition is clearly laid down. I can see no difference in principle between selling a ship and requesting an offer for her purchase in such a way as convinces the person who, in response, makes a bid, that he will be bound to carry out the purchase if the bid is accepted. The one act, just as much as the other, can only be justified, given the facts as proven in this case, under a right derived from abandonment, for does not the solicitation and receipt of a *bona fide* bid to purchase necessarily imply power to make title, should the bid be accepted?

Judgment

Judgment for plaintiff for the amount of both the policies and for the moneys paid out by them to the workmen engaged on the "Radius" after she came to plaintiff's wharf.

Judgment for plaintiff.

MORRISON, J.

1926

May 12.

IN RE ELIZA JANE BULLEN, DECEASED.

Administration—Deceased domiciled in United States—Foreign executors—Attorney-in-fact appointed in British Columbia—Application for letters of administration—R.S.B.C. 1924, Cap. 5, Sec. 47.

IN RE ELIZA JANE BULLEN, DECEASED

Where the executors of a deceased person, domiciled in the United States, have appointed an attorney-in-fact within this Province with instructions to apply for letters of administration with will annexed, the petition will be granted in preference to leaving the estate within the Province in the hands of the official administrator.

PETITION for administration of the estate of Eliza Jane Bullen situate within the Province of British Columbia. Eliza Jane Bullen, late of the City of Dunkirk in the County of Chautauqua in the State of New York, U.S.A., died on the 26th of October, 1925, domiciled in the said State of New York.

Statement

Probate of her will was granted to Julia F. Gross and Kathryn Wheeler by the Surrogate Court of the said County of Chautauqua on the 11th of November, 1925. The petitioner, Alexis Martin was duly appointed the attorney of the said Julia F. Gross and Kathryn Wheeler under their hands and seals and was authorized by them to apply to the Court for letters of administration with the will annexed. Heard by MORRISON, J. at Victoria on the 12th of May, 1926.

Argument

Alexis Martin, in person, referred to rule 65 of Probate Rules, 1925, and *Re Lelaire* (1903), 9 B.C. 429.

O'Halloran, for Official Administrator, *contra*, referred to *In re F. H. Bates, Deceased* (1919), 27 B.C. 1.

Judgment

MORRISON, J.: Probate of the will of deceased was granted to Julia F. Gross and Kathryn Wheeler by the Surrogate Court of the County of Chautauqua in New York State and they have appointed the petitioner their attorney-in-fact with instructions to make this application. The official administrator opposes the application, but where duly appointed foreign executors have appointed an attorney-in-fact within the Province to manage such portion of the estate as is within the Province and have instructed him to petition for administration with the will annexed I think the wishes of those interested should be carried into effect and the petition should be granted in preference to action by the official administrator.

Petition granted.

SCOVIL v. LEWIS.

COURT OF APPEAL

1926

March 18.

SCOVIL v. LEWIS

Practice—Action for damages—Interlocutory judgment by default—Order setting aside—Affidavit in support—Non-disclosure of defence—Appeal—County Court Rules, Order IX., r. 9.

In an action in the County Court for damages resulting from a collision between automobiles the plaintiff entered interlocutory judgment in default of a dispute note being filed. The defendant then applied for and obtained an order setting aside the judgment, the defendant to be at liberty to enter a dispute note. The affidavit of defendant's solicitor in support of the application recited "that after going into the facts of this case fully with my client, the defendant, I verily believe and have so advised in my capacity as a solicitor, that he has a good defence to this action upon the merits."

Held, on appeal, reversing the order of GRANT, Co. J. that Order IX., r. 9 of the County Court Rules requires that the affidavit must disclose a defence on the merits; there must be something more than a mere statement that the party has a good defence on the merits. In this case there is simply the opinion of the solicitor that his client has a good defence on the merits which is not sufficient and the interlocutory judgment should be restored.

APPEAL by plaintiff from the order of GRANT, Co. J. of the 11th of January, 1926, vacating the interlocutory judgment entered in the action on the 7th of January, 1926. The action which was for $875 damages resulting from a collision between automobiles was commenced in the County Court on the 23rd of December, 1925. The plaint was served on the defendant on the 30th of December, and no dispute note being filed judgment was entered as stated. The application to set aside the judgment was supported by an affidavit of the solicitor, in which he stated that he had telephoned Mr. *Macdonald* a member of the firm acting as solicitors for the plaintiff, telling him he would accept service for the defendant, and Mr. *Macdonald* asked him to write a letter to his firm to that effect, in reply to which defendant's solicitor said it was hardly necessary; that on the 5th of January he was taken ill and did not arrive back to his office until the 7th of January when it was too late to file a dispute note; he further stated that after going into the facts

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of the case fully with his client he believed and advised his client that he had a good defence to the action on the merits.

The appeal was argued at Vancouver on the 18th of March, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. M. Macdonald, for appellant: Interlocutory judgment was signed, the defendant having failed to defend. The solicitor's affidavit was the only material before the Court and was on information and belief only: see *The King* v. *Licence Commissioners of Point Grey* (1913), 18 B.C. 648. On the sufficiency of the affidavit see *Meissenger* v. *Deuter* (1922), 2 W.W.R. 777; *Farden* v. *Richter* (1889), 23 Q.B.D. 124; *Chilliwack Evaporating & Packing Co.* v. *Chung* (1917), 25 B.C. 90; *Royal Bank* v. *Fullerton* (1912), 17 B.C. 11; *Klein* v. *Schile* (1921), 2 W.W.R. 78. Under Order IX., r. 9 he must disclose his defence: see *Stewart* v. *McMahon* (1908), 7 W.L.R. 643; *Jones* v. *Murray* (1908), 9 W.L.R. 204; C.E.D., Vol. 5, pp. 363-4. The affidavit is not sufficient.

Argument

J. A. MacInnes, for respondent: By the misfortune of the solicitor he was late in putting in a dispute note. The cases he referred to are all with reference to liquidated damages. For the purposes of opening I have disclosed a defence. We deny the fact of negligence. In any event there is inherent jurisdiction in the judge to carry out justice: see *Easefelt* v. *Houston and Johnson* (1911), 16 B.C. 353. On the question of lack of affidavit see *McCaul* v. *Christie* (1905), 15 Man. L.R. 358; *Moore* v. *Kennedy* (1898), 12 Man. L.R. 173; *Great West Land Co.* v. *Powell* (1919), 2 W.W.R. 78 at p. 79-80; *Gordon* v. *Violette* (1915), 9 W.W.R. 127; *Beale* v. *Macgregor* (1886), 2 T.L.R. 311.

Macdonald, in reply, referred to *Petty* v. *Daniel* (1886), 34 Ch. D. 172 and *Barker* v. *Jung* (1918), 26 B.C. 352.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal should be allowed. I would be in favour of allowing an indulgence which would result in the issue between parties being tried and the rights of the parties determined, but we have to pay some attention to the Rules of Court, otherwise we shall get into inextricable con-

fusion. Now, the motion at the time that it was made to the Court below was authorized by rule and that rule specifies upon what evidence it shall be supported, and the language of the rule, I think, clearly indicates what must be shewn on affidavit as to the merits of the case:

"Where a defendant has failed or neglected to file a dispute note, the judge may, upon an affidavit disclosing a defence upon the merits and satisfactorily explaining such failure or neglect, set aside the judgment and let in the defendant to defend."

What is made essential by that rule is an affidavit disclosing a defence upon the merits. We cannot overlook that and say that the learned judge must have had this or that before him. It has to be on affidavit. There is an appeal from the order to this Court and the affidavit must be before this Court, so that we shall be in like position to deal with it as was the judge below. The solicitor who makes the affidavit says:

"That after going into the facts of this case fully with my client, the defendant, I verily believe and have so advised in my capacity as a solicitor, that he has a good defence to this action upon the merits."

MACDONALD, C.J.A.

If you can call that disclosing a defence, the rule is practically idle since it discloses nothing. It is simply the opinion of the solicitor that his client has a good defence upon the merits. There were a number of cases cited to us, some of them very authoritative cases in which the judges, the majority of the judges, at all events, have held very clearly that there must be something more than a mere statement that a party has a good defence upon the merits.

The question was raised by Mr. *MacInnes* that because this was an action for damages a plea of "not guilty" would be a good plea. No doubt in the proper case a plea of "not guilty" is a good plea, but it does not disclose the merits. The appeal is allowed. Costs to follow the event. And the order appealed from is set aside with costs.

MARTIN, J.A.

MARTIN, J.A.: This is an application to set aside a judgment signed in default of a dispute note and it must be borne in mind that the judgment has been regularly signed. I note that because the language of the rule in question, No. 9 of Order IX., is very sweeping in its comprehension, and would, *ex facie*, apply to all judgments, whether they have been entered regu-

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larly or irregularly. But I desire, as a matter of precaution, to note that I have very considerable doubt whether that rule would extend to a case, even if expressed in wide terms of an irregularly signed judgment, in regard to which it never was necessary to have an affidavit of merits, the old practice on that point being well set out in that admirable book Archbold's Practice, 13th Ed., Vol. 2, p. 800, and 1196-7. The difficulty that I experience is as to whether or not the language of the rule requiring the disclosure of a defence upon the merits extends to such a case as we have here which is not one of a liquidated demand but one of unliquidated damages and in such a case it is obvious to me, at least, that the expression the disclosing of a defence on the merits (which I pause to say means only one of the many defences that might hereafter be set up) whether that language is to be construed in the strict way which it is conceded it would have to be construed without regard to a case of liquidated damages. No case has been cited exactly upon the point and it was in the course of argument that I asked the assistance of counsel upon it. I pause here to say that some-

MARTIN, I.A. thing has been said about the affidavit on the merits but there is no doubt about this that the old practice (and in that respect there has been no change) is well set out in Archbold where he says this, p. 800:

> "The affidavit of merits must, in express terms, state that the defendant has 'a good defence to this action upon the merits.' It may be made either by the defendant himself or his solicitor or agent, or the clerk of the solicitor who has the sole management of the cause, or some person who has had such a connexion with the cause as acquaints him with its merits, and this must appear on the face of the affidavit."

Now, there was that latitude allowed in the affidavits under the old practice for 100 years and I do not suppose anybody will say we have become more strict in that regard as time has gone by, the contrary, if anything, is the case. Such a defence as would constitute a defence to an action in negligence in its primary sense would be contained in two words only today; they would be "not guilty" as one sees in the form to be found in that most excellent safe guide Bullen & Leake's Precedents of Pleadings, 8th Ed., at p. 914. So I am of the opinion that if the defendant had added these simple words to the otherwise

entirely satisfactory affidavit of merits, "not guilty" (which, of course, means not guilty of the negligence in question) that he would have complied with the letter as well as the spirit of the rule which we have under consideration. My doubt is occasioned by the fact that unfortunately those words are not there and, after giving the matter my careful consideration, I find myself constrained with reluctance to take the view that I am unable to differ from the conclusion which I understand my brothers have all reached that it would not be safe to depart from the letter of this rule. Such being the case, I cannot find, in the absence of those words, there has been that express disclosure (however briefly it might, in my opinion, have been sufficiently set up) in the material before us and, therefore, the learned judge should not properly have made the order that he did make.

MARTIN, J.A.

GALLIHER, J.A.: I find myself unable to bring this case within the provisions and language of Order IX., r. 9. I was somewhat impressed by Mr. *MacInnes's* ingenious presentation of this, as distinguishing this case for damages from the ordinary case of an account or a promissory note: but we have got to imply or infer something that is not actually before us and that so far as we can see, or rather we cannot say it was before the judge from whose order the appeal is taken. It may be in such a case that had that been made clear to us, we could have maintained Mr. *McInnes's* position. I find myself, after all the argument that has been addressed to us, unable to say what would be the defence that would be put forward and whether any defence has been alleged at all, apart from the allegation in the affidavit that the solicitor has satisfied himself by enquiry and by considering the matter and by looking at the authorities that the defendant has a good defence. But it is not disclosed and if the judge below is in the same position as I am now, it is not disclosed to him.

GALLIHER, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal should be allowed. Unquestionably the whole weight of authority supports the submission of the insufficiency, as I would call it under the rule, of the affidavit in this particular case. At the outset

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I was of that opinion, and with every deference to the argument of Mr. *MacInnes,* I cannot change it. The affidavit is clearly insufficient. In the present case the defendant does not make the affidavit to support the application. That, in itself, throws great discredit upon the application made. There is no suggestion that the defendant himself could not make the affidavit. Was he ill or was he out of the country? No evidence upon this point whatever. The solicitor makes the affidavit and in a very roundabout and inconclusive manner says that there is a defence upon the merits but that is not sufficient, the grounds of the defence must be stated. Now there was a suggestion thrown out that possibly where the action was one of tort which this is, it was upon a different basis to that of an action based upon liquidated damages. I will refer to a case which shews there is nothing in this suggestion. A great number of cases have been cited by Mr. *Macdonald* which were pertinent and certainly unanswerable in my opinion, but I just take one not cited by Mr. *Macdonald.* This case is one of *Watt* v. *Barnett* (1878), 3 Q.B.D. 183, and the judgment of two very eminent judges, Chief Justice Cockburn and Mr. Justice Mellor. The application was to set aside a judgment that had been signed against the defendant Barnett. It appeared that he had been sued with four other persons for tort alleged to have been committed by them as directors of a company, and a substitutional order for service was obtained. Barnett said that he never had any knowledge of the writ at all.

MCPHILLIPS, J.A.

The case looks like a very hard case, but judgment went against him nevertheless for default of appearance. And the learned counsel acting for him, Mr. Rolland, at p. 184, contended that the order for substitutional service was not conclusive if it were shewn that notice of the proceedings never, in fact, reached the defendant and he was entitled to have the judgment set aside unconditionally. Mr. Herschell, who was later Lord Chancellor of England, contended that the judgment being regular could not be set aside, or at any rate should not be set aside unless the affidavit satisfied the Court that the defendant had merits and had no notice of the proceedings.

Now, in this case unquestionably the affidavit does not satis-

factorily establish that the defendant has a meritorious defence. The affidavit is so incomplete and so illusory in its language, I quote some of the statements therein. "That after going into the facts of this case fully with my client," the facts were we cannot tell what, "I verily believe and have so advised in my capacity as a solicitor that he has a good defence to this action upon the merits." We are not given the slightest hint of what the grounds are. Chief Justice Cockburn in this case I have before me, *Watt* v. *Barnett, supra,* said (pp. 185-6):

"Before letting the defendant in to defend [and that is what Mr. *MacInnes* is urging upon behalf of his client] we must consider whether he gives us any grounds for thinking that he has a substantial case which he desires to try. If he does not we are not bound to set aside a judgment which we may think ought in the interests of justice to stand."

MCPHILLIPS, J.A.

Now, in the interests of justice, this judgment should stand. Where the defendant or a plaintiff has a judgment in his favour that is a very solemn and important matter in the administration of justice and it is a matter of grave concern to come in and set aside that judgment and the Court is not entitled to set a judgment aside upon mere caprice. A judgment can only be displaced upon disclosed defence and the defence should appear to be a reasonable one. How can a Court apply its mind to a defence which is kept within the mind of the solicitor? It is, clearly, a perfectly untenable proposition to advance and further is against the positive language of the rule. This Court is not entitled to change the law according to whim or fancy and I think that is what is being asked today. We are asked to assume there is a defence where no defence is disclosed.

There was no material before the learned judge which would entitle him to exercise a judicial discretion. The order made was wholly without jurisdiction when you consider the want of material.

MACDONALD, J.A.

MACDONALD, J.A.: While I regret the insufficiency of the affidavit, I am clear on the construction of the rule, and on the authorities that the appeal must be allowed.

Appeal allowed.

Solicitors for appellant: *Macdonald & Laird.*
Solicitor for respondent: *P. S. Marsden.*

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1926

March 8.

REX v. SMITH

REX v. SMITH.

Criminal law—Keeping common gaming-house—User of store for betting—Betting on races in Mexico—Evidence—Conviction—Appeal—Criminal Code, Secs. 227(d), 228, 235(2) and 986.

On appeal from the conviction of an accused as keeper of a common betting-house, the question for the Court is whether in its opinion there was evidence before the magistrate which would justify him in drawing the inferences of fact that he has drawn, and if there is such evidence the conviction should be upheld (MCPHILLIPS, J.A. dissenting, being of opinion that conviction unreasonable upon the evidence adduced).

APPEAL by accused from a conviction by the police magistrate at Victoria on a charge that he was unlawfully the keeper of a disorderly house, to wit, a common betting-house located at 627 Pandora Avenue. The accused's premises were ostensibly a plumber's shop. On the 15th of January, 1926, the chief of police watched the door of the premises and saw that when any one went to the door accused unlocked the door, let them in and then locked it again. On the following day in the afternoon the chief of police and two officers, with a search warrant, went to the premises, tried the door, and it was locked. The chief saw accused within and through the window shewed him the warrant and, instead of coming to the door, the accused went to a room at the back, and as he did so tore up certain papers. Shortly after he came back and opened the door. The police found jockey sheets of racing in Tia Juana, Mexico, called "over nights" and day sheets, two newspapers, one being the "Tribune" of San Diego, California, containing accounts of the racing at Tia Juana, a manual containing a chart of the performances of horses, a telegram code and a telegram from San Diego with reference to the horse racing. On this evidence the premises were found to be a common betting-house of which the accused was the keeper and he was fined $100. The accused applied for leave to appeal upon certain grounds of mixed law and fact.

Statement

The appeal was argued at Vancouver on the 5th and 8th of

March, 1926, before MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

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Clearihue, for appellant: Any betting that took place on the premises was private betting and it is taken out of sections 227 and 228 of the Code by section 235(2). The betting is on the odds given at the track at Tia Juana. As to the papers found on the place these can all be obtained at any time at the cigar stores: see *Rex* v. *Jung Lee* (1913), 22 Can. C.C. 63; *Rex* v. *Gow Bill* (1920), 33 Can. C.C. 401; *Rex* v. *Covert* (1916), 28 Can. C.C. 25; *Rex* v. *Richardson* (1924), 42 Can. C.C. 142; *Rex* v. *Schama; Rex* v. *Abramovitch* (1914), 112 L.T. 480 at p. 482. It is necessary to prove that betting takes place as a business; isolated cases are not sufficient. There must be proof of general resort to a place: see *M'Connell, Brennan, Respondent* (1908), 2 I.R. 411; *Reg.* v. *Davies* (1897), 2 Q.B. 199; *Jayes* v. *Harris* (1908), 21 Cox, C.C. 639; *Rex* v. *Hynes* (1919), 31 Can. C.C. 293 at p. 297; *Rex* v. *McKay* (1919), 46 O.L.R. 125.

Argument

C. L. McAlpine, for the Crown: Section 227(*d*) defines a common betting-house. Evidence of delay in giving entry and the tearing of papers is sufficient to make out a case under section 986: see *Rex* v. *Sillers* (1922), 37 Can. C.C. 94; *Rex* v. *Smallpiece* (1904), 7 Can. C.C. 556; *Rex* v. *Albert Deaville* (1903), 1 K.B. 468; *Rex* v. *Coy* (1925), 36 B.C. 34; *Rex* v. *Pidgeon* (1926), *post,* p. 309. The decision of the magistrate should not be disturbed: see *Rex* v. *Riddell* (1912), 4 D.L.R. 662; *Rex* v. *De Bruge* (1924), 4 D.L.R. 496; *Rex* v. *Berger* (1925), 2 D.L.R. 237; *Rex* v. *Berdino* (1924), 34 B.C. 142.

Clearihue, replied.

MARTIN, J.A.: The Court is of the opinion, that is to say the majority of the Court, that this appeal should be dismissed in that the motion for leave to appeal should be refused. It really comes down to the question as to whether or no we think that there is evidence before the magistrate which would justify him drawing the inferences of fact that he has drawn. If there is that evidence there can be no doubt the conviction should be upheld. This matter was considered by this Court in *Rex* v.

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Berdino (1924), 34 B.C. 142, and there we adopted the view of the King's Bench Division in *Pasquier* v. *Neale* (1902), 2 K.B. 287. In *Rex* v. *Berdino, supra,* at p. 145, we said, in adopting the language in *Pasquier* v. *Neale,* that:

"'It is impossible for us to say that a magistrate is not at liberty to draw inferences of fact unless they can be conclusively proved to be true inferences,'"

and it is impossible to say that herein there was no evidence to support the view which the magistrate took. Now, our Code says in section 1014, that before we set aside the verdict of a jury, which also includes the conviction of a magistrate, we must be "of opinion . . . that it is unreasonable or cannot be supported, having regard to the evidence." We feel we are unable to go that far because there was evidence upon which he could take the view that he has communicated to us in the report he has given us, pursuant to the statute, and the conviction and the reasons therein stated.

MARTIN, J.A.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would allow the appeal. In my opinion the evidence adduced before the magistrate was wholly insufficient to support the conviction. It is a conviction very serious in its nature when it is considered that it affects a working journeyman plumber occupying a reputable position in the community, having as customers men of standing and reputation. The evidence is very scant indeed, in truth insufficient to establish that he was the keeper of a common gaming-house. Now, there was no evidence whatever that in the premises gaming or betting was going on, none whatever. The mere fact that there were newspapers and records of past horse racing, in my opinion, proves nothing. It would be indeed perilous if a reputable citizen be found guilty of a crime upon such meagre evidence.

There might be, as I suppose there was, in the eyes of the police, suspicious circumstances, but suspicious circumstances do not constitute proof, and it certainly would be intolerable that circumstances which may as well comport with innocence should be deemed to be circumstances proving guilt and that is

all I can say these facts have indicated. Now, we have had the cases cited by Mr. *Clearihue* of Lord Reading's view, Lord Alverstone's view, Mr. Justice Meredith's view, all accentuating that feature of our jurisprudence that the case must be made out, the *onus probandi* is upon the Crown; it never shifts. And that an isolated instance like this of going into these premises would constitute a crime does not comport with my view of the law. It is quite permissible for people to bet upon these races at Tia Juana. Some people seem to think the mere fact a person bets constitutes him a criminal. Certainly that is not the law. There is nothing in betting that is against the moral law; the statute law, it is true, intervenes but the statutory crime must be proved in all its ingredients. The attempt is on this very shadowy evidence to make out that the accused was the keeper of a disorderly house—a common gaming-house. I have no hesitation whatever in saying that the conviction was manifestly unreasonable. It is wholly unsupported by the evidence which is necessary in such cases and the benefit of the doubt, if we are driven that far, should unquestionably be given to the defendant. So upon two grounds the appeal should be allowed; on the ground of not proven, or if there was some evidence that evidence was wholly insufficient and there was a doubt and his explanation might be true. Even if the magistrate disagrees with the explanation if reasonably it might be true that would not entitle him to convict and if this Court disbelieved his explanation likewise that would not entitle the sustaining of the conviction. I would, therefore, quash the conviction and allow the appeal.

MCPHILLIPS, J.A.

MACDONALD, J.A.: I agree with the judgment of MARTIN, J.A.

MACDONALD, J.A.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Clearihue & Straith.*
Solicitor for respondent: *J. W. Dixie.*

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March 2.

CORPORATION OF THE DISTRICT OF MAPLE RIDGE v. WESTERN POWER COMPANY OF CANADA, LIMITED.

CORPORATION OF MAPLE RIDGE v. WESTERN POWER COMPANY OF CANADA

Municipal law—Contract—Construction—Supply of electricity to municipality—Erection of poles and right of way through municipality—By-law—Submission to electors.

The defendant Company entered into a contract with the plaintiff Municipality for the supply of electricity and in pursuance thereof a by-law was passed by the Municipality conferring upon the Company the right to sell electricity within the Municipality; the right to erect steel towers along Dewdney Road and to string wires thereon for transmitting electricity through and beyond the Municipality; and the right to erect poles and string wires within the Municipality for the purpose of providing electricity within the Municipality. The Company proposed to erect a line of poles in duplication of the steel towers along Dewdney Road for transmission of electricity through and beyond the Municipality and the Board of Works of the Municipality charged with the duty of approval and supervision approved of the location of the new line and the Company proceeded with the erection of the poles pending the submission of a new by-law to the electors granting leave to erect the new line, but the by-law failed to pass. The Company then refused to make certain electrical connections between inhabitants of the Municipality and its main lines. The Municipality obtained judgment in an action for removal of the new poles on Dewdney Road and for a declaration that the Company is bound to make the necessary connections between the power lines and the inhabitants.

Held, on appeal, affirming the decision of MACDONALD J., that the contract properly construed did not permit the erection of the duplicate line of poles on Dewdney Road and the second by-law having been rejected by the electors the poles should be removed.

A clause of the contract required that the Company should make the necessary connection between the customer's installation and the Company's power line provided such installation were located within half a mile of the power line.

Held, that the distance is to be measured in a straight line and not along the highways.

Statement

APPEAL by defendant Company from the decision of MACDONALD, J. of the 5th of October, 1925, in an action for a declaratory judgment with respect to the terms of a certain contract entered into between the plaintiff and the Western

Power Company of Canada, Limited, in 1910. The defendant Company as assignee acquired all the benefits of the Western Power Company of Canada, Limited, under the contract and assumed the liabilities thereunder. The original company constructed a transmission wire through the Municipality for the purpose of supplying other municipalities beyond; and also other wires for distributing electricity for industrial and lighting purposes for the inhabitants. Clauses 1, 2, 3 and 4 of the 1910 agreement were as follow:

"(1) The Corporation hereby grants unto the Company, its successors and assigns, right and privilege to sell electric light, and electric current for lighting, heating, power, industrial and other purposes incidental thereto within the Corporate limits of the Municipality of Maple Ridge.

"(2) The Company may construct, erect and maintain, and there is hereby granted to the said Company under and subject to the terms, conditions and covenants herein set forth, the right, power and privilege to construct, erect and maintain steel towers along that portion of the road or highway known as the Dewdney Road to the Laity Road, thence westerly along the centre section line road to the westerly boundary of the Municipality, for the purpose of carrying its transmission wires in, through and beyond the said Municipality.

"(3) The Company may construct, erect and maintain, and there is hereby granted to the said Company under and subject to the terms, conditions and covenants herein set forth the right, power and privilege to construct, erect and maintain poles, standards, crossarms, brackets and their several attachments, and to string and operate a line or lines of wires along all streets, and across or under any public highway or bridge within the limits of the Municipality of Maple Ridge, and to do all things which may be necessary in the operating and supplying of electric current for lighting, industrial, power and heating purposes.

"(4) The design and location of all steel towers and the location of the poles erected within the Municipality of Maple Ridge shall be such as shall first be approved by the Board of Works of the said Municipality, which approval shall not be unreasonably withheld, and all of the said work shall be performed to the reasonable satisfaction of the Board of Works of the Corporation."

Statement

In 1924 the defendant Company sought to extend its system especially beyond the Municipality and sought to use the Dewdney Road for further transmission wires and in order to do this they commenced putting up a further line of poles for carrying the transmission wires. The question then arose as to whether under the agreement the consent of the council or its board of works was sufficient but the Municipality through its solicitor concluded a by-law was required. But on a by-law

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being submitted to the Municipality it was defeated. Leave then being refused the defendant Company refused to supply power to certain property holders within the Municipality. The learned trial judge ordered that the defendant Company should supply the individuals within the Municipality who required electricity and that the new poles on Dewdney Road should be taken down.

The appeal was argued at Victoria on the 8th and 11th of January, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

J. W. deB. Farris, K.C. (*Riddell,* with him), for appellant: There is in fact one through or transmission wire on the wooden poles. The plans shew that they were going to carry a through line on the new poles. Clause 3 of the agreement is in our favour and gives the authority required: see Halsbury's Laws of England, Vol. 10, pp. 459-460, par. 803; *Gwynne* v. *Muddock* (1808), 14 Ves. 488 at p. 490; *reddendo singula singulis* applies. The words of a deed should be construed in favour of the grantee: see Halsbury's Laws of England, Vol. 10, p. 440, par. 778; Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., pp. 186 and 188; *Neill* v. *Duke of Devonshire* (1882), 8 App. Cas. 135 at p. 149. The subsequent conduct of the parties may be considered in explanation of an ambiguity: see *Doe dem. Pearson* v. *Ries* (1832), 8 Bing. 178 at p. 181. We have the right under clause 4 to put the poles up. Consent was given by the council before the by-law was defeated: see *Mouflet* v. *Cole* (1872), L.R. 8 Ex. 32.

Mayers, for respondent: The council had no power to approve the pole line. There were two main objects: (a) the Company wanted a through line; (b) the Municipality wanted light and power within the Municipality. The Company refused to supply outside the lines of the Municipality as provided for in the original agreement. The construction of a contract is a matter of law and in case of a mistake they are not entitled to equitable relief: see *Directors, &c., of the Midland Great Western Railway of Ireland* v. *Johnson* (1858), 6 H.L. Cas. 798 at p.

811. The only authority for using the highway is in the contract: see *Grand Trunk Pacific Railway* v. *Fort William Land Investment Company* (1912), A.C. 224. It is clear that if the by-law did not pass nothing was granted. They refuse to carry out one portion of the contract and try to enforce another: see *Jureidini* v. *National British and Irish Millers Insurance Company, Limited* (1915), A.C. 499 at p. 503.

Riddell, replied.

Cur. adv. vult.

2nd March, 1926.

MACDONALD, C.J.A.: The questions in appeal are limited to two, which are both questions of construction of a by-law passed by the respondent with the assent of the ratepayers of the Municipality. The by-law is marked as Exhibit 2 in these proceedings. It is a by-law conferring upon the appellant privileges which the Council of the Municipality alone had no power to grant. The first clause of the by-law grants to the appellant the right to sell electricity within the Municipality; the second the right to erect steel towers along the Dewdney Road and to string wires thereon for the purpose of transmitting electricity through and beyond the Municipality; while the third, which is the one to be construed, as I read it, gives the appellant power to erect poles and string wires within the Municipality for the purpose of utilizing the privileges granted by the first clause.

MACDONALD, C.J.A.

The appellant proposes to erect a line of poles in duplication of the said steel towers on the Dewdney Road and propose to string wires thereon for the transmission of electricity through and beyond the Municipality. In my opinion the by-law properly construed does not permit of this being done. There is no ambiguity I think in clause three. Reading it with the preceding clauses its meaning is not open to doubt.

The preamble of the by-law was relied upon by appellant's counsel as assisting in the interpretation of clause 3, but since the clause is not ambiguous the preamble does not assist us. But assuming otherwise, the parties had two distinct things in mind when the by-law was drafted—transmission of electricity through and beyond the Municipality for use in other munici-

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palities for which the respondent gave the appellant the right of way; and secondly, the selling of electricity within the Municipality, the privilege of which was granted to the appellant. The preamble compendiously covers both and therefore there is no necessary implication such as was contended for.

The appellant induced the respondent to submit a new by-law to the electors, granting leave to the appellant to erect this new transmission line, and pending the fulfilment of the formalities required for the passing of such by-law, the plaintiff's board of works, the body charged with the duty of approval, supervision and location of poles on the respondent's roads and streets, approved of the location of the poles for this new line. The by-law, however, failed to pass, yet the appellant says that, having obtained such approval, it has the right to erect this pole line even if it has no power to transmit electricity through and beyond the municipal limits, and that therefore the injunction is premature. This contention wholly ignores the manifest intention of all parties which was, I think, that the approval should be acted upon only in the event of the electors approving the new by-law.

The other ground of appeal is also one of construction of the by-law. By clause 10 the appellant was required to make, free of charge to its customer the necessary connection between the customer's installation and the Company's line provided such installation were located within half a mile of a named point. One Pullen demanded such connection and was refused it on the ground that, though the distance between his house and the named point was less than half a mile measured in a straight line, yet it was slightly over that distance when measured along the highway. In my opinion the distance is to be measured in a straight line.

I would therefore dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: Several questions are raised upon this appeal and I shall first consider that relating to the construction of the agreement of 22nd December, 1910, which should be viewed as a whole and upon a reasonable business basis in the light of the surrounding circumstances. Counsel put forward their views

elaborately thereupon, and after giving it careful consideration I think the learned judge below gave it the right construction, *viz.,* in brief, that par. 2 relates to the transmission of electric current through the municipality on steel towers and par. 3 to the distribution of it by poles within the Municipality.

Then, second, as to what rights, if any, were acquired by the resolution of the plaintiff passed at a council meeting on 20th December, 1924, which resolution in the shape of a proposed by-law and accompanying agreement was submitted to the electors of the municipality on the 17th of January, 1925, and rejected by them, in consequence of which, it is submitted by the plaintiff, no rights were acquired by defendant under the said resolution because it was conditional upon the passing of the by-law and therefore fell with it. This raises a question of fact upon a matter of contract, not legislation, between the parties which therefore is open to investigation upon the evidence before us, and after having carefully read all the evidence before us I am of opinion that the resolution was conditional upon the approval of the electors of the proposed new arrangement as a whole which being refused the resolution became ineffective.

MARTIN, J.A.

Then, third, as to the method of measurement of the distance of one half mile within which the defendant is ordered to make electrical connection with the house of one Pullen, as being "located within one half a mile of the Canadian Pacific Railway depot in . . . Whonnock," under the said agreement of 22nd December, 1910. Is the measurement to be by straight line or by the road? which latter would exclude the obligation to connect. It is admitted that the general rule, as laid down by the unanimous decision of the Exchequer Chamber in the leading case of *Mouflet* v. *Cole* (1872), L.R. 8 Ex. 32, after a review of many decisions, is that the distance is to be measured in a straight line: the language there was in effect identical with that at Bar, being "within the distance of one half of a mile of the said premises called the Lord Holland," a public house: the Court adopted the language of Crompton, J. in *Lake* v. *Butler* (1855), 5 El. & Bl. 92 at p. 99, thus, p. 34:

"If this question were quite new, the convenience would be all in favour of construing the distance as that measured in a straight line,

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and the words would be, to say the least, capable of bearing that construction. In common language, if you ask how far it is from one place to another, the answer often is, 'Do you mean by the road or by the fields, or as the crow flies?'"

And the Court added, p. 36:

"One other point is to be disposed of. We think, in measuring the distance it should be taken from the nearest point of the one house to the nearest point of the other, without regard to where the doors are situated."

It was submitted that the circumstances of this case would justify us in departing from this long established rule but I am unable to take that view of them: if measurements are to be determined by roads which are subject to alteration the contractual obligation would likewise alter and this is eminently a case where there should be no room for difficulty of that kind, but on the contrary that the object noted in the following expressions in the *Mouflet* case should be attained, p. 34:

"We do not . . . . think that there is any sound distinction between statutes and contracts in this respect. In each the object is to substitute a certain distance, capable of easy determination, for a reasonable distance, which being uncertain, would be a trap for litigation. And the object of the draftsman who prepares either an Act of Parliament or a contract, where it is necessary to specify a distance, ought to be to use words that give a fixed and easily ascertainable guide."

MARTIN, J.A.

This Court, indeed, has already recently adopted that rule in a criminal case arising out of the Summary Convictions Act, *Rex* v. *Holt* [(1925), 36 B.C. 391]; (1926), 1 W.W.R. 47 wherein we decided (though the report does not bring out the point clearly) that the distance of the sittings of the "nearest County Court from the place where the cause of the information or complaint arose" should be determined by measuring in a straight line to the nearest town (Cumberland) wherein the Court sat and not by highways or railways which afforded more convenient speedy communication with another though more distant town (Nanaimo, the County town) as well as other advantages in the way of greater facilities for trial.

Two other minor questions were raised but their weight does not require particular consideration, and so upon the whole case I am of opinion that the appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: I agree in the findings of the learned trial judge.

McPHILLIPS, J.A.: In my opinion the learned trial judge, MACDONALD, J., arrived at a right conclusion and this appeal should be dismissed. The learned trial judge, in a very careful and complete way, in his reasons for judgment, canvasses the facts and referred to the relevant authorities. I have little to add. The evidence, in the main, consists of documentary evidence. The agreements called for legal construction and I am in agreement with the construction arrived at by the learned trial judge. In so saying though, it cannot be gainsaid that there is some room for a variance of opinion save upon the closest reasoning. What is the position though when contracts are insisted upon to confer a power or right to do certain things, especially in the nature of a franchise? If there be ambiguity the contracts will be ineffectual and that is the present case. In *Elderslie Steamship Company* v. *Borthwick* (1905), A.C. 93, Lord Macnaghten, at p. 96 said: "In such a case as this an ambiguous document is no protection." In respect to the high power transmission line, that is covered by the right of way for the towers and the carrying of the necessary wires thereon. There is a clear line of demarcation between the two rights or powers. They are in no way merged. The supply of electrical energy and distribution thereof must be confined to the boundaries of the Municipality. The learned counsel for the respondent, Mr. *Mayers*, strongly urged at this Bar that "transmission" meant the carrying of the through electrical energy and that "distribution" meant the local user of electric light and power and with this submission I entirely agree.

It is apparent, upon a close study that what was provided for was the transmission of the high power electric energy upon and along wires stretched upon the steel towers whilst the wooden poles would be confined to the local distribution system in the Municipality.

The learned counsel for the appellant, Mr. *Farris*, in a very persuasive way endeavoured to contend to the contrary and laid great stress on what might be viewed as the logical result of all that had been agreed to and set forth in the documentary evidence and that it was illogical to so hold. In this connection,

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I would refer to what Lord Halsbury said in *Quinn* v. *Leathem* (1901), A.C. 495 at p. 506:

"Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

I cannot refrain, though, from saying that the construction the learned counsel for the appellant endeavoured to put upon the powers conferred would enure to the advantage of inhabitants outside the Municipality and I cannot see that there would be, in the public interest, any advantage, but on the contrary, inconvenience to not admit of electric energy for distribution without the Municipality being carried upon the wooden pole line primarily carrying the electric energy for distribution within the Municipality. However, that which would be a convenience and local benefit cannot prevail over the letter as contained in the by-laws and agreements. In *Directors, &c., of the Midland Great Western Railway of Ireland* v. *Johnson* (1858), 6 H.L. Cas. 798 at p. 811, Lord Chelmsford said:

"The construction of a contract is clearly matter of law; and if a party acts upon a mistaken view of his rights under a contract, he is no more entitled to relief in equity than he would be in law."

MCPHILLIPS, J.A.

I would also refer to what Mr. Baron Parke said in *Shore* v. *Wilson* (1839), 9 Cl. & F. 355 at pp. 556-7:

"From the context of the instrument, and from these two descriptions of evidence, with such circumstances as by law the Court, without evidence, may of itself notice, it is its duty to construe and apply the words of that instrument; and no extrinsic evidence of the intention of the party to the deed, from his declarations, whether at the time or his executing the instrument, or before or after that time, is admissible; the duty of the Court being to declare the meaning of what is written in the instrument, not of what was intended to have been written. The excepted cases in which such evidence is admissible, if, indeed, there be more than one excepted case (that is, where there are two subjects, or two objects, both described in the instrument, and each equally agreeing with it), having no bearing whatever on the present question."

In my opinion, it was vital that the approval of the ratepayers should be had for the appellant to be vested with the powers contended for upon this appeal and that approval was denied. The resolution passed by the Municipality cannot, in my opinion, be invoked as conferring any more extensive powers. It reasonably must be confined to the electrical transmission of

high voltage to be carried in the steel towers. There is this further fact, the appellant itself would not appear to have considered the resolution, as being effective to accomplish the contended for powers, as no steps were taken following the passage thereof, evidently awaiting the passage of the by-law, which was submitted to the ratepayers. This is some evidence of the construction put upon the resolution by the appellant. It would appear to me to be incontrovertible that it was all along well understood that the powers contended for by the appellant, and the carrying out of which were outlined in the plans, should depend upon the approval of the ratepayers and that the Municipality never intended in all that was done to grant these powers independent of the approval of the ratepayers whether or not the Municipality had the power to grant the powers without such approval and there would not appear to be any evidence to support any such contention. Further it is patent that the whole trend of the proceedings had and taken indicates that any such powers would be exercisable only upon the assent of the ratepayers. That being the case, it is quite impossible for the appellant now to contend to the contrary. In this connection, I would refer to what Lord Shaw, in delivering the judgment of their Lordships, said at p. 229 in *Grand Trunk Pacific Railway* v. *Fort William Land Investment Company* (1912), A.C. 224:

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"On the other hand, their Lordships are unable to give any countenance to the proposition that an order thus pronounced, subject to a condition in itself neither unnatural nor unreasonable, but erroneously inferred to be within the Board's powers, should be treated by the method of striking the condition out and leaving the order as an unconditional order to stand. Nobody meant that."

Here the contention is now advanced that nevertheless the powers contended for by the appellant have been sufficintly authorized and within the authority of the Municipality quite independent of the assent of the ratepayers upon the construction of the agreements and particularly the resolution of the Council of the Municipality. With this contention I cannot agree. The projected plans and operations outlined to the Municipality and agreed upon were conditional upon the assent of the ratepayers and the ratepayers failing by vote to approve

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of the contemplated works—all that was done—falls, by reason of that non-assent.

I would dismiss the appeal.

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MACDONALD, J.A.: I have very little to add to the reasons for judgment of the learned trial judge on the construction of the agreement and the obligation to make the necessary connections between the power line and the residence of F. E. Pullen. On the latter point I do not think we are obliged as suggested to place the strained construction on the agreement that because it was not established that Pullen had an installation on his premises he is therefore out of Court.

As to the interpretation of the agreement, I do not think it is necessary to resort to canons of construction. The second clause confers the right to construct, erect and maintain steel towers along the Dewdney Road for the purpose of carrying its transmission wires through and beyond the Municipality for what may be called, through traffic. Clause 3 refers to the supply of electrical energy within the Municipality. The word "poles" is used in clause 3 and omitted in clause 2. The agreement taken as a whole supports this construction. Nor do I think that because in one instance (even if in a few instances) poles were permitted to carry lines conveying power outside of the Municipality, that fact can be taken as an aid in construing the agreement on the principle that acts done under it may be regarded, as stated by Tindal, C.J., in *Doe dem. Pearson* v. *Ries* (1832), 8 Bing. 178 at p. 181, "as a clue to the intention of the parties." That rule should only be resorted to if the wording of the contract is ambiguous. Even if ambiguity is granted, this alleged acquiescence in a very limited way, possibly for convenience, or through oversight, should have little weight.

MACDONALD, J.A.

I cannot agree either with appellant's submission that while it can be enjoined from stringing wires intended to go beyond the Municipality it connot be restrained from beginning the work by the erection of poles on which wires would later be placed. The appellant is restrained from erecting poles "for the purpose of stringing thereon wires for transmitting electrical energy beyond the limits of the plaintiff's Municipality."

If, of course, they erect them for local purposes the order would not be effective. It is clearly within the jurisdiction of the Court, once the work is begun for an admitted purpose not permitted by the agreement to make such an order.

Dealing with the effect of the resolution passed by the respondent giving approval with certain reservations to the plans submitted for the construction of a wooden pole line on the Dewdney Road, that approval must now be regarded in the light of the construction placed upon the agreement. The only approval which could be given under the agreement of 1910 would be either for the design and location of steel towers or the location of poles erected within the Municipality, *i.e.*, poles for the purpose of distribution within the Municipality. That is not the resolution contemplated by Exhibit 13. It relates to an entirely different situation, one that never materialized owing to the defeat of the by-law. If, of course, the construction sought to be placed upon the 1910 agreement by the appellant should be given effect to, other consideration would arise which need not be considered.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *V. Laursen.*

Solicitors for respondent: *Mayers, Lane & Thomson.*

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REX v. CANADIAN ROBERT DOLLAR COMPANY, LIMITED.

Criminal law—Charge dismissed—Appeal to County Court—Sittings nearest place where complaint arose—Mode of measuring distance—R.S.B.C. 1924, Cap. 93, Sec. 114; Cap. 245, Sec. 77.

REX v. CANADIAN ROBERT DOLLAR CO.

Under section 77 of the Summary Convictions Act an appeal from a conviction or order of a justice shall be heard at the sittings of the County Court which is nearest in a straight line to the place where the cause of the information or complaint arose. The question of which is nearest by practical mode of access does not apply.

Rex v. *Holt* (1925), 36 B.C. 391 followed.

APPEAL by the Crown from the decision of BARKER, Co. J. of the 9th of December, 1925, dismissing an appeal from the stipendiary magistrate for the County of Nanaimo, who dismissed a charge against the Canadian Robert Dollar Company, Limited that on the 22nd of June, 1925, near Deep Bay in said county said Company unlawfully and without the written consent of an officer of the forest branch, continued to carry on lumbering operations while a fire was burning on the property upon which it was then conducting said lumbering operations. On the hearing before the County Court judge, counsel for the Company raised the objection that the Court had no jurisdiction sitting in Cumberland; that the appeal should have been taken to the sittings of the Court in Alberni. Section 77 of the Summary Convictions Act provides that either party "may appeal to the County Court, at the sittings thereof which shall be held nearest to the place where the cause of the information or complaint arose." The evidence disclosed that the site of the fire in question was in a straight line considerably nearer Alberni than it was to Cumberland, but that the railway route from the site of the fire was shorter and more convenient to Cumberland than it was to Alberni. The following cases were cited: *Fanchaux* v. *Georgett* (1915), 9 W.W.R. 458; *Mouflet* v. *Cole* (1872), 42 L.J., Ex. 8; *Lake* v. *Butler* (1855), 24 L.J., Q.B. 273; *The Queen* v. *The Inhabitants of Saffron Walden* (1846),

Statement

15 L.J., M.C. 115. The County Court judge dismissed the appeal.

The appeal was argued at Vancouver on the 2nd of March, 1926, before MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Wood, for appellant.

J. W. deB. Farris, K.C., for respondent, was not called upon.

The judgment of the Court was delivered by

MARTIN, J.A.: The Court is of the opinion that it is unnecessary to call upon the respondent's counsel in this case, because having in view the judgment we gave this morning in the case of *Corporation of Maple Ridge* v. *Western Power Company of Canada* [*ante,* p. 252], and also the prior decision of this Court in *Rex* v. *Holt* (1925), 36 B.C. 391, the case is really concluded by our own decisions. In the *Maple Ridge* case, the leading case is the one there referred to, *Mouflet* v. *Cole* (1872), L.R. 8 Ex. 32, wherein a distinguished Court unanimously decided, after reviewing decisions on the point, as follows, summarized, for convenience, from the judgment that was handed down this morning: Judgment

"We do not think that there is any sound distinction between statutes and contracts in this respect. In each the object is to substitute a certain distance, capable of easy determination, for a reasonable distance, which being uncertain, would be a trap for litigation. And the object of the draftsman who prepares an Act of Parliament or a contract, where it is necessary to specify a distance, ought to be to use words that give a fixed and easily ascertainable guide."

That is the rule we adopted this morning as regards civil cases either under statute or under contract. Then the case of *Rex* v. *Holt* (which is fortunately our decision on the same statute that is now before us) says that the same rule is applicable to prosecutions of this kind, and we cannot give effect to the suggestion that in criminal cases there might be some other *ratio decidendi,* because in accordance with our decision in *Rex* v. *Holt* that is not the case; the only submission therein made to us (though the report is not as full as it might be) was that the usual rule might be displaced because of inconvenience that might arise from the geographical situation of the country, *i.e.,*

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the greater facilities of transportation in favour of Nanaimo. We rejected that distinction in that case, and, of course, that being the principle it is incumbent upon us to follow it here. One might also say in addition that these are not the days when we would feel disposed, in the light of an era of progression, to depart from the old rule of direction "as the crow flies" because men are now flying as well as crows.

Appeal dismissed.

Solicitor for appellant: *H. S. Wood.*
Solicitors for respondent: *Bourne & DesBrisay.*

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COUSINEAU v. CITY OF VANCOUVER

COUSINEAU v. THE CITY OF VANCOUVER.

Negligence—City fire-truck—Collision with automobile—Inevitable accident.

At eight o'clock on the morning of the 26th of June, 1925, the plaintiff's auto-truck was proceeding northerly along Kingsway. He was sitting on the right of the front seat and the driver on the left, his son sitting behind them. As they approached 11th Avenue they were just to the right of a tram-car going the same way. The tram-car slowed down as it approached the crossing but did not stop on reaching the intersection but proceeded on and then suddenly stopped when about one-third of the way across the intersection. The plaintiff's auto-truck, which was then about half way between the tram-car's gates, proceeded on and when it had cleared the front of the street-car and was about half way across the intersection it was struck violently by a city fire-truck. The plaintiff was seriously injured and his son was killed. The fire-truck proceeding easterly along 11th Avenue to a fire slowed down to a stop on nearing Kingsway and blew its siren. When the street-car stopped the fire-truck proceeded to cross in front of it near the middle of the intersection and ran into the plaintiff's truck. In an action for damages the jury brought in a verdict of inevitable accident and the action was dismissed.

Held, on appeal, affirming the decision of MACDONALD, J. (MACDONALD, C.J.A. dissenting), that there was evidence upon which the verdict of inevitable accident could be supported and the appeal should be dismissed.

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APPEAL by plaintiff from the decision of MACDONALD, J. and the verdict of a jury in an action for damages resulting from a collision of the defendant's fire truck (six tons in weight and carrying hose to a fire) with the plaintiff's automobile truck at the intersection of Kingsway and 11th Avenue. On the 26th of June, 1925, at about 8 a.m. the plaintiff's Ford truck (the driver being on the right side of the front seat, the plaintiff on the left side, with a boy sitting between them, and the plaintiff's son, 16 years old sitting behind) was proceeding northerly along Kingsway just behind, and to the right of a street-car. As the street-car approached 11th Avenue, it slowed down, as though about to stop, before reaching the intersection (at this point the plaintiff's car being to the right and half way between the two gates of the street-car). It did not stop but proceeded to go across the intersection and when the front of the street-car was about six feet from the middle of the intersection it suddenly stopped. The plaintiff's car proceeded on and when just past the middle of the intersection was smashed into by the city's fire truck coming from the left and across the front of the street-car. The fire-truck had been proceeding along 11th Avenue easterly to a fire and when nearing Kingsway its siren was going. On seeing the street-car it slowed down substantially to a stop and when the street-car stopped on nearing the middle of the intersection the fire-truck proceeded to pass in front of it intending to connect to a hydrant at the south-eastern corner of the intersection. The plaintiff was seriously injured by the collision, and his son was killed. The occupants of the plaintiff's car say that owing to their being on the opposite side of the street-car they did not hear the fire truck's siren. The jury brought in a verdict of inevitable accident.

Statement

The appeal was argued at Victoria on the 11th and 12th of January, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Alfred Bull, for appellant: The street-car was beyond the proper place to stop and the view of the driver of the fire-truck that any one on the opposite side to the street-car would stop is wrong. The verdict is perverse: see *Monrufet* v. *B.C. Electric*

Argument

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Ry. Co. (1913), 18 B.C. 91; *Goudy* v. *Mercer* (1924), 34 B.C. 103. The evidence is all in and there is no reason for a new trial, all that is required is assessment of damages: see *Allcock* v. *Hall* (1891), 1 Q.B. 444. On the charge there is objection as to his dealing with "inevitable accident" in not shewing where the burden of proof lay: see *The Merchant Prince* (1892), P. 179. There is also objection in counsel for the City referring in his address to the effect an adverse decision would have on the fire department.

Argument

McCrossan, for respondent: The fire truck was practically at a dead stop when it reached Kingsway and the siren was going continually to that point. Under the by-law the right of way is given to the fire brigade. Vehicles must come to a standstill when a fire-truck is coming. The Vancouver charter authorizes the by-law: see *Quinn* v. *Walton* (1921), 30 B.C. 401. All other cars stopped at our approach. On the question of contributory negligence see *The Canadian Pacific Ry. Company* v. *Smith* (1921), 62 S.C.R. 134. On the question of burden of proof see Beven on Negligence, 3rd Ed., 129; *Morgan* v. *Sim* (1857), 11 Moore, P.C. 307 at p. 311; *The "Marpesia"* (1872), L.R. 4 P.C. 212 at p. 219; Huddy on Automobiles, 5th Ed., p. 448; *Hallren* v. *Holden* (1913), 18 B.C. 210 at pp. 214-5. The driver of the fire-truck had a right to assume that any person on the other side of the street-car would obey the law and stop when the street-car stopped.

Bull, replied.

Cur. adv. vult.

2nd March, 1926.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The action was brought for damages caused by collision between plaintiff's automobile and a fire-truck of defendant's, the consequence of which was that plaintiff's son was killed, he himself injured and the car badly damaged. The plaintiff's car was being driven by another son and had been following the tram in its approach to a street intersection. The driver of the tram slowed down as if to stop to take on or let off passengers but did not do so but instead increased its speed whereupon the plaintiff's driver came up alongside the tram and was almost abreast of it when the tram-

car was suddenly brought to a stop, the plaintiff's car proceeding on was struck by defendant's truck with the result above stated.

The siren of the truck had been sounding but the occupants of the plaintiff's car did not hear it on account of the noise of the tram and of their own car. The tram-car was brought to a stop by a signal from the captain of the fire crew. It is perfectly clear on the evidence that it was not stopping to take on or let off passengers since it was one-third of the way across the intersecting streets when brought to a standstill in compliance with the said signal. The plaintiff's car was being driven at a reasonable rate of speed; he was passing the tram-car as he had a right to do. The tram-car was between him and the truck so that he had no opportunity of seeing it. By the traffic rules he was bound to look out for vehicles coming from his right and those coming from his left were obliged to look out for him. The fire-truck was coming from the left, but its driver had the right of way over all traffic. This right of way was the only privilege enjoyed by him over other traffic. Still it was his duty to look out for such traffic and not endanger it. It was said that the truck came almost to a stop as it reached the pavement of the intersecting streets, and then, instead of being kept under complete control, was rushed across at the rate of 10 miles an hour. Now, in my opinion, the driver of the truck was negligent. Knowing the cause of the sudden stop of the tram-car he could not assume that the traffic on the other side of it would come to a stop behind the tram-car as it was required to do when the tram-car stops to take on or let off passengers. He ought, on the contrary, to have assumed that vehicles might be coming on the other side of the tram-car and that they might be endangered by reason of its sudden stoppage.

MACDONALD, C.J.A.

No contributory negligence was found, nor did defendant's counsel argue that there was such. The jury found that the accident was unavoidable, in other words that neither party was guilty of negligence. Holding, as I do, that the defendant's driver was clearly guilty of negligence and that therefore the verdict cannot be sustained, I would order a new trial, the costs of the abortive trial to abide the results.

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MARTIN, J.A.

MARTIN, J.A.: This is an action for personal injuries caused to the plaintiff while driving in a motor-car by the alleged negligent driving of the defendant's fire-truck, and the defences of inevitable accident and contributory negligence are set up, pars. 5, 7, though the latter was abandoned at the trial. The jury found inevitable accident, upon which verdict the learned judge dismissed the action. The appellant's counsel submitted that upon the story of the defendant's own witnesses it is liable, and asks not for a new trial, as that, he said, would be useless, but for judgment and a remission to assess damages.

The first objection taken was that the defendant's counsel had sought to improperly influence and inflame the mind of the jury by appealing to them as "taxpayers" of the municipality which was the defendant. Such an invocation cannot be countenanced nor was it countenanced by the trial judge who, upon objection, at once took adequate steps to put the matter right to the jury, and the subsequent remarks of the defendant's counsel, as recorded did not, I think, tend to prejudice the jury. I may say here, and with all respect, that it is to be regretted that the learned judge refused the application of the defendant's counsel to put questions to the jury in accordance with the proper practice in that behalf, the case being far from that simple one which he deemed it, and the additional defence of inevitable accident complicated it and his charge on that aspect of the case leaves much to be desired, and these elements have added to the original difficulty of arriving at a satisfactory solution of the matter.

In these conditions I have carefully examined the evidence to see if it could reasonably be said that there was negligence on the defendant's part so as to determine whether it might still be necessary to order a new trial, despite the wishes of the appellant to the contrary (there already having been two trials) and the said unsatisfactory direction on inevitable accident (to which objection was not taken at the time and therefore a special and onerous order as to costs against the appellant under section 60 of the Supreme Court Act would have to be made) with the result that, viewing the matter at large and apart from any controversy about the application of traffic acts and regulations

(which I assume to be in appellant's favour) I do not think that it could reasonably be said that the driver of the fire-truck, whatever wrong ideas he might have had, did not in fact drive with due caution in reaching Kingsway and after he became apprized of the situation by the stoppage of the tram-car across his line of progress; but even if this manner of dealing with an unsatisfactory case might not be wholly satisfactory yet there undoubtedly was evidence upon which if entirely properly directed the verdict of inevitable accident could be supported, and therefore it would not be in accordance with justice or the practice of granting new trials in general to grant one here especially in opposition to the wishes of the appellant, seeing that the judgment in his favour that he pressed for is, upon the evidence, quite out of the question. It follows that the appeal should be dismissed.

MARTIN, J.A.

GALLIHER, J.A.: Since adjournment I have read the evidence throughout as I was then of the impression that the case was very close to the line.

I would find some difficulty in deciding this case if I were trying it myself, and feeling thus, I would not be justified in setting aside the verdict.

The appeal should be dismissed.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MACDONALD, J.A.: The jury found that the accident was unavoidable and returned a verdict for the defendant (respondent). The verdict means that in the opinion of the jury, in view of all the surrounding circumstances, the street-car stopping, the cessation of all visible traffic, the probability that any one driving on the other side of the street-car out of sight of the fire-truck driver would likewise stop, the fact that a near-by fire in a house had to be extinguished—reasonable care was exercised by the respondent in crossing the street. Contributory negligence by the appellant was not alleged. The jury therefore, if right in acquitting the respondent of negligence were also right in attributing the occurrence to unavoidable accident.

MACDONALD, J.A.

The inquiry would appear to be limited to one point, *viz.*, can

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we find in the record reasonable evidence to support the jury's finding negativing negligence on the part of the respondent? An Appeal Court will not hesitate, as in the case of *McDonald* v. *Weir* (1925), 34 B.C. 502, to set aside a verdict if the jury acted unreasonably and refused to draw plain inferences from the evidence and undisputed facts. On the other hand, while an Appellate Court may find that a jury failed to discharge its functions it must not usurp them.

We must assume that the jury accepted, as they might, the evidence favourable to the respondent, unless clearly unbelievable. Counsel for the appellant relied on markings on the plan shewing the *locus* made by witnesses in giving evidence, indicating that the fire-truck was on the wrong side of the street. Mathematical deductions were also made to shew that the street-car when it stopped was 24 feet beyond its ordinary stopping point. The jury, however, heard the oral testimony of the witnesses and where there was conflict between that testimony and points marked on the plan they would naturally accept the oral statements made with the whole situation before the mind's eye. Markings on a plan placed before a witness probably for the first time, represent only an attempt, not always successful, to translate the oral testimony to another form. These considerations are applicable to the point "D" marked on the plan; to the point as to whether or not the fire-truck was practically in the middle of the street crossing in passing over, and to the distance the street-car actually stopped beyond the point marked "C," its ordinary stopping place to let off or take on passengers. On the latter point a witness riding in the street-car testified that it stopped about the length of its fender beyond the point "C." Similar evidence was given by a witness sitting next to the driver of the fire-truck who would have a clear view. The same witness stated that the fire-truck passed the street-car within two or three feet of the fender thus shewing, if his first observation was fairly accurate its relative position to the "silent policeman"if one had been placed at this intersection. He further stated that the left wheel of the fire-truck was "practically on the silent policeman if there had been one there." It was the same witness who marked the point "D" on the plan. If right

MACDONALD, J.A.

in the foregoing testimony, all of which, of course, would only be a general approximate estimate, the point marked "D" would seem to be an incredible position indicating as it does the position of the front wheels of the fire-truck at the moment the street-car stopped. It may be said that the skid marks of the fire-truck shewn on the plan are accurate. They shew the position of the fire-truck at the point of impact. Making allowance, however, for the shifting from its usual course which might reasonably be made just before the impact, or the shifting possibly caused by the impact itself, they do not necessarily shew that the fire-truck was crossing on the wrong side of the intersection, at least to any appreciable extent. In addition, the jury had before them evidence that the fire-truck on emerging into Kingsway, came practically to a standstill when finding that the street-car stopped as directed to allow it to pass, it proceeded across with its engine under control at a speed of ten miles an hour, the siren sounding continuously.

On that state of facts, accepting the evidence outlined, the jury had one question before them, *viz.*, should the driver of the fire-truck have anticipated, knowing that the street-car was not taking on or discharging passengers, that a moving motor-car might be screened from view, and with that knowledge cross at such a reduced rate of speed that his fire-truck could be stopped practically at once, or at all events, without doing serious damage if a collision took place? In answering that question the jury would have a right to find from the evidence that the street-car did not "seem to stop" as appellant's witnesses suggested at the usual stopping point, and then proceed over 20 feet beyond before actually stopping, but rather that it commenced to gradually slacken its speed for a distance of between 40 and 60 feet. They might also very well consider, in weighing the degree of care the driver of the fire-truck should exercise, even though negligence is not imputed to the appellant, that he might assume that a driver of a motor-car would not take the risk of passing even a moving street-car at such a point until it got beyond the centre of the intersection as cross traffic hidden from his view might suddenly cross in front of the street-car. One is not called upon to assume imprudent conduct, even though not

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amounting to negligence, on the part of others; at least that is a factor the jury might consider. Another factor would be that the driver of the fire-truck might naturally believe that with all visible traffic stopped to allow the fire-truck to proceed on its errand of fire-fighting a driver of a motor-car hidden from view would hear, or should hear if he had his wits about him, the piercing sound of the siren, at all events after the street-car stopped and the grinding of the brakes ceased.

On all the foregoing facts it was eminently a question for a jury to decide if it was reasonable to cross at ten miles an hour. They chose to say that it was not negligent and I cannot say they were clearly wrong. Apart from any question of the validity of the by-law purporting to give the apparatus of the fire department the right of way (a fact which in itself would not excuse negligence as rights must be exercised with due regard to the safety of others) the jury were justified in concluding that it was an unavoidable accident, thus negativing negligence on the part of the respondent. They could reach the same conclusion even if the driver of the fire-truck was under a misconception of his rights. It is true that to support the defence of unavoidable accident, the *onus probandi* was on the respondent to establish that there was no neglect of reasonable precautions under all the circumstances in crossing at ten miles an hour. I think that the learned trial judge placed this aspect before the jury. He said after referring to certain facts:

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"That point you may take into account in determining whether Petrie was negligent in proceeding on his way with the fire-truck, without being satisfied that there was no traffic that might reasonably be expected to be at that point which would thus be intercepted by the onward progress of his fire-truck."

On the whole, therefore, I would not interfere with the finding that the rate of speed of ten miles an hour was not *per se* negligence; because in the last analysis that is really the issue. The respondent was not called upon to take extraordinary precautions. Ordinary care and skill only under all the circumstances was required, and if, notwithstanding such ordinary care, the accident occurred the jury might say it was unavoidable. I am not suggesting that the point is free from doubt. Indeed, I think on the single point of rate of speed of the fire-truck the verdict

is close to the line. If the jury had held it negligence I would not disturb it. Having reached the opposite conclusion, however, it is not enough to simply raise an element of doubt to justify a reversal of the verdict of a jury on that ground. We must be satisfied that the verdict was perverse.

It was objected that the learned trial judge did not fully outline to the jury the law governing unavoidable accident. It would doubtless be better if he had dealt with this aspect with greater particularity, but reading the whole charge I would not feel justified in finding non-direction on this point.

I would dismiss the appeal.

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

Solicitor for appellant: *Alfred Bull.*
Solicitor for respondent: *J. B. Williams.*

REX v. SLINN.

Criminal law—Charge of contributing to juvenile delinquency—Conviction—Appeal to County Court dismissed—Habeas corpus—Jurisdiction—Estoppel—Proclamation—Can. Stats. 1908, Cap. 40, Secs. 29, 34 and 35.

On an application for a writ of *habeas corpus* by an accused who was convicted by the judge of the Juvenile Court for contributing to juvenile delinquency under section 29 of The Juvenile Delinquents Act:—

Held, that The Juvenile Delinquents Act (Dominion) was not in force because it was not proclaimed as required by section 34 thereof after the passing of the Provincial Act, the proclamation produced (made under section 35) being futile because it could only be made if no Provincial Act had been passed. The application was therefore allowed.

APPLICATION for a writ of *habeas corpus* on the ground of lack of jurisdiction in the convicting magistrate. On the 5th of August, 1925, accused was convicted before Mrs. MacGill, judge of the Juvenile Court for contributing to juvenile delinquency under section 29 of The Juvenile Delinquents Act, 1908, Statement

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Statement

Can. Stats. 1908, Cap. 40. Accused appealed to the County Court and the appeal was dismissed on the 29th of September, 1925. Section 34 of The Juvenile Delinquents Act, 1908, provided that the Act could be brought into force in any Province after the passing of legislation by the Province providing for the establishment of a Court and section 35 provided that the Act could be brought into force in any city if proper facilities existed in that city, and subsection 2 of section 35 provided for the appointment of a judge. On the 25th of February, 1910, a Provincial Act was passed and brought into force in Vancouver by proclamation of the Lieutenant-Governor on the 15th of June, 1910. On the 9th of July, 1910, the Governor-in-Council issued a proclamation in which it was recited that the legislation referred to in section 34 of the Act of 1908 had not been passed, but the Governor-in-Council was satisfied that proper facilities existed in the City of Vancouver for carrying out the provisions of the Act, and the proclamation proceeded to bring the Act into force as provided in section 35. Heard by HUNTER, C.J.B.C. in Chambers at Vancouver on the 1st of February, 1926.

Argument

L. H. Jackson, for the application.

J. L. Lawrence, for the Crown, raised the preliminary objections: (1) That this was the second application for *habeas corpus* and should not be heard: see *Rex* v. *Loo Len* (1923), 33 B.C. 213; (2) that no objection having been taken either before Judge MacGill as to her jurisdiction nor on the appeal, that the accused was bound by the appeal and could not then take objection to jurisdiction in the lower Court: see *Rex* v. *Beamish* (1901), 8 B.C. 171 and *Rex* v. *Miller* (1913), 25 Can. C.C. 151.

The preliminary objections were overruled.

5th February, 1926.

Judgment

HUNTER, C.J.B.C.: The Dominion Act is not in force because it was not proclaimed as required by section 34 after the passing of the Provincial Act. The Dominion proclamation produced, being made under section 35, is futile because it could only be made if no Provincial Act had been passed.

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The result has been to create an *impasse* but the Court is urged to hack a way through by declaring recitals in the proclamation to have been made by mistake and that it should stand in lieu of the proper one which ought to have issued under section 34. This would be, presumably, by applying the maxim that the Court looks on that as done which ought to have been done, but, powerful as this maxim is, I cannot see that it is powerful enough to enable the Court to usurp the function of the Executive.

Judgment

The application must be allowed.

Application allowed.

REX v. ZIMMERMAN.

COURT OF APPEAL

1925

Nov. 20.

REX v. ZIMMERMAN

Criminal law—False pretences—Sentence—Revision by Court of Appeal—Criminal Code, Secs. 1013(2) and 1022—Prisoner's health—Grounds for reduction of sentence—Comments on value of English criminal decisions.

On appeal by a prisoner from his sentence on a charge of false pretences the ground that the state of his health had become worse since his conviction should more properly be the subject of consideration on an application for the clemency of the Crown, which is in a much better position than the Court of Appeal to receive and entertain current reports of proper officials who have had the convict under observation since imprisonment and can speak authoritatively upon his condition.

APPEAL from a conviction by MACDONALD, J. of the 4th of May, 1925, the accused having been sentenced at Vancouver to 25 months' imprisonment on a charge of having obtained $150 by false pretences.

Statement

The appeal was argued at Vancouver on the 20th of October, 1925, before MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

The prisoner, in person, pleaded for a reduction of the sentence mainly on account of the increasing seriousness of the state of his health.

Argument

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Matheson, for the Crown: On the question of the prisoner's health and what effect it should have on the Court of Appeal see *Rex* v. *Wetherden* (1921), 16 Cr. App. R. 1; *Rex* v. *Adams* (1921), 17 Alta. L.R. 52; *Rex* v. *Finlay* (1924), 3 W.W.R. 427; *Rex* v. *Pinder* (1923), 2 W.W.R. 997.

Cur. adv. vult.

On the 20th of November, 1925, the judgment of the Court was delivered by

MARTIN, J.A.: This is an appeal by leave under amended section 1013(2) of the Criminal Code against the sentence of two years and one month's imprisonment imposed upon the accused by Mr. Justice W. A. MACDONALD on the 4th of May last at the Vancouver Spring Assizes for obtaining the sum of $150 by false pretences. The prisoner appeared in person and presented his case and we also have the benefit of the report of the learned trial judge and of his observations at the time he passed sentence (the maximum penalty for which is three years) and it appears that he took into consideration the state of the prisoner's health at the time which was in particular pressed upon us as having become worse since then. As to that aspect of the matter we are of opinion that while the convict's physical state, as well as his age, may be taken into consideration in passing sentence, yet changes in health thereafter should more properly be the subject of consideration elsewhere on an application for the clemency of the Crown under section 1022, which, apart from other things, is in a much better position than we are to receive and entertain current reports of the proper officials who have had the convict under observation since his imprisonment, and so can speak authoritatively upon his condition. In this as in its other aspects this appeal has given us very careful, indeed anxious consideration, particularly because it is the first one under the amendment of 1923 to come before us. The conclusion we have arrived at, based upon the examination of many authorities in England and in Canada down to the present time, is that we do not feel justified in changing the sentence imposed by the learned judge because, in the main, it does not appear that he has left out of consideration

Judgment

any substantial element, and it is evident from his remarks when imposing sentence that he felt he was taking as lenient a view of the case as he thought his duty to the public warranted. Though it was the accused's first offence and he ultimately pleaded guilty, yet he did not do so till after he had resisted extradition from the United States to which he had fled, and his incarceration before his trial was due to his own conduct in that respect, and while his crime was not committed against a client yet he was nevertheless a solicitor at the time who, as the learned judge below pointed out, was fully aware of his evil intentions and their consequences.

If it is possible to extract any general principle from the many conflicting cases that are to be found in the English reports of the decisions of that Court of Criminal Appeal, based upon facts and circumstances which are never the same, and in different conditions of society and under punitive statutes and regulations for persons and institutions which (as has been pointed out in *Rex* v. *Adams* (1921), 17 Alta. L.R. 52, 57) are often very different from ours and to an extent which we have no means of ascertaining or weighing the practical effect of, it would be that an Appellate Court is reluctant to interfere with the sentence unless it is clearly of the opinion that it should do so having regard to all the circumstances of the particular case and bearing in mind the advantage possessed by the judge below of personal observation of the convict and his conduct and condition at the time. This substantially and practically is the course that has been adopted by other Appellate Courts in Canada (after considering the said authorities), such as the Court of Appeal for Alberta in *Rex* v. *Adams, supra;* in *Rex* v. *Finlay* (1924), 3 W.W.R. 427, and of Manitoba in *Rex* v. *Petch* (1925), 3 W.W.R. 434, and it is desirable for us to follow the Courts of our own country in this matter in which they have the best opportunity for determining what sentence is most suited to its conditions at the time of its imposition.

Judgment

It follows that the appeal should be dismissed, but as already intimated, the case on its present physical aspect appears to be one more the subject of an appeal to the prerogative of mercy than to our less ample powers.

Appeal dismissed.

CAYLEY, CO. J.

1925

Dec. 23.

REX v. HICKS.

Criminal law—Charge by police officer dismissed—Appeal by harbour master—"Any person aggrieved"—Right of appeal—Costs—Criminal Code, Sec. 749.

REX v. HICKS

A harbour board policeman laid a charge against the master of a steamer for infringement of a by-law made by the harbour commissioners prohibiting the unloading or discharging of refuse or rubbish within the limits of the harbour. On the charge being dismissed an appeal was taken by the harbour master of Vancouver to the County Court.

Held, on appeal, that the harbour master not being an "aggrieved party" nor the "prosecutor or complainant" had no right of appeal under section 749 of the Criminal Code.

Semble, only the complainant or informant (including in the meaning of the word "complainant" the King and bodies corporate) and the defendant has a right of appeal under said section.

Statement

APPEAL by the Harbour Master at Vancouver under section 749 of the Criminal Code from the dismissal of a charge against the master of the steamship Charmer for allowing refuse or rubbish to be thrown from his steamer within the territorial limits of Vancouver Harbour in contravention of a by-law of the Corporation of the Vancouver Harbour Commissioners. Argued before CAYLEY, Co. J. at Vancouver on the 16th of December, 1925.

Sloan, for appellant.
McMullen, for respondent.

23rd December, 1925.

Judgment

CAYLEY, Co. J.: This is an appeal under section 749 of the Criminal Code from the dismissal by a police magistrate of a charge against the master or person in charge of one of the C.P.R. boats in that he did

"unlawfully cause or allow, refuse or rubbish, to be unloaded, discharged, deposited or thrown from the said S.S. Charmer within the territorial limits of Vancouver Harbour as defined by the Vancouver Harbour Commissioners Act, contrary to the provisions in the by-laws of the Corporation of the Vancouver Harbour Commissioners in such case made and provided."

Objection is now taken by the respondent to the notice of

appeal on the grounds that the appellant is not an "aggrieved party," nor the "prosecutor or complainant" of the charge.

The facts are that the informant was one Robinson, a constable in the employ of the Corporation of the Harbour Commissioners of Vancouver and the party appealing is Captain A. H. Reed, who described himself as "Harbour Master in and for the Harbour of Vancouver." Section 749 of the Code says: "Any person who thinks himself aggrieved . . . the prosecutor or complainant, as well as the defendant," may appeal, and some judges have held that this means that three parties can appeal, namely: (1) Any person who thinks himself aggrieved; (2) the prosecutor or complainant; and (3) the defendant (*Rex* v. *Hatt* (1915), 25 Can. C.C. 263 at p. 265). Other judges have held that there are only two parties: (1) The prosecutor or complainant; and (2) the defendant (*Gates* v. *Renner* (1915), 9 W.W.R. 190; 24 Can. C.C. 122). It seems to be a question of individual interpretation of language. I myself am inclined to lean towards the second opinion that only the complainant or informant (including in the meaning of the word "complainant," the King and bodies corporate) and the defendant can appeal—the King for the reasons given in *Rex* v. *Hong Lee* (1920), 28 B.C. 459; (1920), 3 W.W.R. 795 at p. 797; 36 Can. C.C. 5, and corporations because corporations can only act through an agent and while the agent's name is used the real complainant is the corporation. The notice of appeal reads as follows:

Judgment

"Take notice that Capt. A. H. Reed, of the City of Vancouver, in the Province of British Columbia, Harbour Master in and for the Harbour of Vancouver, City of Vancouver aforesaid, being a person who thinks himself aggrieved by reason of a dismissal . . . . of a charge based upon an information, hereby appeals," etc.

The information or complaint is signed by James Robinson who described himself as "harbour board policeman."

By-law 10 of the Corporation of the harbour commissioners reads as follows:

"The duties of the secretary and of the harbour master and of all other officers of the commissioner shall be performed by them subject to such particular directions and instructions as the commissioner may, from time to time, give or cause to be given."

It is not stated in any of the by-laws that it is a duty of the

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harbour master to prosecute cases or appeal from decisions. There was no evidence given that the harbour commissioners had instructed the harbour master under the provisions of by-law 10 aforesaid to prosecute this charge or take this appeal. But it is contended that the harbour master in taking this appeal was acting in a ministerial capacity and under the decision in *Re Minister of Inland Revenue* v. *Thornton* (1917), 12 O.W.N. 30; 28 Can. C.C. 3, he can act for the commissioners in a ministerial capacity. In that case, however, it was shewn that the information was laid in the name of the minister of inland revenue although signed and sworn to by an inland revenue officer and it is decided there that the minister was the prosecutor and might appeal under section 749 of the Code. But in the case at Bar the information was not laid in the name of the harbour commissioners nor was the appeal taken in the name of the harbour commissioners.

Suppose a man were prosecuted by the City of Vancouver for an infringement of one of the city by-laws and the magistrate dismissed the charge, could an appeal be taken in the name (naming him) of the chief of police of the City of Vancouver? It seems to me not. If the notice of appeal had read: "Take notice that the Corporation of the Harbour Commissioners of the City of Vancouver . . . . hereby appeals," the notice would be unimpeachable provided the information was laid on their behalf. But Captain Reed cannot, I think, personally appeal as "prosecutor" nor is the defect remedied by describing himself as "harbour master."

Judgment

It may be said that the objection is technical. On the other hand, it may be said that officials should not assume to act for their corporations without instructions and I think this is the consideration which should prevail. The word "aggrieved" used in section 749 is either superfluous or it has a definite intention. Reading 55 Geo. III., Cap. 68, Sec. 3, which is an Act concerning highways, we find it recited in the preamble, *inter alia,* "any person or persons who may think themselves aggrieved" and in the enacting clauses an appeal is given to "any person or persons injured or aggrieved." These words were considered by Abbott, C.J., in *Rex* v. *The Justices of Essex* (1826), 5 B. & C. 431; 108 E.R. 160, and the judgment says:

"The matter in question, *viz.*, the stopping up or diverting of a public highway, affects in a certain degree all His Majesty's subjects, and therefore as the statute has not given a right of appeal to all persons, but merely to the party aggrieved, we must suppose that the Legislature intended to confer that privilege upon those persons alone who have sustained some special and peculiar injury, and not to extend the power of appealing to any captious person whomsoever."

In like manner our section 749 extends the right of appeal to any person "who thinks himself aggrieved" and as the language of the learned judges in *The Queen* v. *Keepers of Peace and Justices of County of London* (1890), 25 Q.B.D. 357, seemed to cast doubt on the right of any party to appeal against an acquittal, the section goes on to add that "the prosecutor or complainant" may appeal, provided always (I think) that he is not a "captious person" but one who has a legal right to feel "aggrieved." Now the harbour master of Vancouver is merely an officer of the commissioners and can produce no evidence of either general or particular instructions from the commissioners to either prosecute a charge or appeal from an acquittal.

Judgment

I have, on the above grounds, concluded that the objection of the respondent must be sustained.

The respondent asks for costs and after thinking the matter over and considering that the respondent has been put in jeopardy, once at the police Court and once here, I think that under the authority of *Pahkala* v. *Hannuksela* (1912), 2 W.W.R. 911; 20 Can. C.C. 247; 8 D.L.R. 34, I should allow costs.

Appeal dismissed.

GREGORY, J.

1926

May 10.

SCHUBERG v. LOCAL INTERNATIONAL ALLIANCE THEATRICAL STAGE EMPLOYEES *ET AL.*

SCHUBERG v. LOCAL INTERNATIONAL ALLIANCE THEATRICAL STAGE EMPLOYEES

Trade-union—Theatre stage hands—Walk-out—Picketing—Distribution of pamphlets—Statements of opinion—Watching and besetting—Injury to theatre's business—"Fair and reasonable argument"—R.S.B.C. 1924, Cap. 258.

The plaintiff who owned and operated a theatre reduced the number of his stage hands. The result was a walk-out by the stage hands and the defendant trade-union distributed hand-bills at the theatre entrance addressed to the public stating that the plaintiff's theatre "is unfair to organized labour." They further had motor-cars and sandwich-men displaying signs and banners bearing the same statement before the entrance to the theatre. In an action for damages and an injunction:—

Held, that the acts were intended to injure the plaintiff's business for the purpose of forcing him to employ the number of stage hands the defendants desired him to employ and the defendants' acts resulted in a material falling off in the plaintiff's business. The defendants' acts amounted to an unlawful watching and besetting and the Act relating to trade-unions did not save the defendants from liability; the plaintiff is therefore entitled to damages and an injunction.

Statement

ACTION for damages for injuries sustained through the defendants' action in attempting to injure the plaintiff's business. Tried by GREGORY, J. at Vancouver on the 21st of April, 1926.

T. G. McLelan, and *Pyke*, for plaintiff.
Lefeaux, and *E. I. Bird,* for defendants.

10th May, 1926.

Judgment

GREGORY, J.: There is practically no dispute about the facts in this case and shortly stated are that the plaintiff carries on business under the name of "Empress Theatre." At the time of the acts complained of he was the sole owner of the business. He had no formal contract with the defendants or anybody purporting to act for them. Mr. Harrington's statement that plaintiff said the contract would be the same as that with his former firm, being disputed by the plaintiff is not satisfactorily proved.

For a long period the Empress Theatre had employed seven stage hands. Plaintiff gave notice that he would, after a named date, employ only five. This was unsatisfactory to the stage hands and to the defendants and the stage hands were called out, or walked out. Plaintiff employed five outsiders and the defendants thereupon placed men at the entrance to the theatre who distributed hand-bills addressed to the theatre going public of Greater Vancouver stating, *inter alia,* in large type, that "The Empress Theatre is unfair to organized labour." Defendants also caused motor-cars and sandwich-men, displaying signs and banners bearing the same statement, to parade before the entrance to the theatre; they watched and beset the plaintiff's place of business.

I find, as a fact, that these acts were all done with the intention of injuring the plaintiff's business and in the hope that to save himself from such injury he would return to the employment of seven stage hands as desired by the Vancouver Theatrical Federation, the body with whom the contract, if any, would have been made. Defendant's intention was to injure plaintiff; its object was to force him to conform to the Vancouver Theatrical Federation's views of the proper number of stage hands to be employed at the Empress Theatre. Apart from this, I find no evidence of any personal malice against the plaintiff. During the continuance of these acts, the volume of the plaintiff's business was materially reduced.

Judgment

It was argued that there was no liability for the acts complained of by reason of the provisions of the Act relating to Trade-unions, being R.S.B.C. 1924, Cap. 258. This Act I think gives no protection as to section 1. The defendants admit their responsibility. Section 2 only permits the communication of facts, etc., and the persuasion by fair and reasonable argument, without any unlawful act. The statement that the theatre was unfair to organized labour is not a statement of fact but one of opinion merely, about which people may and do differ. An attribute which does not belong to a statement of fact.

The statements on the hand-bills, banners and standwich-boards were not "fair or reasonable argument"—they were not argument at all and in addition they were accompanied by the

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unlawful act of watching and besetting. See *Rex* v. *Blachsawl* (1925), 3 W.W.R. 344, a decision of the Appellate Division of the Supreme Court of Alberta which I have no hesitation in accepting notwithstanding the suggestion that it is bad law. It is quite true, as argued, that the Parliament of Canada cannot by declaring a certain act to be criminal invade the exclusive jurisdiction of Provincial Legislatures to legislate on property and civil rights, but surely there can be no question that the preservation of the public peace is a subject coming within the jurisdiction of the Dominion Parliament.

The only remaining section of the statute is section 3 and it is equally inapplicable to the circumstances of the case before me.

As the plaintiff had a perfect right to carry on his business with five stage hands, if he so wished, and the defendants have combined to prevent him from so doing and have endeavoured to carry out their object by unlawful means and have caused him serious loss and injury, I can see no reason why they should not be made liable for such injury even though their ultimate object was to promote their own lawful interests, and *Serrell* v. *Smith* (1925), A.C. 700; *Quinn* v. *Leathem* (1901), A.C. 495; *J. Lyons & Sons* v. *Wilkins* (1899), 1 Ch. 255 and *Sleuter* v. *Scott* (1915), 21 B.C. 155 furnish I think ample authority for this.

Judgment

The plaintiff testified that his loss amounted to $700 a week for a period of five weeks, but in arriving at this amount, I do not think that he made proper allowance for the natural falling off of business after the Christmas holiday season or for the fact that his productions were of a smaller and probably poorer class. It is impossible to tell exactly to what extent the defendants' unlawful acts injured him but I think $1,750 is probably much nearer the mark than his own figures and there will be judgment for that amount. There must also be an injunction and if counsel cannot agree upon the form of it, it may be spoken to later as well as any other matter which I may have overlooked.

Plaintiff will have the costs of the action.

Judgment for plaintiff.

ROBERT PORTER & SONS LIMITED v. MACKENZIE.

MCDONALD, J.

1926

April 21.

ROBERT PORTER & SONS LTD. v. MACKENZIE

Mortgage—Interest—Agreement to pay increased rate in consideration of forbearance to sue—Foreclosure—Interest paid to certain date under oral arrangement—Interest for balance of period only asked for at rate originally fixed—Validity of verbal arrangement.

A mortgage provided for payment of interest at 6 per cent. per annum, subsequently the parties entered into a verbal agreement that after maturity the rate should be 8 per cent. until 1918 and 7 per cent. after that in consideration for which the mortgagee agreed that the principal moneys should not be called in. Interest was paid on this basis until the 31st of October, 1924. The mortgagee seeks foreclosure and asks that the account be taken on the basis that interest was paid up to the 31st of October, 1924, and that the account be taken for the subsequent period at 6 per cent. The defendant contends the whole account should be gone into and that the verbal agreement for a higher rate of interest than that specified in the mortgage is void under section 4 of the Statute of Frauds.

Held, that it is not sought here to charge the lands with the higher rate of interest but that the charge should be enforced on the basis that the rate of interest chargeable is 6 per cent., so that in taking accounts the interest should be treated as paid up to the 31st of October, 1924.

Standard Trusts Co. v. *Hurst* (1914), 24 Man. L.R. 185 applied.

ACTION for foreclosure. The mortgage provided for interest at 6 per cent. but there was an agreement between the parties that the interest should be 8 per cent. after maturity until 1918, and 7 per cent. after that in consideration for which the mortgagee agreed that the principal should not be called in. Interest was paid on this basis until the 31st of October, 1924. The mortgagee now seeks for foreclosure and asks that accounts be taken on the basis of interest at 6 per cent. since the 31st of October, 1924. The defendant asks that the whole account be taken; that the verbal arrangement for higher interest is void under section 4 of the Statute of Frauds. Tried by MCDONALD, J. at Vancouver on the 15th of April, 1926.

Statement

Armour, K.C., for plaintiff.

J. W. deB. Farris, K.C., for defendant.

21st April, 1926.

MCDONALD, J.: Upon consideration, I am satisfied that the

Judgment

MCDONALD, J.

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April 21.

ROBERT PORTER & SONS LTD. v. MACKENZIE

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inevitable conclusion of fact to be reached in this case is that the defendant's husband had full authority from her to agree, and did agree, that although the mortgage in question provided for the payment of interest at only 6 per cent., the rate to be paid after maturity should be 8 per cent. until 1918 and 7 per cent. thereafter and that in consideration of that agreement, the principal moneys should not be called in. The parties acted on this basis and interest was paid up to 31st October, 1924. The plaintiff now seeks foreclosure and asks that the account be taken on the basis that interest was paid up to 31st October, 1924, and that the rate on which the accounts should be cast is 6 per cent. The defendant contends that the whole account should be gone into and that the above verbal agreement to pay a higher rate of interest than that provided for by the mortgage is void under section 4 of the Statute of Frauds. I think this contention is unsound. It is not sought to charge the lands with a higher rate of interest. If such were sought the verbal agreement could not be enforced. *Standard Trusts Co.* v. *Hurst* (1914), 24 Man. L.R. 185. All that is sought here is that the charge should be enforced on the basis that the rate of interest chargeable is 6 per cent. There will be judgment accordingly for the plaintiff and the registrar in taking the accounts will treat the interest as paid up to 31st October, 1924, the rate thereafter being 6 per cent.

Order accordingly.

REX v. PERRI.

THOMPSON, CO. J.

1926

Feb. 24.

REX v. PERRI

Criminal law—Intoxicating liquor—Sale of—Charge dismissed—Appeal—Evidence—Accused entitled to benefit of reasonable doubt—R.S.B.C. 1924, Cap. 146, Sec. 91.

Section 91 of the Government Liquor Act casts on the accused, on a prosecution for the unlawful sale of liquor, the onus of proving his innocence where there is evidence of possession, but the rule laid down in *Rex* v. *Schama* (1914), 84 L.J., K.B. 396 nevertheless applies and he is entitled to the benefit of any reasonable doubt as to his guilt.

APPEAL by the Crown from the decision of the police magistrate at Fernie dismissing a charge for the unlawful sale of liquor. Argued before THOMPSON, Co. J. at Fernie on the 17th of February, 1926. Statement

Fisher, K.C., for appellant.
Sherwood Herchmer, for respondent.

24th February, 1926.

THOMPSON, Co. J.: This is an appeal by the Crown from the judgment of G. G. Henderson, Esq., police magistrate in and for the city of Fernie, county of Kootenay, Province of British Columbia.

The facts may be stated briefly: A man by the name of Vincent states that he entered into negotiations with the accused (respondent) Perri for the purchase of four bottles of pre-war whisky for the sum of $20. Pursuant to this agreement he met the accused on the evening of January 15th at the Grand Central Hotel, a hotel owned and conducted by the accused. There, he states, he received the liquor and gave a cheque for $20 payment of which he subsequently stopped. Nothing more is heard about the cheque. When he left the hotel carrying the liquor he was met by the chief of police, Charles Anderson, who seized the liquor, retaining three bottles. One bottle was thrown away and destroyed by Vincent. Vincent was then arrested. The evidence is practically silent as to what happened to him after that. On the same evening the chief of police met Perri Judgment

THOMPSON, CO. J.

1926

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at the Grand Central Hotel by arrangement and searched the premises. No liquor was found. Perri denies the whole story and states that in his opinion the liquor was purchased, if at all, from a man by the name of Enoch Neuert, who was living at his hotel. He denies all knowledge whatsoever of the liquor and says that he never had it and knows nothing at all about it. Neuert denies selling the liquor and claims to have had no knowledge whatsoever of the alleged sale.

A motion was made to dismiss which I did not allow for reasons previously given, namely, that there was some evidence to go before the jury.

Mr. *Herchmer* moves for dismissal of the appeal on the following grounds: (1) That the only direct evidence of sale is that of an accomplice; (2) that the evidence of Perri is an absolute denial to which credence should be given by the Court; (3) that in any event the accused person is entitled to the benefit of any doubt which I may have.

Mr. *Fisher* moves for a conviction on the ground, that evidence having been given by Vincent of the possession of the liquor by the accused it is for the accused to prove affirmatively and beyond all doubt that he was not guilty of the offence. In aid of this contention he cites and relies on section 91 of the Government Liquor Act, R.S.B.C. 1924, Cap. 146. In fact his whole case depends on the construction I may place upon section 91.

Judgment

The evidence of Vincent was not particularly convincing. I doubt very much if a man of his experience could hope to buy pre-war whisky for $5 an imperial quart. Secondly, it is rather an unusual thing for a man purchasing from a bootlegger to pay by cheque. Thirdly, if his story is true he is an accomplice and the evidence of an accomplice must be looked upon with grave suspicion. Fourthly, the natural attitude of a man purchasing liquor illegally is to blame some person who would be naturally subject to suspicion rather than the real vendor. His whole attitude throughout his evidence was not convincing. On the other hand the evidence of Perri, while much more definite than that of Vincent, is open to grave suspicion. The fact that the lights were put out or burnt out when he and Vincent came

down stairs; and the fact that he went upstairs with Vincent all tend to shew a line of guilty conduct.

The whole case, however, comes down to the one proposition—there being some evidence, however weak, whereby the onus is cast upon the accused by virtue of section 91, can he invoke the principles of *Rex* v. *Schama* (1914), 84 L.J., K.B. 396; 112 L.T. 480, namely, that there being a reasonable doubt the accused is entitled to it notwithstanding the section, or must he prove beyond a doubt that he is not guilty of the offence charged?

This section has been considered in a great many cases during the last few years, and these cases I propose to consider. I may say that the corresponding section in The Ontario Temperance Act, 1916, Cap. 50, is section 88, and is word for word similar to section 91 of the British Columbia Government Liquor Act.

In *Rex* v. *Casola* and *Rex* v. *Wodyga,* two unreported decisions of my own, I held that the word "may" used in section 91 means "must." This seemed to me to be the logical conclusion from the decision of Mr. Justice Middleton in the case of *Rex* v. *Le Clair* (1917), 39 O.L.R. 436; 28 Can. C.C. 216; but when I gave these decisions the cases which I am going to consider were not cited to me. In *In re Baker. Nichols* v. *Baker* (1890), 44 Ch. D. 262; 59 L.J., Ch. 661, Cotton, L.J., at p. 663, says:

Judgment

"I think that great misconception arises from the attempt to argue that the word 'may' means 'must.' It never can mean 'must' so long as the English language retains its meaning; but it gives a power, and then it may be a question in what cases where a judge has a power given him by the word 'may' it becomes his duty to exercise that power."

This is a very strong statement made by a very eminent judge, and, if correct, it goes a long way to support the contention of Mr. *Herchmer.*

I will now consider the cases which have been decided in the Canadian Courts. In doing so I start with the general statement of law set forth by Mr. McRuer in 61 D.L.R. pp. 189-90:

"The proper construction and application of sec. 88 [B.C. section 91] has not yet been determined. There are a number of decisions by Courts of co-ordinate jurisdiction which conflict in part and do not definitely settle the law. . . . The section is discussed at length in *R.* v. *Lemaire* [(1920)], 48 O.L.R. 475, 34 Can. C.C. 254, 57 D.L.R. 631, by Meredith, C.J.C.P., but the opinions expressed there are *obiter dictum.* The reasoning in this case

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is nevertheless convincing. The judge says, at pp. 633, 634 (57 D.L.R.): 'Mere possession, charge, or control does not make an accused prisoner *prima facie* guilty of all the crimes of the Ontario Temperance Act calendar. If any one is charged with selling liquor which it is proved he once had, but which now some one else has, he may, not must, be convicted, if he fails to shew, as he should be able easily to do if innocent, that the change of possession was lawful, whilst if charged with unlawfully having liquor, and the prosecution proves only that the possession was had in the dwelling-house in which the accused resides, [if it is a legal place] the prosecution must fail; whilst if it is in a place where it may not lawfully be had the onus apart from the section should be on the accused to exculpate himself. And when a case is made against an accused person under sec. 88, its weight, must of course, depend upon its circumstances.'"

He then goes on to state, p. 190:

"A careful reading of these decisions and the section seems to warrant the conclusion that the magistrate may in his discretion convict where proof of possession of the liquor in question has once been established. But there is nothing in the section to say that the magistrate must convict in such a case unless he is satisfied on the evidence that a conviction ought to be made. The opinion expressed in *R.* v. *Le Clair* does not seem to be wholly warranted by the wording of the section."

Rex v. *Le Clair, supra,* is undoubtedly a very strong case for the Crown, especially the words used by Middleton, J. at p. 439:

"There is a statutory presumption of guilt upon proof of custody of the dangerous thing, and the common law rule is reversed—the accused must prove his innocence to the satisfaction of the magistrate or take the consequences."

Judgment

This decision was practically followed by the same judge in *Rex* v. *Moore* (1917), 41 O.L.R. 372; 30 Can. C.C. 206, but seems to have been doubted by himself in the case of *Rex* v. *Kozak* (1920), 47 O.L.R. 378; 33 Can. C.C. 189, that is, the general principle which the Crown seeks to place upon section 91 seems to have been doubtful in the judge's mind when he gave this decision.

We then come to the case of *Rex* v. *Lemaire* (1920), 48 O.L.R. 475 (34 Can. C.C. 254). At p. 478, the learned judge says:

"Mr. Haverson's bugbear, sec. 88 [B.C. sec. 91], is really not as formidable, objectionable, and vicious as he seems to imagine, though it goes a long way contrary to that which is the rule in trials generally and which generally must always be the rule. But it does not make all the innocent guilty. It must be given a reasonable meaning, the meaning that when any one charged with an offence against the provisions of the Act is proved to be or to have been in possession, charge, or control of liquor under such circumstances as would make him guilty of the offence charged, then, if it

is not shewn to be a lawful possession, charge, or control, he may be convicted," etc.

Again, at p. 479, he says:

"I cannot think that the learned judge who decided the case of *Rex* v. *Le Clair* really meant to express a contrary view, much less to decide that in no case coming under sec. 88 could a conviction be quashed for want of 'evidence to support' it. All that that case seems to me to have really decided was: that, in view of the circumstantial evidence set out at the conclusion of the judgment, the magistrate could not be found fault with, in *certiorari* proceedings, for refusing to give effect to the unsupported testimony of the accused that he was not guilty."

The next case is that of *Rex* v. *Bondy* (1921), 49 O.L.R. 115; 64 D.L.R. 35, a decision of Mr. Justice Orde, in which he follows the decision of Mr. Justice Middleton.

The strongest case for the defence is that of *Rex* v. *Galsky* (1923), 4 D.L.R. 705; (1924), 1 W.W.R. 366, a decision of Stubbs, C.C.J., in Manitoba, where he dismissed the charge upon proof that the liquor was kept in a legal place. In that case he cites an unreported decision of the Manitoba Court of Appeal of *Rex* v. *Steinberg*. This case would plainly shew that the presumption which the Crown seeks to place upon the accused may be rebutted by the evidence of the Crown itself, and undoubtedly tends to shew that my decision in *Rex* v. *Casola* (unreported) is not correct.

Judgment

Another very strong case for the defence is *Rex* v. *Diamond* (1921), 16 Alta. L.R. 302; ((1921), 2 W.W.R. 45). At p. 306 Stuart, J. says:

"I do not know that a better example than this case could be found to shew how different a case is apt to appear in a Court of Appeal from the way it must have appeared at the trial. There is no doubt that any reader of the story just recounted must have little sense of humor if he refrains from laughter when the obvious purport of it all dawns upon him. It would, I think, be rather difficult to conceive a more barefaced attempt at a 'camouflage' which might deceive the police than we have presented to us in this story.

"But nevertheless, what is the problem which is presented to us upon this appeal? It is whether there was any evidence upon which the Diamonds could properly be convicted, not of having broken the law, or of having attempted to do so, in some vague uncertain way (which beyond all doubt is true upon the evidence) but of having actually sold that liquor illegally.

"Now undoubtedly the Diamonds manufactured a pretence of having sold the liquor to Hiram Miller. But it was, strangely enough, incumbent on the prosecution to shew that this was really a pretence because, if it had

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been true, it would have been a sale to a person beyond the Province and so within the law. Yet having succeeded completely in proving that the liquor had not been sold to Miller the prosecution was still bound to convince the magistrate that there had nevertheless been a sale."

He then goes on to shew that proof was not furnished by the Crown of there having been a sale.

A case very much in point to the present one is that of *Rex* v. *Jolly* (1925), 43 Can. C.C. 355, a decision by Denton, Co. Ct. J. I have great faith in the judgments of this learned judge of the County Court of York, as he must have a great many cases of a similar nature coming before him.

Judgment

From a study of all the cases which have been cited to me, and which I have been able to obtain, I can come to no other conclusion but that section 91 casts upon the accused the onus of proving his innocence where there is evidence of possession, but he is still entitled to the benefit of doubt. I think the law may be very clearly stated that while the onus is cast upon the accused by virtue of section 91, nevertheless the rule laid down by the English Court of Criminal Appeal in *Rex* v. *Schama, supra,* still exists and the accused is entitled to the benefit of any reasonable doubt.

The appeal of the Crown is dismissed, costs reserved.

Appeal dismissed.

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Immigration—Chinaman unlawfully in Canada—Order for deportation by controller—Certiorari—Can. Stats. 1923, Cap. 38, Secs. 10(2), 26 and 38.

An order for the deportation of the respondent was made by the controller of Chinese immigration under section 26 of The Chinese Immigration Act, 1923. On *certiorari*, the respondent claiming he was born in Canada, the order for deportation was set aside.

Held, on appeal, reversing the order of GREGORY, J., that the order for deportation be restored as it had been made with jurisdiction and none of the essentials of justice had been violated.

Held, further, that *certiorari* in general lies with respect to an order for deportation made under section 26, and section 38 is no bar to its application when such orders are made without or in excess of jurisdiction or in violation of the essentials of justice.

Section 10(2) of The Chinese Immigration Act, 1923, has no application to deportation proceedings under section 26.

APPEAL by the Crown from an order of GREGORY, J. of the 11th of November, 1925, quashing a deportation order made by the controller of Chinese immigration by which Low Hong Hing was ordered to be deported to China. The accused was arrested on the 15th of April, 1925, and brought before the chief controller of Chinese immigration, Percy Reid, under section 10 of The Chinese Immigration Act, 1923, when a preliminary inquiry was held and after adjournment was again proceeded with before Chief Controller A. E. Skinner who made the deportation order on the 20th of May, 1925. The accused claimed he was born in New Westminster on the 15th of September, 1905. An order for a writ of *certiorari* was issued on the 14th of October, 1925, and the application resulting in the order appealed from was heard by GREGORY, J. on the 27th of October, 1925. Statement

The appeal was argued at Vancouver on the 3rd and 4th of March, 1926, before MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Elmore Meredith, for appellant: The respondent was arrested in Canada and ordered to be deported under section 10 Argument

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of The Chinese Immigration Act, 1923. He says he was born in Canada. The question here is whether the controller had jurisdiction to make the order: see *Rex* v. *Nat Bell Liquors, Ld.* (1922), 2 A.C. 128; 65 D.L.R. 1 at pp. 21-2. If it is a proper proceeding to take *certiorari* then the Court can only look at the proceedings for the purpose of deciding whether there was jurisdiction: see *The Colonial Bank of Australasia* v. *Willan* (1874), L.R. 5 P.C. 417. The order was quashed on the ground that the controller had received improper evidence.

Argument

Bloomfield, for respondent: That the Court below can decide as it did on *certiorari* see *Rex* v. *Anthony* (1922), 36 Can. C.C. 192; *Re Yee Foo* (1925), 56 O.L.R. 669; *Rex* v. *Home Secretary* (1917), 1 K.B. 922 at p. 930. The question as to whether he is a British subject is not within the jurisdiction of the controller: see *Regina* v. *Stimpson* (1863), 4 B. & S. 301. That the Court can review the evidence see *Rex* v. *Emery* (1916), 27 Can. C.C. 116; *Rex* v. *Oakes* (1923), 39 Can. C.C. 329. This man was born in Canada and is a Canadian citizen. That *certiorari* will lie see *The King* v. *Licence Commissioners of Point Grey* (1913), 18 B.C. 648; *Re Maritime Fish Co. Ltd.* (1919), 46 D.L.R. 108; *Rex* v. *Woodhouse* (1906), 2 K.B. 501.

Meredith, replied.

Cur. adv. vult.

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MARTIN, J.A.: This is an appeal by the Crown, in reality, from an order of Mr. Justice GREGORY setting aside, upon *certiorari,* an order for the deportation of the respondent made by the controller of Chinese immigration at Vancouver, on the 20th of May, 1925, in pursuance of the powers conferred upon him by section 26 of The Chinese Immigration Act, 1923, Cap. 38, which section is as follows:

"Whenever any officer has reason to believe that any person of Chinese origin or descent has entered or remains in Canada contrary to the provisions of this Act or of the Chinese Immigration Act, chapter ninety-five of the Revised Statutes of Canada, 1906, or any amendment thereof, he may, without a warrant apprehend such person, and if such person is unable to prove to the satisfaction of the officer that he has been properly admitted into and is legally entitled to remain in Canada, the officer may detain such person in custody and bring him before the nearest controller for examina-

tion, and if the controller finds that he has entered or remains in Canada contrary to the provisions of this Act or of the Chinese Immigration Act or any amendment thereof, such person may be deported to the country of his birth or citizenship, subject to the same right of appeal as is provided in the case of a person applying for original entry to Canada. Where any person is examined under this section the burden of proof of such person's right to be or remain in Canada shall rest upon him. Where an order for deportation is made under this section and in the circumstances of the case the expenses of deportation cannot be charged to the transportation company, such expenses shall be paid by the person being deported if able to pay, and, if not, by His Majesty."

This section deals with two classes of cases only, *viz.*, those wherein the person has "entered or remains in Canada" and provides its own summary and complete procedure in the exercise of the powers jointly conferred upon the controller by said section 26, and by 10(1) as follows:

"10. (1) The Controller shall have authority to determine whether an immigrant, passenger or other person seeking to enter or land in Canada or detained for any cause under this Act is of Chinese origin or descent and whether such immigrant, passenger or other person, if found to be of Chinese origin or descent, shall be allowed to enter, land or remain in Canada or shall be rejected and deported."

Subsection (2) of 10 laying down the procedure to be followed in certain specified cases has, in our opinion, no application to this case because it is in its opening words restricted to Chinese persons "applying for admission or entry to Canada," which is not the case before us, the person here being one who either "has entered or remains in Canada" under said section 26. In reaching this conclusion we have not overlooked the later words in (2) "that such person is entitled to remain in Canada," but that ambiguous expression, entirely at variance with the said opening words restricting the examination to those alone who are "applying for admission or entry," is clearly not sufficient to embrace non-specified classes and may well be satisfied by construing said words as referring to the actual physical presence of the applicant in Canada wherein he may be permitted to "remain," and in this appropriate sense that word is, in fact, used in section 2(1) whereby provision is made for the applicant to "remain until the provisions of this Act have been complied with" in Canada in "a proper building" provided for that purpose, and if his application for "lawful admission to Canada" be granted he would be entitled to "remain"

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permanently therein. This construction moreover not only does not deprive the person under suspicion (*i.e.*, the suspect, under section 26) of any right under section 10, but on the contrary, gives him the additional right (as is very proper in the case of one found to be already "remaining" at large in Canada) of being represented by counsel at all hearings "whenever any evidence or testimony touching the case is received by the Board," and not merely after the preliminary hearing under section 10, because it is submitted, and rightly, we think, by respondent's counsel, that the joint effect of section 10 of the Immigration Act of 1924, Cap. 45, and sections 15 and 79 of the Immigration Act of 1910, Cap. 27, is to confer that privilege upon him and also to require the investigating tribunal, be it Board of Inquiry or Controller, to keep "a summary record of proceedings and evidence and testimony taken by" it. Under the special procedure provided by section 26, there is first what is in effect a preliminary inquiry to determine to the "satisfaction" of the immigration "officer" before his apprehension of the suspect, and then, if and when the suspect is brought before the nearest controller for examination under section 26, it becomes that controller's duty, and his alone, to "find" if the suspect has lawfully entered or may lawfully remain in Canada in accordance with the provisions of the statute, and if he is found not to be so entitled then the suspect "may be deported," and it is declared that,

> "Where any person is examined under this section the burden of proof of such person's right to be or remain in Canada shall rest upon him."

This emphatic provision leaves no opportunity for doubt regarding the onus of proof to establish a right claimed "under this section" and continues the similar burden laid upon him to "prove to the satisfaction of the officer" who originally apprehended him, his right to be in Canada, and it is, to us, obvious that to require another and in effect second preliminary examination under section 10(2) (quite appropriate to other proceedings) would be to import another and uselessly harassing inquiry into proceedings under section 26 already fully ample for their declared purpose. We have considered this aspect of the case because the suspect swears in his affidavit, paragraph 3, that after being arrested by an immigration officer

he was on the 30th of June, 1924, brought before the controller and that

"a preliminary enquiry was then made before the said chief controller, pursuant to section 10 of the Chinese Immigration Act, and was then adjourned by the said chief controller to a date unfixed, and for a period of nearly six months thereafter I am advised by my solicitor, Mr. *Edgar Bloomfield*, and verily believe, that he endeavoured to ascertain when and where the enquiry would be continued, and that it was not until February, 1925, that the matter was proceeded with, when my bondsman, Wong Mee Doon, was notified that a further examination would be proceeded with on March 10th.

"(4) After a little delay and further adjournment the examination was proceeded with on the 15th of April, 1925, when, after certain evidence had been given before another chief controller, Mr. A. E. Skinner, an order was made by the said A. E. Skinner to deport me to China, a copy of which order is now shewn to me and marked Exhibit 'A' to this my Affidavit."

This statement as to the opening proceedings being a preliminary hearing under section 10 may well be a pardonable error in description on the part of the suspect because his counsel before us continued that error in confusing the procedure of section 26 with section 10(2), but the matter is of no moment and if a preliminary hearing were in fact held it was simply an unauthorized and superfluous proceeding which in the circumstances did not have, and could not have had any effect upon the right of the suspect, as hereinafter to be noted.

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It is conceded that certain persons have the right to "remain in Canada," *e.g.*, those who are "Canadian citizens or have acquired Canadian domicil" (section 38) which expressions are for the purposes of the Act, defined by section 2 (*d*) and (*f*), Cap. 27, of said Act of 1910. The respondent claimed before the controller as before us, that he was born in this Province in 1905 and so was a Canadian citizen, which means—

"i. a person born in Canada who has not become an alien;

ii. a British subject who has Canadian domicil; or,

iii. a person naturalized under the laws of Canada who has not subsequently become an alien or lost Canadian domicil."

Thus a hearing under section 26 would include the case of any person found to be in Canada and claiming to be within these three classes. The question of fact then, and the sole fact, herein to be "found" by the controller was that raised by the claimant, *viz.*, was he a Canadian citizen? and therefore entitled to remain in Canada, and upon that issue the hearing took place

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before the controller first on the 15th of April, 1925, and later on the 20th of May following, the suspect being represented by the same counsel on both occasions, with the result that the order of deportation was made at the conclusion of the hearing which order is admittedly *ex facie* valid in all respects and shewing a competent jurisdiction. Such being the situation the appellant's counsel submits that *certiorari* will not lie and that no case could be cited to support it in such circumstances, whatever might be done if *habeas corpus* or other proceedings were open, in the circumstances, under section 38.

The operative portion of the order in question is:

"This is to certify that Low Hong Hing, is a person of Chinese origin and descent who arrived at Canada at unknown port or place of entry, has this day been ordered deported by the controller of Chinese immigration at this Port, in accordance with the provisions of section 26 of The Chinese Immigration Act, 1923, it having been established that he is illegally in Canada, in that said Low Hong Hing was not born in Canada and in that he entered Canada contrary to the provisions of The Chinese Immigration Act, or The Chinese Immigration Act, 1923, and the said Low Hong Hing is hereby ordered to be deported to China.

"Dated at Vancouver, B.C., this 20th day of May, 1925.

"A. E. Skinner,

"Controller of Chinese Immigration."

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The respondent's counsel submitted some authorities but they not being apparently sufficient, and the matter being of importance, we gave leave to hand in others for further consideration. These and many others have been carefully considered in the light of the very unusual circumstances that the very question upon which the right under section 38 to review the controller's proceedings depends, *i.e.*, the Canadian citizenship of the suspect, is here the very question that jurisdiction is conferred upon him to decide and not in any sense a preliminary or collateral question, but inseparably interwoven therewith. Such being the fact it is safe to fall back upon sound principles in determining the real question raised which is that the suspect wishes to establish before us by these proceedings in *certiorari* the fact that he is a Canadian citizen as aforesaid despite the adjudication of the controller to the contrary because he submits that the evidence before the controller, and now before us, establishes his claim, and on our jurisdiction in general the following observations of Lord Justice Scrutton in *Rex* v.

Chiswick Police Station Superintendent (1918), 1 K.B. 578 at pp. 589-90 are much in point:

"This jurisdiction of His Majesty's judges was of old the only refuge of the subject against the unlawful acts of the Sovereign. It is now frequently the only refuge of the subject against the unlawful acts of the Executive, the higher officials, or more frequently the subordinate officials. I hope it will always remain the duty of His Majesty's judges to protect those people."

A question arose as to the application of *certiorari* in general to proceedings of this nature and while the matter is not wholly free from doubt yet the decision of this Court in *The King* v. *Licence Commissioners of Point Grey* (1913), 18 B.C. 648 supports it, and similar proceedings were taken in *Rex* v. *Home Secretary* (1917), 1 K.B. 922; and in *Rex* v. *Chiswick Police Station Superintendent, supra,* wherein the "deportee" (as Lord Justice Pickford aptly describes him at p. 585, in coining an almost necessary word) applied for *habeas corpus* against a deportation order of the Home Secretary, Lord Justice Scrutton said, p. 591:

"Parliament has allowed the order in council to confer upon such persons as may be specified in the order powers with regard to arrest and detention. In my view at present those powers are of a judicial character and cannot be delegated by the person named in the order."

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The leading case on the subject is *Rex* v. *Woodhouse* (1906), 2 K.B. 501, wherein three of the Lords Justices unanimously reversed the unanimous decision of three judges of the King's Bench Division (Lord Alverstone, C.J., and Ridley and Darling, JJ.) and decided that *certiorari* would lie against licensing justices, and though an appeal was taken from this unsatisfactory situation yet the House of Lords (1907), A.C. 420, while reversing the Court of Appeal on the merits, expressly refrained from "considering any point in regard to the remedy applicable to this case."

Dealing with the matter then as one in which *certiorari* in general will lie, the effect of section 38 must be considered, *viz.*:

"No Court and no judge or officer thereof shall have jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the Minister or of any controller relating to the *status*, condition, origin, descent, detention or deportation of any immigrant, passenger or other person upon any ground whatsoever, unless such person is a Canadian citizen, or has acquired Canadian domicil."

But the respondent submits that this section is no bar to

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orders made either without jurisdiction or in excess of jurisdiction or in violation of the essentials of justice and beyond doubt that is the case whatever may or may not be done in other circumstances. The first of these submissions presents no difficulty in the circumstances before us for reasons already given based on the fact that the sole question of fact upon which the jurisdiction depends is the same that the controller must adjudicate upon in discharging the duty specially imposed upon him by the statute—see, *e.g., Rex* v. *Nat Bell Liquors, Ld.* (1922), 2 A.C. 128; and the very instructive and important decision of the eight Irish judges in *The King* v. *Mahony* (1910), 2 Ir. 695; and *Rex* v. *Morn Hill Camp Commanding Officer* (1917), 1 K.B. 176, which last is a case of *habeas corpus,* but the Lord Chief Justice said (p. 188) that in that respect the same principles apply as in *certiorari,* in which relation it must be borne in mind that another and special means of questioning in the most ample way the decision of the controller is conferred by the right of appeal to the minister of immigration given to the deportee by sections 26 and 12, a right which he availed himself of in this case but unsuccessfully, and then took the present proceedings. There are so many cases on the point both in England and in Canada that it would be impossible here even to note them all, but *The Queen* v. *Stevens* (1898), 31 N.S.R. 124; and *Rex* v. *Anthony* (1922), 36 Can. C.C. 192, may be referred to in illustration. The last case was relied on in support of the second ground, *viz.,* that the "essential requirements of justice" (as Lord Chief Justice O'Brien terms them in *Mahony's* case, *supra,* 706, 708) had been violated because certain statements under oath from several persons living in Calgary had been there taken by an investigating officer of the department of immigration in the absence of the suspect, in January, 1925, after the so-called preliminary inquiry had been opened in June and before the public inquiry under section 26 which opened on the 15th of April, 1925, in the presence of the accused and his counsel. No technical objection was taken then or now to the form of this impeached evidence but it is submitted that it should have been taken in the presence of the accused. That all depends, however, upon the way in which it is to be regarded: it would not be objectionable if it

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were to be regarded as, *e.g.*, evidence obtained by affidavit or declaration to support the case for deportation coming on for hearing providing that the suspect was given an opportunity of meeting the evidence if he so desired, and though the controller, like the Board of Inquiry, has, under section 15, *supra*, the wide power "at discretion" to "take evidence under oath or by affirmation in any form which they deem binding" yet that does not deprive him of the right to take unsworn statements—tribunals of unusual description are not bound to follow the usual rules of evidence required by ordinary Courts of justice—*cf.*, *Wilson* v. *Esquimalt and Nanaimo Ry. Co.* (1922), 1 A.C. 202, and *Mackonochie* v. *Lord Penzance* (1881), 6 App. Cas. 424.

Here, not only was no objection of any kind taken when the said statements from Calgary were put in evidence and the accused after being confronted with them by the controller gave his explanation thereof, but his own counsel cross-examined him thereupon and called two witnesses to support his claim of Canadian citizenship and after that his counsel requested an adjournment which was granted and the final hearing came on some five weeks later on the 20th May, when the suspect's counsel called no further witnesses but made certain statements of fact in his behalf which were received, after which and for the first time he complained of the "very great injustice" that had been done by taking the evidence in Calgary without notice to his client, but he did not even then (though he had had five weeks' time to inquire into and answer that Calgary evidence if he felt that his client's case could be assisted by so doing) apply for an adjournment to meet it, and therefore the only inference is that it would be useless to do so; what happened in the *Anthony* case, *supra*, was essentially different; the Court there had, after the hearing, considered and acted on evidence "not produced during or as part of the trial," which clearly was a gross miscarriage of justice. The cases of *Rex* v. *Home Secretary* (1924), 68 Sol. Jo. 646, and *Re Yee Foo* (1925), 2 D.L.R. 1131, should be added to those already cited.

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In our opinion, after reading most carefully all the proceedings before us (which this grave submission necessitated) it is impossible to say that any of the essentials of justice have been

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violated and so that is an end of the case, but it is an additional satisfaction to us to feel that, in the course of the complete investigation which was forced upon us by said submission, it became clear that "if it had been possible for us to go into the case on the affidavits" (as was said in the *Morn Hill* case, *supra*) the conclusion reached by the controller could be abundantly justified.

MARTIN, J.A. It follows that the appeal should be allowed, and the order for deportation restored.

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

MCPHILLIPS, J.A. MCPHILLIPS, J.A.: I entirely concur in the reasons for judgment of my brother MARTIN in this appeal, and agree in allowing the appeal.

Appeal allowed.

Solicitors for appellant: *Congdon, Campbell & Meredith.*
Solicitor for respondent: *Edgar Bloomfield.*

REX v. NOZAKI.

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Criminal law—Conviction—Evidence—Material in previous civil proceeding allowed in—Privilege.

A. gave N. a power of attorney to collect certain debts and sell a certain property in Vancouver. N. collected the debts and sold the property but retained the moneys claiming that the amount collected was due him for wages for previous services rendered to A. A. then brought action to recover the sums collected and recovered judgment for $734.65 and N. was then examined as a judgment debtor. A criminal proceeding was then taken against N. on a charge of applying and converting to his own use the moneys he had so collected. The only evidence submitted against him was the pleadings, proceedings and evidence taken on the previous civil trial and his examination as a judgment debtor. He was convicted and sentenced to four months' imprisonment.

Held, on appeal, reversing the decision of the magistrate (MARTIN and GALLIHER, JJ.A. dissenting), that it was only after examination of accused as a judgment debtor and failure to execute the judgment that these proceedings were taken. There is no evidence to support the prosecution except that of the appellant himself. His story is a reasonable one and in face of this and the fact that the person alleged to have been injured was not called the conviction should be set aside.

APPEAL by accused from a conviction by the police magistrate at Vancouver on the 21st of January, 1926. Nozaki was given a power of attorney by one Tamame Akazawa for collecting certain moneys owing to Akazawa and selling certain land and buildings Akazawa owned in South Vancouver. He sold the lands and collected the moneys owing and was charged with converting said moneys to his own use. An action had previously been brought in the Supreme Court by Tamame Akazawa against Nozaki to recover moneys she claimed were due her and after she had obtained judgment against him, he was examined as a judgment debtor. He was sentenced to four months in the common gaol and appealed on the ground that the pleadings, proceedings and evidence taken in the civil action were wrongfully admitted in evidence against him.

Statement

The appeal was argued at Vancouver on the 24th of March, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

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Argument

Armour, K.C., for appellant: The whole question here is whether a statement in a civil proceeding can be used in evidence against him on a criminal charge: see *Rex* v. *Van Meter* (1906), 11 Can. C.C. 207 at p. 211. There was no other evidence but this.

W. M. McKay, for the Crown: This is a question of law. The examination of a judgment debtor is properly admitted: see *Reg.* v. *Coote* (1873), L.R. 4 P.C. 599 at p. 605; *Reg.* v. *Madden and Bowerman* (1894), 14 C.L.T. 505; *Reg.* v. *Williams* (1897), 28 Ont. 583; *Reg.* v. *Douglas* (1896), 1 Can. C.C. 221; *Reg.* v. *Hammond* (1898), 29 Ont. 211.

Armour, in reply, referred to *Rex* v. *Peel (No. 1)* (1920), 60 D.L.R. 469.

Cur. adv. vult.

1st June, 1926.

MACDONALD, C.J.A.: I would allow the motion for leave to appeal and would also allow the appeal.

The appellant was charged with fraudulently converting moneys collected for another to his own use. The facts as told by the appellant are as follows:

Akazawa, a Japanese, died in 1921, leaving a widow who engaged the appellant, after her husband's death, to look after a large rooming-house which, I gather, had been conducted by her late hubsand, and some other business of hers. She agreed, as appellant alleges, to pay him $50 a month for this service. The services were rendered over a period from 1921 to 1924, when the widow went to Japan. Before leaving, the appellant, who had not had a settlement with her, mentioned his wages or salary, and she told him that she would need the money to pay her expenses to Japan and to put her children to school there, and asked him as a favour to continue the collections under a power of attorney which she gave him, and take what was coming to him out of the proceeds. The widow did not return as was expected, and a dispute afterwards arose with respect to the accounts between the appellant and herself. An action was brought in her name in the Supreme Court wherein both claim and counterclaim were considered. She was adjudged entitled to something over $1,600 on her claim and he to nearly $1,000

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on his counterclaim, the one was set off against the other, and she obtained judgment for $734. The appellant was then examined as a judgment debtor. The only evidence for the Crown on the trial of this charge was his own. The Japanese widow was not called, nor was her evidence procured on commission. The learned magistrate seems to have been, at one period of the trial, in great doubt, for he said:

"All I am concerned with is, whether he had a reasonable—well a reasonable right to suppose that that money was coming to him."

And again:

"It is almost impossible for me, Mr. *McKay*, with the present knowledge which we have, to decide that this man had not what he considered a colour of right."

After reserving decision, however, the magistrate said:

"I have carefully considered this case and reading the evidence, I have come to the conclusion that this is, if you like, a fake defence, there is no merit in it at all, and I find him guilty as charged of stealing the money."

Now, as I have already said, there is no evidence to support the prosecution, except that of the appellant himself, and if his story be a false one, there is nothing to support the case for the Crown.

The appellant's story is not an unreasonable one, and is corroborated to some extent by two witnesses called on his behalf. In the face of this, and of the fact that the person alleged to have been injured, was not called to clear up the matter as she might have done, I think it would be most unsafe to sustain the conviction.

This is another case of using the criminal Courts to enforce a civil demand. It was not until after judgment in the civil action, and after the examination of the appellant as a judgment debtor, and failure to execute the judgment, that these proceedings before the magistrate were instituted. I do not say that there was not the right to institute them, but in all the circumstances of this case, there being no real informant at all and no effort having been made by the Crown to obtain evidence of value, the proceedings ought not to have been taken.

I do not find it necessary to consider the question of the admissibility on behalf of the Crown, of the evidence taken on appellant's examination as a judgment debtor. On the trial he gave evidence and was taken over the same ground again, and

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did not object to answer on the ground that his answers would incriminate him.

The conviction should be set aside.

MARTIN, J.A.: Upon the point of the admission of the evidence the authorities cited are in the circumstances, sufficient, I think, to sustain that ruling.

As to the other branch of the appeal upon the facts, I am of opinion, after a careful consideration of the evidence, that a case has not been shewn which would warrant our interference with the view taken by the convicting magistrate as set out in his decision at the time and in his report to us, *viz.*, that the defence set up was a sham one. Even if the story told by the accused could be regarded as uncontradicted by witnesses yet it was pointed out by the Privy Council in *Berney* v. *Bishop of Norwich* (1867), 36 L.J., Ecc. 10 at p. 12, that

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> "Daily experience shews that a tribunal trying questions of fact, ill performs its duty if it adopts as true every statement on oath not contradicted by counter-testimony, it being in accordance with that experience that many such statements ought to be disbelieved, and that without imputing perjury."

But here there is the additional fact that the statements made by the accused to the magistrate are in important respects not in accord with his statements previously made in the civil proceedings in the Supreme Court which were, we hold, properly in evidence, and so I find it impossible to hold that the magistrate reached a conclusion contrary to that which reasonable men might well arrive at, and so the appeal should be dismissed.

GALLIHER, J.A.: The authorities to which we have been referred all bear out the contention of the Crown, that the evidence of the accused on examination for discovery in aid of execution, are admissible against him in a subsequent criminal charge, unless the witness at the time objects to answer on the ground that his answers may tend to incriminate him in any subsequent criminal proceedings. See *Reg.* v. *Coote* (1873), L.R. 4 P.C. 599 at p. 607; *Rex* v. *Van Meter* (1906), 11 Can. C.C. 207; *Reg.* v. *Madden and Bowerman* (1894), 14 C.L.T. 505; *Reg.* v. *Williams* (1898), 28 Ont. 583.

GALLIHER, J.A.

I am not inclined to disagree with the magistrate below that

the defence set up is a fake defence, and would dismiss the appeal.

McPhillips and Macdonald, JJ.A. would allow the appeal.

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

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Solicitor for appellant: *Douglas Armour.*
Solicitor for respondent: *W. M. McKay.*

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REX v. PIDGEON

Criminal law—Disorderly house—Gaming—Warrant—Sufficiency of material for—Evidence—Gain—Criminal Code, Secs. 226, 228, 641 and 986.

Prima facie evidence of guilt under section 986 of the Criminal Code where a premises is found to be "provided with any means or contrivance for playing any game of chance," etc., is established by evidence of the finding on the premises in question of card tables at which players are sitting with cards and poker chips on the table. *Rex* v. *Cessarsky* (1920), 15 Alta. L.R. 201 followed.

Statement

APPEAL by accused from his conviction by the stipendiary magistrate at Prince George, on the 23rd of October, 1925, for unlawfully keeping a disorderly house, to wit: a common gaming-house; to wit: a house, room or place kept for gain to which persons resort for the purpose of playing at any game of chance or at any mixed game of chance and skill, contrary to section 228 of the Criminal Code. He was fined $100 and costs. The premises in question were behind what is known as the Prince George Cigar Store. There is an entrance from the street into the cigar store and a door through a partition at the back of the cigar store into the premises in question. On the night of October 16th, 1925, two policemen with a search warrant entered the cigar store and on shewing the search warrant were allowed in to the premises in question by the accused; five men

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were around a table with cards and chips; there was no evidence of a "rake off." Accused claimed the premises were occupied by the Prince George Club. This club had a constitution and by-laws and leased the premises. The members paid $1 entrance fee and $1 every six months. Members pay for the cards they use and there is no rake off. Accused claimed he was manager of the Club at a salary and rented the premises to the Club. Only members were allowed on the premises.

Statement

The appeal was argued at Victoria on the 19th of January, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Maitland, for appellant: A search warrant was issued on an information in which he says "he has reason to believe"; he does not say he believes. The warrant is for searching the "Prince George Cigar Store," whereas under this warrant the police entered the "Prince George Club" which although in the same building is behind and partitioned off from the cigar store; see *The King* v. *Levesque* (1918), 45 N.B.R. 522; *Hicks* v. *McCune* (1921), 49 O.L.R. 41. The only evidence of gambling is given by the defence and they say there was no gain: see *Rex* v. *Riley* (1916), 23 B.C. 192.

Argument

E. Meredith, for the Crown: The magistrate made a report under section 9 of the Criminal Appeal Rules and found this club was a mere sham. No given statement is required for the issue of a warrant under section 641. The information is not required and should be treated as surplusage: see *Rex* v. *Kong Yick* (1918), 25 B.C. 269. The only essential as regards section 641 is for the magistrate to authorize entry and this he did. That there was sufficient evidence to convict see *Rex* v. *Coy* (1925), [36 B.C. 34]; *Rex* v. *Cessarsky* (1920), 15 Alta. L.R. 201, and under section 986 a conviction is justified. There having been a conviction he cannot on appeal go into the sufficiency of the material upon which the warrant was issued.

Maitland, in reply: There can be no conviction under section 986 without a warrant. Any reasonable doubt should be exercised in our favour: see *Rex* v. *Payette* (1925), 35 B.C. 81.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal should be dismissed. The magistrate apparently came to the conclusion that the evi-

dence of the witnesses for the accused was not entitled to very much credence, in fact he gave none at all to it. So far, therefore, as the facts are concerned, we are not embarrassed.

With regard to the question of law I had considerable doubt, but when we remember that the Court of Appeal in Alberta has decided a case similar to this under section 986, holding that the warrant was not necessary in order to raise a *prima facie* case, we should, if we allow the appeal, give a decision in conflict with that decision. When construing Dominion statutes that should be avoided as far as possible, otherwise the result would be that in one Province one construction would prevail, and in another Province another. We should have the spectacle of a man imprisoned in one Province for an act for which another would go free in another Province.

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I can see that one construction or the other might be reasonably given to this rule 986. That being so, I would not now give a decision which would be in conflict with the Alberta decision.

MARTIN, J.A.: If we were of the opinion that the warrant based upon the report in writing, taking the information to cover that term is not a valid one, the only effect of that would be that under 986 the prosecution would lose the benefit of the *prima facie* evidence thereby conferred. I think it better, having regard to the other aspect of the case, that we should not express an opinion upon the validity of that warrant, because quite apart from it I have no doubt that under 986 the conviction may be sustained. The effect of the magistrate's finding is that he considers this so-called club is only a sham club, and therefore I follow our decision in *Rex* v. *Coy* (1925), [36 B.C. 34]. I think the decision of the Court of Appeal of Alberta in *Rex* v. *Cessarsky* (1920), 15 Alta. L.R. 201, should be sustained. And so the appeal should be dismissed.

MARTIN, J.A.

GALLIHER, J.A.: I may say in considering the *Coy* case I was very considerably impressed with the reading of the judgment of Mr. Justice Beck in Alberta. But I think that what my learned brothers who have spoken have decided to do is really, where you cannot say beyond a doubt that the decision is

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wrong, especially in cases under the Criminal Code, then we should make the decisions of our Court conform to decisions that have been given under similar sections of the Code in other Courts of the Dominion. For that reason I feel bound to follow the decision of the Alberta Court, and with this result, that the appeal should be dismissed.

MCPHILLIPS, J.A.: I would dismiss the appeal. If it were necessary for the decision of this appeal to determine whether the warrant was valid under section 641, I would hold that it was invalid, as I am of the opinion that the report in writing is a condition precedent to the exercise of the power of the magistrate to issue the warrant.

However, it is unnecessary to decide that point for the determination of this case, in that it would appear to me there is sufficient evidence to warrant a conviction by the magistrate, and the necessity for a valid warrant under 641 is not at all requisite. It would seem to me too that this Court has already in *Rex* v. *Coy* (1925), [36 B.C. 34] gone the necessary length. My brother MARTIN expressly refers to *Rex* v. *Cessarsky* (1920), 15 Alta. L.R. 201, and the judgment would seem to indicate that this Court in *Rex* v. *Coy* have adopted the decision of the Court of Appeal of Alberta. But quite apart from that, as I have said, the facts in my opinion are sufficient to warrant the conviction. I also agree with the observation of my brother the Chief Justice that it is fitting that there be uniformity in so far as possible in the decisions under the Criminal Code of Canada.

MCPHILLIPS, J.A.

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

MACDONALD, J.A.

Appeal dismissed.

Solicitor for appellant: *J. M. McLean.*
Solicitor for respondent: *P. E. Wilson.*

THE KING v. BURKE-ROCHE.

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THE KING v. BURKE-ROCHE

Succession Duty Act—Application under section 34—Judge—In Chambers—Persona designata—Fresh proceeding—Costs—Crown Costs Act—R.S.B.C. 1924, Cap. 244, Secs. 34, 41 and 43; Cap. 62.

A summons was taken out in the Supreme Court for the defendant to appear before a judge of the Court upon an application of the Minister of Finance of British Columbia who claims $1,601.41 being succession duty payable by the defendant as administratrix of the estate of Leonora Clapham, deceased. It was held on the application that the proceedings were obviously meant to be taken under section 34 of the Succession Duty Act; that under that section the judge is *persona designata* and the proceedings should not have been instituted in the Supreme Court, the application should therefore be dismissed.

Held, on appeal, that as it appeared that after the proceedings taken before MURPHY, J. Crown counsel gave notice to the defendant that he would apply to the judge for a summons to be issued by the judge himself and duly made an application to Macdonald, J. for a summons in accordance, as he thought, with the provisions of the Succession Duty Act but the learned judge refused to issue a summons, this was an entirely distinct proceeding which amounted to an abandonment of these proceedings and the appeal should be quashed.

APPEAL by the Crown from the decision of MURPHY, J. of the 10th of September and the 24th of November, 1925. On the application of the Minister of Finance a summons was issued on the 9th of April, 1925, directed to Elizabeth Burke-Roche as administratrix of the estate of Leonora Clapham, who died December 30th, 1914, claiming $1,601.41 with interest at 6 per cent. from December 30th, 1916, as succession duty. The judge below held that the proceedings were obviously meant to be taken under section 34 of the Succession Duty Act. This section empowers a judge of the Supreme Court to issue summonses and he concluded that he was bound by authority to hold that the judge under section 34 is *persona designata*, and that he therefore could not hear the application. On the hearing of the appeal it transpired that after the application had been dismissed by MURPHY, J., Mr. *Killam*, counsel for the Crown, gave Mr. *Mayers* notice by telephone that he would apply to the judge for a summons to be issued by the judge himself in accordance with what he thought was the proper interpretation

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of section 34 of the Succession Duty Act and accordingly made application to MACDONALD, J., but on the judge's refusal to issue a summons he then proceeded with this appeal.

The appeal was argued at Victoria on the 14th and 15th of January, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Killam, for appellant: The learned judge below held that under section 34 the judge was *persona designata* and that the application should not be in the Supreme Court. There is $1,601.41 in succession duty due on the Clapham estate of which Mrs. Burke-Roche is executrix. He followed *Chandler* v. *City of Vancouver* (1919), 26 B.C. 465. We submit that he is not *persona designata*: see *In re Succession Duty Act and Estate of Edward H. Grunder, Deceased* (1923), 33 B.C. 181 at p. 188; and on appeal (1924), S.C.R. 406, *sub nom. Blackman* v. *The King*. We submit that the Crown Costs Act applies.

Mayers, for respondent: As to the question of *persona designata* I could refer to the judgment of Idington, J. in *Blackman* v. *The King* (1924), S.C.R. 406. Section 43 of the Succession Duty Act has no bearing on the construction of section 34: see also *Doyle* v. *Dufferin* (1892), 8 Man. L.R. 294. This case is concluded by *The King* v. *The United States Fidelity & Guaranty Co.* (1922), 30 B.C. 440. After the decision of Mr. Justice MURPHY, counsel for the Crown went before another judge and asked him to institute a fresh proceeding in the matter, which was refused. We submit that this fresh proceeding constituted an abandonment of the appeal. On the question of costs see *Watson* v. *Howard* (1924), 34 B.C. 449; *In re Estate of Sir William Van Horne, Deceased* (1919), 27 B.C. 372.

Argument

Killam, in reply: The Crown is not bound by any mistakes made by its servants or agents.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal must be quashed. The proceeding that was commenced before Mr. Justice MURPHY, I think was a proper proceeding; and while it does not matter now, I do not think the summons issued by Mr. Justice MURPHY was defective. Perhaps the Act may have been

inapt in requiring the judge to issue a summons; but it was substantially complied with by the summons that was issued. Now if the matter had gone on, and no other subsequent proceedings had been taken by the Crown, we could, I think, entertain the appeal. But not being content with the proceedings taken before Mr. Justice MURPHY, the Crown did an act which in my opinion amounted to an abandonment of these proceedings. The Crown counsel telephoned Mr. *Mayers* that he would make an application to the judge for a summons to be issued by the judge himself; it does not really matter whether it was the same judge or not—it was not the same judge however, in this case—that gives additional distinctness to the second proceedings—that he would make an application to Mr. Justice MACDONALD for a summons in accordance, as he thought, with the provisions of the Act. His learned friend acquiesced in attending there without formal notice. Mr. Justice MACDONALD refused to issue the summons—he certainly refused to issue it then, but he may not have intended that as a final disposition of the motion and adjourned the matter *sine die*.

That second proceeding was an entirely distinct proceeding from the first, as it is conceded by counsel for the Crown. The two proceedings could not properly go on at the same time—they are repugnant. If the second proceeding was commenced, and I think it was commenced when the notice that the application had been made was communicated to Mr. *Mayers*, the only consistent view, I think, that can be taken of this circumstance, is that the Crown determined to abandon the proceedings before Mr. Justice MURPHY and intended to abandon any further proceedings, by way of appeal or otherwise, and determined to commence the proceedings anew before another judge, and as it thought with a proper summons.

MACDONALD, C.J.A.

Therefore, the only order we can make is that the proceedings before Mr. Justice MURPHY were abandoned; and that the appeal should be quashed.

The order below as to costs should be sustained; we have no power to award the costs of the appeal.

MARTIN, J.A.: In my opinion the appellant has as a result of the very wise proceedings taken since the order of Mr. Justice

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MURPHY debarred himself from prosecuting this appeal. As to whether what was done may exactly be styled an abandonment or not I express no opinion. I think, with all deference, it is not desirable to express any opinion as to the powers exercised originally or refused to be exercised by Mr. Justice MURPHY under section 34, and as to the capacity in which those powers could lawfully be exercised.

As regards the costs I agree with what the Chief Justice has said.

GALLIHER, J.A.: I am not abundantly clear, or not as clear as I would wish to be at the moment as to the abandonment of the proceedings. If a summons had actually issued I would not have had any difficulty in agreeing, and I do not disagree, because it would be a matter I would require to consider longer if my learned brothers were not all decided upon it. I, with my brother MARTIN, think it is not necessary to deal with the question under section 34 as to whether the judge was *persona designata* or not. The section is certainly more or less difficult to deal with. You find in the first place that a judge may direct that it come up before a judge of the Court, which may mean any judge. Then we find later towards the end of the section provisions that seem absolutely useless and out of place if the judge is to be a judge as we understand it, the Court or a judge thereof.

GALLIHER, J.A.

As to costs I am quite clear, and I agree with what has been said by my learned brothers.

MCPHILLIPS, J.A.: I am of like opinion that the appeal should be quashed. Here an application has been made to one learned judge, who disposed of the matter from one point of view; then apparently counsel made an application to another learned judge, with the statement of the disposition made by the judge just applied to. And after consideration the learned judge last applied to, decided that the matter should stand over until after the determination of an action which it was explained to him had been brought and which would be decisive of all matters in controversy. I cannot see, on the face of the material how very well it can be said that there is any tenable position

MCPHILLIPS, J.A.

now under that original order of Mr. Justice MURPHY or any right of appeal therefrom, because Mr. Justice MACDONALD has now become seized of the matter, and it stands adjourned for later consideration. The position then is that Mr. Justice MACDONALD is seized of this matter. And that being so it must constitute an abandonment of the previous proceedings. I see no way really out of the difficulty the appellant is in. I hesitate very often to give effect to what might be termed to be a decision on a technical submission in the Court of Appeal, I am not in favour of it, really, but I always guide myself by this, are the interests of justice furthered or thwarted? Now on full consideration of this whole matter, I think the interests of justice will be best carried out by the action brought, the whole matter in controversy can well be determined in that action. The Crown is a party to the proceedings; and the Crown has already entered an appearance in those proceedings. Certainly it would not be in accordance with good practice whilst those proceedings are current, and the Crown appearing, that this Court should consider this appeal which might have the effect of prejudicing the trial and the disposition of that suit. I think in the interests of justice, that we must proceed upon some rule, and as to that I am clear that upon the material before us Mr. Justice MACDONALD is seized of this matter that is now being attempted to be heard in appeal. And that being the situation I might refer to the celebrated case of *The Leonor* (1916), 3 P. Cas. 91; (1917), 3 W.W.R. 861; that was exactly a similar case, Mr. Justice MARTIN was seized of it, and notwithstanding, Mr. Justice Cassels took the matter into his hands; and when one judge is seized of a matter I am firmly of the opinion that no other judge, or for that matter the Court of Appeal, can be warranted to interfere, until there has been a disposition of the matter of which the judge is solely seized. It must be deemed to be sacred ground, the jurisdiction must be respected.

MCPHILLIPS, J.A.

MACDONALD, J.A.: I rest my judgment on the view that the Crown resorted to a course of procedure which in effect amounted to an abandonment of the proceedings before Mr. Justice MURPHY.

I express no opinion on the other points raised; except as to

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the disposition of costs, I agree with the Chief Justice on that point.

Appeal quashed.

Solicitors for appellant: *Killam & Beck.*
Solicitors for respondent: *Mayers, Lane & Thomson.*

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REX v. JUNGO LEE

REX v. JUNGO LEE.

Immigration—Deportation—Warrant—Omission of date of Act—Validity—Habeas corpus—Can. Stats. 1923, Cap. 22.

An application on the return of an order *nisi* for *habeas corpus* to release accused on the ground that in the recital in the original warrant of deportation the figures "1923" were omitted from the citation of "The Opium and Narcotic Drug Act, 1923," was refused.

Held, on appeal, affirming the order of MORRISON, J. that the omission does not invalidate the warrant.

Rex v. *Gan* (1925), 36 B.C. 125 approved.

Statement

APPEAL by accused from the order of MORRISON, J. of the 22nd of January, 1926, dismissing his application for release on the return of a summons in *habeas corpus* proceedings. On the 3rd of November, 1924, in the County of Essex, Ontario, Jungo Lee was convicted of having opium in his possession under section 4(*d*) of The Opium and Narcotic Drug Act, 1923, and sentenced to imprisonment. A deportation order that accused be deported to China after service of his sentence was issued on the 21st of March, 1925.

The appeal was argued at Vancouver on the 4th and 5th of March, 1925, before MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Stuart Henderson, for accused: In the warrant of deportation issued on the 21st of March, 1925, after the words "The Opium and Narcotic Drug Act" the figures "1923" are left out. The proper description of the Act is "The Opium and Narcotic Drug

Act, 1923." An amended order was issued after the 12th of June, 1925, but there was no power in the deputy minister of immigration to make the amended order as the form was changed by an amending Act on the 11th of June, 1925, whereby it could only be dealt with by the minister of justice.

Elmore Meredith, for the Crown: There are the material facts, namely, that he is an alien and that he was convicted for having drugs in his possession and sentenced to imprisonment under The Opium and Narcotic Drug Act, 1923: see *The Canadian Prisoners' Case* (1839), 3 St. Tri. (N.S.) 963; *Ex parte Beeching* (1825), 28 R.R. 224. The Crown has the right to issue a substituted warrant.

Argument

Henderson, replied.

Cur. adv. vult.

1st June, 1926.

MARTIN, J.A.: This is an appeal from an order of MORRISON, J., refusing, on the return to an order *nisi* for *habeas corpus,* to release the appellant from close custody under an order or warrant of deportation, dated 21st March, 1923, made by the deputy minister of immigration and colonization, which warrant is before us on a return by the controller of Chinese immigration as follows:

"By virtue of the within order I, Arthur Ernest Skinner, the controller of Chinese immigration, at the Port of Vancouver, do hereby return to the Honourable Mr. Justice Gregory that Jungo Lee, mentioned in the said order, is held by me under the warrant of deportation hereunto annexed, and that the said Jungo Lee is now detained in the immigration shed at the City of Vancouver by virtue of the said warrant.

"Dated at Vancouver, B.C., this 16th day of December, A.D. 1925.

"(sgd.) A. E. Skinner."

MARTIN, J.A.

It is objected that the said return is a false one because the warrant for deportation so annexed to the return is alleged not to be the same as the warrant which was shewn to the solicitor of the deportee when he went to inquire into the cause of his client's detention, and the falsity is said to consist in the fact that in the recital in the original warrant so shewn as aforesaid the figures "1923" now appearing in the warrant returned after the words The Opium and Narcotic Drug Act, did not appear in the original and that it has been altered or a new one substituted therefor, and it is submitted that the result of that

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omission is to invalidate the warrant, the citation of the statute under which the conviction was made being incorrect, in that it should be The Opium and Narcotic Drug Act, 1923, which is the short title of that statute, being Cap. 22 of that year.

But it is impossible to close our eyes to an all-important fact brought before us by the appellant himself in his own affidavit which exhibits in full the conviction recited in said warrant and by that fact it appears that he was convicted of the offence in question "contrary to The Opium and Narcotic Drug Act, 1923," and we think it would be an unwarranted straining of the law to hold in such circumstances at least that a mere omission in the mere recital in a warrant of the date of a statute upon which a conviction was based, would invalidate the warrant itself. These applications are of a special kind and we have already held them to be civil and not criminal in their nature. In civil matters a reference to statutes is often not required to be exact and even in our Rules of Court and the forms prescribed well-known statutes are briefly cited in general language such as, *e.g.,* in rule 211, the Statute of Limitations and Statute of Frauds, and the Wills Act, in Appendix D, Sec. III., Form 2; and here, as before noted, all possible doubt has been dispelled by the appellant's own affidavit. It is to be also noted that here the section and subsection of the Act in question are recited, *viz.,* "section 4 (*d*)" as is considered sufficient in several forms of pleadings under that statute to be found in Bullen & Leake's Precedents of Pleadings, 8th Ed., p. 679 *et seq.*

MARTIN, J.A.

Furthermore we observe and approve the recent decision of MURPHY, J. (departing from his former one) that in a conviction itself the omission of this same date in citing this statute is not fatal—*Rex* v. *Gan* (1925), 36 B.C. 125.

This being our view of the case it is not necessary to pursue the consequently irrelevant question of the falsity of the return in the absence of any express motion in that direction upon alleged contempt, such as was made in, *e.g.,* the celebrated *The Canadian Prisoners' Case* (1839), 3 St. Tri. (N.S.) 963; 9 A. & E. 731; and A. A. Fry's (one of the counsel engaged) special and excellent report of the same in which Lord Abinger,

C.B., said, p. 1033 (St. Tri.), p. 104, Fry, very appropriately to the present case:

"This is a case of a *habeas corpus* to the gaoler of Liverpool, on the return to which a motion has been made to discharge the prisoners. The Court is bound to look at the substance of the return; if it contains sufficient matter in substance to shew that the prisoner is lawfully detained, we cannot discharge him upon *habeas corpus*, though the return should in some respects be informal, or should go into matter not essential to the question."

And *cf.* also *Reg.* v. *Roberts* (1860), 2 F. & F. 272, where the same course was adopted after an opportunity to fortify the return had been rejected. In the present case if it were deemed profitable to pursue the question of falsity the Court below, like us, had power *ex mero motu* to require a further affidavit elucidating the deportation order as was done by the Court of Appeal in *Rex* v. *Chiswick Police Station Superintendent* (1918), 1 K.B. 578, wherein the legality of the action of the Home Secretary was manifested in that way, but in the view we take of the matter that course would be superfluous.

MARTIN, J.A.

It follows that the appeal should be dismissed.

GALLIHER, J.A. would dismiss the appeal.

GALLIHER, J.A.

MCPHILLIPS, J.A.: This appeal raises a question of much nicety. I may say that I so entirely agree with the reasons for judgment of my brother MARTIN, which so completely and conclusively cover all matters in controversy in the appeal at this Bar that I do not consider that anything could be usefully added to further demonstrate the futility of the appeal.

It follows that in my opinion, Mr. Justice MORRISON arrived at a proper conclusion in refusing to release the appellant from close custody under the order for deportation and I agree in the dismissal of the appeal.

MACDONALD, J.A. would dismiss the appeal.

MACDONALD, J.A.

Appeal dismissed.

Solicitor for appellant: *A. J. B. Mellish.*
Solicitors for respondent: *Congdon, Campbell & Meredith.*

MACDONALD, J. (In Chambers)

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May 12.

IN RE ADOPTION OF STANLEY WARREN, AN INFANT.

Practice—Adoption of child—Order for—Made with consent and assistance of mother—Application by mother to set aside—R.S.B.C. 1924, Cap. 6.

IN RE STANLEY WARREN, AN INFANT

An order for the adoption of an infant was made to a judge in Chambers on the 5th of January, 1925, upon petition under the Adoption Act. The petition was supported by an affidavit of the child's mother giving her consent and approval to the order. More than a year later the mother applied to the same judge to set aside the order on the ground that it was ineffectual to accomplish the purpose intended through having been made in Chambers and not having been under the seal of the Court.

Held, that the Adoption Act provides that the powers conferred thereunder may be exercised by a judge in Chambers and the order was made in the terms intended and even if the order were wrong in form the Court should uphold it if having jurisdiction it contains the proper pronouncement of the Court.

Held, further, on the contention that the order was made *ex parte* and thus may be set aside by the judge making it, that if there was the right to make the order for adoption and confer rights and responsibilities upon those adopting the child and even if the material upon which jurisdiction was exercised was defective or insufficient, it is only by way of appeal that the order could be set aside.

Statement

APPLICATION to set aside an order for adoption made on the 5th of January, 1925, under the Adoption Act. The facts are set out in the reasons for judgment. Heard by MACDONALD, J. in Chambers at Vancouver on the 31st of March, 1926.

R. M. Macdonald, for the application.
Harold B. Robertson, K.C., contra.

12th May, 1926.

Judgment

MACDONALD, J.: Alice Maud Warren applies to me, to set aside an order for adoption made on the 5th of January, 1925, whereby Stanley Warren, her son, became under the Adoption Act the adopted child of Ralph Ruffner and Emily Ruffner and his name was changed to "Ralph Ruffner, the younger." This is a peculiar application, in view of the fact that the petition, upon which the order for adoption was made, over a year ago, was supported by the affidavit of the said Alice Maude Warren, mother of the said Stanley Warren, and that she is now seeking to rescind an order which she had thus assisted in obtaining.

The latter part of her affidavit clearly indicates her wishes, at the time when the order was obtained. It reads as follows:

"I am desirous that this Honourable Court should make an order giving the custody and possession of the said infant to the petitioners herein, Ralph Ruffner and Emma Ruffner, his wife, for the purposes of their adopting the said infant male child, Stanley Warren, and with the consent and approval of this Honourable Court that they might have the legal custody of the said infant male child under the name of 'Ralph Ruffner, the younger' in the place and stead of 'Stanley Warren.'"

It is, however, submitted that the order for adoption is ineffectual to accomplish the purpose intended through having been made in Chambers and not being under the seal of the Court. The Adoption Act provides that the powers conferred thereunder may be exercised by a judge in Chambers and, sitting as a judge in Chambers, the order was made in the terms intended, upon what I deemed was proper material. I have made inquiries, particularly in Victoria, and find that numerous orders for adoption have been made, in the form similar to the one in question, so that a large number of persons have assumed responsibilities and adopted children relying upon orders of this nature. Even if the order were wrong in its form, the Court should uphold it, if, having jurisdiction, it contains the proper pronouncement of the Court. See on this point *Rex* v. *Boak* (1925), S.C.R. 525 at p. 531:

Judgment

"We incline to think the order as pronounced by the learned judge may be regarded as the order made by him rather than the order in the mistaken form in which it was drawn up. *Hatton* v. *Harris* (1892), A.C. 547; *Milson* v. *Carter* (1893), A.C. 638, 640."

Then it is submitted that the order was made *ex parte* and thus may be set aside by the judge making it. This involves the question of jurisdiction. If I had the right to make the order for adoption and confer rights and responsibilities upon Mr. and Mrs. Ruffner, even if the material upon which jurisdiction was exercised was defective or insufficient, it could only be by way of appeal, that an order so made could be set aside. It was a deliberate act of a conclusive nature and the order was made as intended. Even if I thought there were any grounds for doing so, I do not think I am at liberty to set aside such order, after it has been drawn up and entered. The "slip" rule would certainly not apply. I am strengthened in this conclusion by the circumstances briefly outlined, particularly the fact

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that Mrs. Warren assisted by her affidavit in obtaining such order and that it is only now, after a lengthy period has elapsed, and the parents, by adoption, have probably become attached to the child that she seeks, without even shewing any benefit which might accrue to the child, to destroy the effect of the order for adoption.

In the view, however, which I take of the preliminary objection, I do not think it necessary to discuss the merits of the application, including the principle of estoppel. Application is refused.

Application refused.

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May 25.

IN RE LAND REGISTRY ACT

MORRISON & POLLARD v. TAYLOR

IN RE LAND REGISTRY ACT. MORRISON & POLLARD v. TAYLOR.

Land titles—Agreement for sale—Previous delivery of certificate of title by vendor to another—Non-registration by either party—Payment of full purchase price—Action for specific performance—Decree—Registration refused without certificate of title—Appeal under section 230 of Land Registry Act—R.S.B.C. 1924, Cap. 127.

M. & P. purchased lands under agreement for sale in 1921, went into possession, and paid taxes. In August, 1925, they learned for the first time that two weeks before the date of their agreement for sale the vendor deposited the certificate of title of said lands with T. as security for a loan of $350 and delivered him a conveyance of the lands. Up to this time neither party had registered their respective interests in the lands. On the 4th of November, 1925, M. & P. lodged a *caveat* in the Land Registry office and on the 29th of December following having paid for the property in full they brought action for specific performance against the vendor and a *lis pendens*. Certificate of *lis pendens* was then filed in the Registry office and upon a decree for specific performance being granted they applied to register the decree but it was refused by the registrar of titles on account of the non-production of the certificate of title. M. & P. then appealed to a judge in Chambers under section 230 of the Land Registry Act.

Held, that M. & P. are entitled to registration of the decree notwithstanding the non-production of the certificate of title.

Statement

PETITION under section 230 of the Land Registry Act.

Petitioners on the 31st of December, 1921, bought under agreement for sale lands in the District of New Westminster. They have occupied the lands from the date of purchase, and have each year paid taxes with which the lands were assessed. About the month of August, 1925, the petitioners learned for the first time that the certificate of title to the said lands was held by Adam Taylor, who claimed that on the 16th of December, 1921, the petitioners' vendor, being the registered owner of the lands, had deposited the certificate of title with him as security for a loan of $350 and that the vendor had delivered a conveyance of the said lands to him. Up to August, 1925, neither the petitioners nor Taylor had applied to register their respective interests in the lands. On November 4th, 1925, the petitioners lodged a *caveat* in the Land Registry office at New Westminster, and on December 29th, 1925, the petitioners, having paid the full purchase price, brought action against the vendor claiming specific performance of the agreement of the 31st of December, 1921, and a *lis pendens*. Certificate of *lis pendens* was filed in the Land Registry office on the 29th of December, 1925. A decree of specific performance was granted on the 22nd of February, 1926. The petitioners then applied to register that decree, and registration was refused by the registrar of titles on account of the non-production of the certificate of title. The petitioners then appealed to a judge in Chambers under section 230 of the Land Registry Act. Heard by MACDONALD, J. in Chambers at Vancouver on the 25th of May, 1926.

Statement

H. I. Bird, for petitioners, referred to sections 34, 36, 40, 43 and 52 of the Land Registry Act. The petitioners bought *bona fide* for valuable consideration without notice of any charge in favour of Taylor and have been diligent in protecting their interest by filing *caveat* immediately on receipt of notice of Taylor's claim. A mortgage by deposit of deeds cannot acquire a better title to register real estate than a purchaser for valuable consideration, who without actual fraud or express notice, takes a conveyance unaccompanied by title deeds: see *Hudson's Bay Co.* v. *Kearns & Rowling* (1896), 4 B.C. 536. Where two parties acquire interests in land from

Argument

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a common source under unregistered contracts the first filing a *caveat* is entitled to priority in the absence of fraud: see *Stephens* v. *Bannan and Gray* (1913), 14 D.L.R. 333; *In re Monolithic Building Company* (1915), 1 Ch. 643.

Elmore Meredith, for Taylor, relied upon section 130 of the Land Registry Act. If petitioners had applied to register at time of purchase by them they would have discovered that certificate of title was outstanding in time to protect themselves from loss. The section requires the registrar to have certificate of title produced before registration.

Judgment

MACDONALD, J.: There will be judgment granting the petition and directing registration notwithstanding non-production of certificate of title.

Petition granted.

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ROGERS v. NANAIMO MOTORS LIMITED.

Motor-car—Sale on instalment plan—Return of car after part payment to local manager of vendors—Sale by local manager—Agency.

ROGERS v. NANAIMO MOTORS LTD.

The local manager of a branch garage of the defendant Company sold a car to H. on the instalment plan. When $384 was still due, H. left the car with said local manager to be disposed of at best possible price. Shortly after and when one of H.'s instalments was overdue, the local manager sold the car to R. for $550 and absconded with this money. The defendant Company then seized the car to cover the balance due from H. R. obtained judgment for the return of the car and damages.

Held, on appeal, affirming the decision of BARKER, Co. J. (MARTIN, J.A. dissenting), that the evidence supported the view of the trial judge that the local manager was acting for his employers in selling the car to R. and the appeal should be dismissed.

Statement

APPEAL by defendant from the decision of BARKER, Co. J. of the 2nd of February, 1926, in an action to recover possession of a motor-car and for damages. The defendant Company had a number of garages the head office being in Nanaimo, where

one Corfield was in charge as general manager. One of the Company's garages in Ladysmith was in charge of one Sackville who sold a car to one Dr. Henry on the instalment plan. When $384 was still due, Dr. Henry went to Chicago and left the car with Sackville for disposal at the best price possible. Shortly after Sackville sold the car to the plaintiff for $550 and the plaintiff paid Sackville this sum by cheque and Sackville gave him a receipt for the amount, signed by himself. At the time of the sale to Rogers one of the instalments from Dr. Henry of $53.12 was overdue and unpaid. The plaintiff from the time of his purchase continued to park his car in the Ladysmith garage. Later Sackville absconded with the money paid for the car by Rogers. The defendant Company then seized the car and took it to Nanaimo to cover the balance still due the Company from Dr. Henry. The plaintiff obtained judgment for the return of the car and for damages to be assessed.

Statement

The appeal was argued at Vancouver on the 9th of March, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Mayers, for appellant: Doctor Henry left the car with Sackville in order that he might dispose of it at the best advantage. In selling the car to Rogers, he was either acting personally or as agent for Dr. Henry. He was not acting for the Company in making this sale. There was no authority from the Company: see *Farquharson Brothers & Co.* v. *King & Co.* (1902), A.C. 325 at pp. 329 and 341.

Arthur Leighton, for respondent: Sackville was the defendant's agent in Ladysmith and he dealt with this car in the course of his business as the Company's representative: see *Armory* v. *Delamirie* (1722), 1 Str. 505; *International Sponge Importers, Limited* v. *Andrew Watt & Sons* (1911), A.C. 279; *Walker* v. *Barker* (1900), 16 T.L.R. 393. The presumption is that Henry left the car with the Company for sale: see *Elliott* v. *Gibson et al.* (1904), 7 Terr. L.R. 96 at p. 97; Halsbury's Laws of England, Vol. 1, p. 158.

Argument

Mayers, replied.

Cur. adv. vult.

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MACDONALD, C.J.A.

MACDONALD, C.J.A.: Apart from the fact that the trial judge accepted the plaintiff's version of the transaction, the circumstances given in evidence all lead me to the like conclusion. There is only one question in dispute between the parties, *viz.*, whether the sale was a sale by Sackville as the agent of one Henry, or on the contrary, was a sale by him as defendant's local manager. If the latter, the plaintiff is right; if the former, he is wrong. One of the most cogent pieces of evidence is the statement of defendant's general manager Corfield, in the presence of Henry and Sackville, in which he said that defendant could not sell the car as Henry's agent, but that if sold Sackville was to sell it as defendant's agent. This statement covers the substantial point at issue, and is consistent with the conclusion arrived at by the learned County Court judge.

The appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A.: The judgment below can, in my opinion, be supported only on the "holding out" principle respecting Sackville's actions as the agent of the appellant for the sale of this particular car, which he was not authorized to sell, and as the evidence fails, to my mind, to establish such a contention the appeal should be allowed and the judgment in favour of the plaintiff vacated.

GALLIHER, J.A.

GALLIHER, J.A.: I am satisfied upon the evidence that the learned trial judge came to the right conclusion, and that Sackville, in selling the motor, was not the agent for Henry but for the Company.

I would dismiss the appeal.

MCPHILLIPS, J.A.

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

MACDONALD, J.A.

MACDONALD, J.A.: In my opinion, at all material times, Sackville was the agent of the appellant. The fair inference from the evidence of conversations of appellant's manager Corfield with Dr. Henry and Sackville followed by repossession of the car is that it was surrendered by Dr. Henry to the Company from whom it was purchased. In that view, we are not troubled with suggestions as to outstanding title in Dr. Henry.

It was returned to Sackville, not personally, in the sense that he was to be the owner but in his personal capacity as agent for the appellant. The latter knew Sackville had the car in his possession and as Corfield stated "Sackville was to act as our agent and not for Dr. Henry." He was, therefore, acting for his employers in selling it to the respondent. As to whether or not he acted beyond the authortiy given him we are not concerned; *qua* the respondent, in any event, he was the appellant's agent and it is estopped from disputing his agency.

I would dismiss the appeal.

Appeal dismissed, Martin, J.A. dissenting.

Solicitor for appellant: *C. F. Davie.*
Solicitor for respondent: *Arthur Leighton.*

REX v. OLNEY.

Criminal law—Plea of guilty—Conviction—Appeal—Ground that accused did not understand nature of charge—Evidence of, refused—Appeal—R.S.B.C. 1924, Cap. 146, Sec. 53; Cap. 245, Secs. 35 and 77.

An accused having been convicted on a charge of selling beer under section 53 of the Government Liquor Act to which she pleaded guilty, appealed to the County Court on the ground that she did not understand the nature of the charge to which she pleaded guilty and was induced to plead guilty in ignorance. The County Court judge refused to allow the accused to submit evidence to displace the plea of guilty and dismissed the appeal.

Held, on appeal, GALLIHER, J.A. dissenting, that as the appeal to the County Court was brought under the statute expressly "to retry the case" *de novo* and the only way to "hear and determine" the question of jurisdiction was "to take all the facts and circumstances into account" the evidence should not have been excluded and there should be an order remitting the case to the County Court for trial.

APPEAL by accused from the decision of GRANT, Co. J. of the 4th of December, 1925, dismissing an appeal from a conviction by the justice of the peace at Alert Bay on a charge of

Statement

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unlawfully selling beer contrary to section 53 of the Government Liquor Act. The accused pleaded guilty before the justice of the peace and was fined $300. The appeal was taken to the County Court on the ground that the accused did not understand the nature of the charge to which she pleaded guilty and was induced to plead guilty in ignorance. The County Court judge refused to allow the accused to submit evidence and dismissed the appeal. The accused appealed to the Court of Appeal on the ground that the learned County Court judge should have heard evidence to be submitted by the appellant in support of her allegation that she had not legally pleaded guilty to the charge and should then have adjudicated on the question and that he exceeded his jurisdiction in refusing to hear such evidence.

Statement

The appeal was argued at Vancouver on the 3rd of March, 1926, before MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Orr, for appellant: We say she was induced to plead guilty in ignorance. We were entitled to call evidence in support of this but were refused leave to do so. We are entitled to submit evidence on the question raised: see *Rex* v. *Lee* (1925), 35 B.C. 401; *Rex* v. *Richmond* (1917), 12 Alta. L.R. 133; *Rex* v. *Barlow* (1918), 29 Can. C.C. 381.

Argument

Wood, for the Crown: This is not the proper course. They should have proceeded by *certiorari*.

Cur. adv. vult.

1st June, 1926.

MARTIN, J.A.: This is an appeal from the judgment of the County Court of Vancouver (*coram* GRANT, Co. J.) affirming the conviction of the appellant for a violation of section 53 of the Provincial Government Liquor Act and the conviction was founded on an alleged plea of "guilty" when the accused was brought before the magistrate, though the conviction properly does not so recite. An appeal to the County Court was duly taken under section 77 of the Summary Convictions Act, Cap. 245, R.S.B.C. 1924, which provides for that course at the instance of "any person who thinks himself aggrieved by any

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such conviction or order," etc., which means not that he "says or fancies that he is aggrieved" but that he has "legal ground for saying he is aggrieved"—*Harrup* v. *Bayley* (1856), 6 El. & Bl. 218; *Rex* v. *Brook* (1902), 7 Can. C.C. 216; *Rex* v. *Gillis* (1914), 23 Can. C.C. 160. Such an appeal is conceded to be a trial *de novo,* and so when the trial was opened the appellant's counsel properly raised *in limine* a special ground of appeal of which he had given notice, though not required to do so, *viz.*:

"That the accused did not understand the nature of the charge to which she pleaded guilty and was induced to plead guilty in ignorance."

This, though not artistically worded, is in substance and effect an allegation that she did not in the true legal sense plead guilty to the "information or complaint" preferred against her under section 35 of the said Summary Convictions Act and unless an accused "admits the truth of the information or complaint" and "shews no sufficient cause why he should not be convicted" the justice cannot convict him but must, as the next section 36 provides, "proceed to inquire into the charge and . . . . take the evidence of witnesses both for the complainant and the accused"; in other words, in the absence of the necessary and indubitable admissions the justice has no jurisdiction to convict without evidence—*Rex* v. *Richmond* (1917), 12 Alta. L.R. 133—and if he does so an appeal obviously lies from that excess of jurisdiction and is a "matter of appeal" of substance and merits that the County Judge should "hear and determine" under section 79, in the trial *de novo* before him. Such a "matter" is one of the most substantial kind, so substantial in fact that if there has been no proper plea of guilty there has been no legal trial, conviction or sentence, and the case comes within that rare class wherein, *e.g.,* the Court of Criminal Appeal in England has the power of ordering a *venire de novo* though it cannot, as we can, order a new trial—*cf.* *Rex* v. *Baker* (1912), 7 Cr. App. R. 217; 28 T.L.R. 373; *Rex* v. *Ingleson* (1914), 24 Cox, C.C. 527; *Rex* v. *Rhodes* (1914), 11 Cr. App. R. 33; *Rex* v. *Golathan* (1915), *ib.* 79; *Rex* v. *Lloyd* (1923), 17 Cr. App. R. 184; and *Rex* v. *Hussey* (1924), 18 Cr. App. R. 121.

MARTIN, J.A.

Such being the situation, when the appeal was opened for

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hearing the appellant's counsel at once and properly (to get rid of the situation created—see *Rex* v. *Gillis, supra*—by her alleged plea of guilty below) defined, and more clearly, as he was entitled to do, his position by saying to the Court:

"Now, what I want to do is to offer to shew that she really did not plead guilty to this charge at all."

And later on he again asked, during the course of his argument to be permitted to call evidence to "displace that plea of guilty" by proving, if possible, that the accused was an unlettered Indian woman unable to read or write and not understanding the English language. In support of this position he formally tendered the evidence of the appellant, but upon objection taken by the Crown counsel that the plea of guilty was an absolute bar and could only be attacked and explained away on *certiorari*, the learned judge rejected the proffered evidence, and as no other evidence could be given while that plea remained upon the record, he dismissed the appeal. In so rejecting the evidence of the plaintiff the learned judge said he would accept that of the convicting magistrate upon the point but it is obvious that if that of the magistrate were receivable that of the "person aggrieved" was equally so. The objection that because the reality of the plea could be attacked on *certiorari* therefore it was invulnerable on an appeal at large (as that to the County Judge was) fails to realize the effect of an act done without or in excess of jurisdiction as above noticed, and in *Rex* v. *Richmond, supra*, the Appellate Court of Alberta was careful to say, pp. 134, 137, 141, that apart from *certiorari*, such a defence could be raised on an appeal (corresponding in the Criminal Code to this) which gave a "perfect remedy for the wrong done him" by the "trial on the merits" (and nothing is more "meritorious" than lack of jurisdiction) which it provided, and this view was affirmed by the same Court in *Rex* v. *Long Wing* (1923), 19 Alta. L.R. 289, on a motion to quash a conviction under a Provincial Liquor Act, in which the Appellate Court held, after considering the circumstances, that it could not "be said with truth that the accused did admit the truth of the information" despite certain admissions which the magistrate wrongly construed as a plea of guilty, "the consequence of this is that the magistrate proceeded to convict the accused when he

MARTIN, J.A.

had no jurisdiction to do so," and so the conviction was quashed.

In the King's Bench division in England a similar course has been adopted on *mandamus* proceedings in aid of an appeal to Quarter Sessions from a conviction by a magistrate, in the interesting case of *Rex* v. *Campbell* (1921), 85 J.P. 189, wherein the Court decided that it could, and it did inquire into the circumstances surrounding the entry of the alleged plea of guilty, and on the material before it held that what the accused had said did not amount to such a plea and therefore it was not a bar to his appeal from that conviction being heard. This is, indeed, the same course as that adopted by the Court of Criminal Appeal in the cases cited *supra* particularly in the *Rhodes* and *Golathan* cases, wherein the Court took evidence on the point saying, in the latter, that in its inquiry into the "reality of a plea of guilty" the Court

"will take all the facts and circumstances of each case into account in order to be satisfied that there has been a mistake."

These decisions are all consistent with the principle laid down in the recent decision of the Privy Council in *Rex* v. *Nat Bell Liquors, Ld.* (1922), 2 A.C. 128, wherein it was said, p. 160:

"Where it is contended that there are grounds for holding that a decision has been given without jurisdiction, this can only be made apparent on new evidence brought *ad hoc* before the superior Court. How is it ever to appear within the four corners of the record that the members of the inferior Court were unqualified, or were biased, or were interested in the subject matter? On the other hand, to shew error in the conclusion of the Court below by adducing fresh evidence in the superior Court is not even to review the decision: it is to retry the case."

MARTIN, J.A.

Now this appeal to the County Court judge was brought under the statute expressly "to retry the case" *de novo* as therein provided, and the only way to "hear and determine" the said fundamental question of jurisdiction was "to take all the facts and circumstances into account" as the *Golathan* case laid down, and it is apparent that if any evidence at all of what occurred when the plea was entered is to be included, that of the person most concerned, the convict, must not be excluded.

Since much was said of my decision in *Reg.* v. *Bowman* (1898), 6 B.C. 271, when exercising in the County Court my then existing powers of a Supreme Court judge, I note that said decision has no application to this case because no suggestion was made that the plea of guilty therein entered was not

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properly and in reality recorded; and, also, it is unnecessary to express any opinion on the present practice of the Courts of this or other Provinces in granting *certiorari* when an appeal will lie: *cf. Traves* v. *City of Nelson* (1899), 7 B.C. 48, 54, and *Re Maritime Fish Co. Ltd.* (1919), 46 D.L.R. 108.

It would appear that the difficulty herein has arisen from the failure to recognize and put forward the true nature of the opening ground of appeal, *viz.,* that it was a jurisdictional one, and in the nature of confession and avoidance in that it confessed that the plea was *de facto* upon the record but avoided its consequences by alleging that *de jure* it ought not to be there, and this position the appellant was entitled to support on the law by authority and on the facts by evidence and he should have been permitted to make the attempt however signally he may have failed therein.

MARTIN, J.A.

The case of *Harris* v. *Cooke* (1918), 88 L.J., K.B. 253, much relied on below, is little in point because the question of the reality of the plea was expressly laid aside and the decision given on a "broader question" (p. 255) which assumed reality.

It follows that the appeal should be allowed, the judgment affirming the conviction vacated, and the case "remitted for trial" (*Rex* v. *Rhodes, supra*) to the learned judge below upon all "matters" properly open thereupon, including that of the "reality [of the] plea of guilty" as aforesaid, in the manner laid down in said last-mentioned case.

GALLIHER, J.A.: If it had been seriously contended that the appellant had not pleaded guilty, in words, as entered by the magistrate, then I could agree with my learned brothers, who take an opposite view to myself, but in effect, in my view, all that is really contended for is that the accused appellant did not understand the nature of the charge and by reason thereof she pleaded guilty through ignorance.

GALLIHER, J.A.

The charge is for selling beer. That is easily understood, there can be no mistaking it for any other charge, there is no ambiguity about it or the plea, and I cannot bring myself to think that a person pleading guilty to such a charge can at a later date come forward and say, "Oh, I did not understand so simple a charge, or I did not think I would be fined so heavily,"

and be entitled to give evidence for opening up the conviction on that ground. If it could be said that the nature of the charge was such that the accused might be misled into pleading as she did, or that she might be thought to have pleaded to a charge different to the one laid, it might be a different matter, but in the very simplicity of the charge itself, I see no room for such a conclusion, nor do I see where it would end if that principle is adopted in the circumstances of this case.

GALLIHER, J.A.

I would dismiss the appeal.

McPHILLIPS, J.A.: I have had the advantage of reading the judgment of my brother MARTIN in this appeal. It so completely demonstrates my view and so conclusively disposes of all the objections advanced by the leared counsel for the Crown in opposition to the submissions made by the learned counsel for the appellant for the reversal of the judgment below, that I do not consider that I can usefully add anything in further support of the allowance of the appeal, save to say, that it is fundamental that where the magistrate may have proceeded without jurisdiction, as here contended, upon the premise of a plea of guilty, and it is alleged that no such plea was in fact understandingly made, that upon appeal had that question is open and evidence is receivable, *i.e.*, new evidence may be adduced to that end. The learned judge below refused to hear the evidence of the appellant upon her appeal from the magistrate, counsel for the appellant desiring to adduce evidence manifesting the invalidity of the plea recorded. In this the learned judge erred in law.

MCPHILLIPS, J.A.

It follows that there must be an order remitting the case for trial to the County Court, the conviction below to be vacated.

MACDONALD, J.A. agreed in making an order remitting the case to the County Court for trial.

MACDONALD, J.A.

Remitted for trial, Galliher, J.A. dissenting.

Solicitors for appellant: *McKay, Orr, Vaughan & Scott.*
Solicitor for respondent: *H. S. Wood.*

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IN RE SUCCESSION DUTY ACT AND WILSON.

Taxation—Succession duty—Property outside Province—Death of owner outside Province—R.S.B.C. 1924, Cap. 244, Secs. 2 and 5(1)(a)—Appeal.

IN RE SUCCESSION DUTY ACT AND WILSON

A deceased had lived in British Columbia but shortly before his death he went to Scotland where he died. At the time of his death he owned some real property in British Columbia but the larger portion of his estate consisted of personal property in the form of cash, stocks and other securities in Scotland. On petition it was held that the personal estate was not subject to succession duty.

Held, on appeal, affirming the decision of MORRISON, J. (MARTIN, J.A. dissenting) that by section 2 of the Succession Duty Act the Legislature left property actually situate abroad, though in contemplation of law situate here, free when a deceased person had died abroad although domiciled here.

APPEAL by the Crown from the decision of MORRISON, J. of the 21st of January, 1926 (reported 36 B.C. 450) on the petition of Margaret Wilson, executrix of the estate of Hector Wilson, who died in Aberdeen, Scotland, on the 20th of June, 1925. At the time of his death Hector Wilson had his domicil in the Municipality of Point Grey, British Columbia, where he had lived with his wife and two children until the 14th of March, 1925, when owing to ill-health he went to Scotland where he resided with his family up to the time of his death. His property in British Columbia at the time of his death consisted of two lots in New Westminster District and a balance due on the sale of his house in Point Grey, its total valuation being $3,341.47. He had personal property in Scotland consisting of cash and investments in a number of securities the total valuation being $56,085.01. The deputy district registrar of the Supreme Court at Vancouver was instructed to collect $1,583.14 being the amount the deputy minister of finance determined to be payable as succession duty in respect of the said estate at the rate of 2-68/100 per cent. of $59,072.45. The petitioner claimed that as Hector Wilson died outside the Province it was only his property situate within the Province that was subject to succession duty. It was held by the trial

Statement

judge that the personal estate of deceased situate without the Province is not liable to succession duty.

The appeal was argued at Vancouver on the 17th of March, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Killam, for appellant: Hector Wilson was domiciled in British Columbia at the time of his death, but he died in Scotland. His estate in Scotland was all personal property and the maxim *mobilia sequuntur personam* applies and under subsection (*g*) of section 5(1) it is subject to taxation: see *Re Succession Duty Act* (1902), 9 B.C. 174. The definition under section 2 has nothing to do with the case. As to the *mobilia* rule see *Smith* v. *The Provincial Treasurer for the Province of Nova Scotia and The Province of Quebec* (1919), 58 S.C.R. 570. There must be clear words to exclude the rule: see *Rex* v. *Lovitt* (1912), A.C. 212. If we come under subsection (*g*) we are entitled to succession duty. As to construction see Maxwell on Statutes, 6th Ed., 39.

Argument

Donald Smith, for respondent: The clear words of the statute take the case out of the *mobilia* rule. On the question of interpretation see Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., pp. 342 and 343. This property in Scotland can be taxed there: see *In re Succession Duty Act and Inverarity, Deceased* (1924), 33 B.C. 318. The rule invoked is in conflict with the Act here and the words of the Act should prevail: see *Brassard* v. *Smith* (1924), 94 L.J., P.C. 81.

Cur. adv. vult.

1st June, 1926.

MACDONALD, C.J.A.: By section 5(1) (*a*) of the succession Duty Act, the Legislature made dutiable not only the value of all real property situate in the Province irrespective of the domicil of the deceased, but also the value of all personal property so situate of a deceased person domiciled abroad which by the common law would be deemed to be situate in the country of domicil. So far there is no difficulty since it is apparent that the Legislature intended that result.

MACDONALD, C.J.A.

The property in question here—stocks or bonds—is situate

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in Scotland; the deceased was domiciled here but he died in Scotland. By the common law his personal property in Scotland would be deemed to be situate here. The interpretation clause of the Act, section 2, however, defines what property is included by the words of section 5(1) (*a*)—"all property situate within the Province"—and declares that the definition "includes" stocks or bonds no matter where the corporation issuing them may happen to be located, "belonging to the estate of any person dying in the Province," and domiciled here. Now, if section 5(1) (*a*) is to be read as embracing only property actually situate here and not that which in contemplation of law is deemed to be situate here, the definition aforesaid does not affect section 5(1) (*a*). It recognizes another class of property, *viz.*, personal property actually situate abroad but which is to be taxed providing that the deceased had been not only domiciled here but had died here as well.

The Legislature was at least consistent. It imposed by section 5(1) (*a*) the duty upon the value of property actually situate here though in contemplation of law situate elsewhere, and by section 2 left property actually situate abroad, though in contemplation of law situate here, free when the deceased person had died abroad though domiciled here.

I have not overlooked section 5(1) (*g*) which was relied upon by the appellant, but I think that that subsection does not help him. It relates to a different subject-matter, but even if it were otherwise, it could not override the specific provision of section 2, which, as I have said, does not bring the property in question within the purview of the Act, but in effect excludes it.

MARTIN, J.A.

MARTIN, J.A.: This appeal should, in my opinion, be allowed. By section 5(1) of the Succession Duty Act, Cap. 244, R.S.B.C. 1924, it is declared that, "save as aforesaid, the following property shall be subject, on the death of any person, to succession duty. . . ." This general term "property" is defined by section 2 as follows:

> "'Property' includes real and personal property of every description and every estate or interest therein capable of being devised or bequeathed by will, or of passing on the death of the owner to his heirs or personal representatives."

Then in the subjoined list of "the following property" of various classes we find in (*g*):

"Any property of which a person dying after the thirty-first day of August, 1900, was at the time of his death competent to dispose. . . . ."

This is, to my mind, clear and unmistakable and in express terms inclusive of the "property" in question herein. But it is sought by implication to exclude this inclusive class by referring to the first and second classes in the list of the said "following property," *i.e.*, (*a*) and (*b*) which deal only with "property . . . . situate within the Province" as defined by section 2. With all respect, however, I am unable to take the view that the definition of other distinct and particular classes can be imported into the construction of the general and comprehensive class of "any property" that is expressly dealt with by section (*g*) which carries its own appropriate definition of "property" as distinguished from the special one appropriate to "property situate within the Province," which definition is only applicable to limited cases where the deceased both dies and is domiciled at that time within the Province: this opinion is fortified by subsection (2) which prevents any possible invasion, so to speak, of the other classes of property, though embraced within the widest possible description of "any property," upon those classes contained in (*a*) and (*b*). Such being, in brief, my view of the matter the case is governed by the *mobilia* principle—*Rex* v. *Lovitt* (1911), 81 L.J., P.C. 140; *New York Life Insurance Co.* v. *Public Trustee* (1924), 93 L.J., Ch. 449—and so the appeal should be allowed.

MARTIN, J.A.

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

GALLIHER, J.A.

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

MACDONALD, J.A.: In my opinion on the construction of section 5, subsection (1) (*g*) of the Succession Duty Act, Cap. 244, R.S.B.C. 1924, standing alone, the property of the deceased referred to in the petition herein, whether located within or without the Province of British Columbia, without regard to the place of death, would be liable to payment of succession duties.

MACDONALD, J.A.

Turning to section 5(1) (*a*), however, we find it expressly deals with the property involved in this appeal, while subsection

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(*g*) is of more general application. In these circumstances the maxim *expressio unius est exclusio alterius* is applicable. By section 5(1) (*a*) read in conjunction with the interpretation of "all property situate within the Province" as contained in section 2 we find it has no application unless the property belonged to the estate of a person dying in the Province.

I would dismiss the appeal.

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellant: *Killam & Beck.*
Solicitor for respondent: *Donald Smith.*

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FERGUSON v. TAYLOR.

Prohibition—County Court—Jurisdiction—Children of Unmarried Parents Act—Appeal—Where the cause of complaint arose—Interpretation—R.S.B.C. 1924, Cap. 34, Sec. 7; Cap. 245, Sec. 77.

FERGUSON v. TAYLOR

F. gave birth to a child out of wedlock in the city of Vancouver and on complaint against T. under section 7 of the Children of Unmarried Parents Act the evidence disclosed that both parties had previously lived near Abbotsford where conception took place. The stipendiary magistrate for the County of Westminster dismissed the complaint and an appeal was taken to the County Court holden at Chilliwack (the County Court nearest Abbotsford) when the appeal was allowed and T. was ordered to pay maintenance for the child. An application for a writ of prohibition on the ground that the appeal should have been heard in Vancouver, being the County Court nearest to where the child was born, under section 77 of the Summary Convictions Act was dismissed.

Held, on appeal, affirming the decision of HUNTER, C.J.B.C. that the cause of the complaint was the seduction and not the birth of the child and the appeal to the County Court of Chilliwack was properly taken.

Statement

APPEAL by defendant from the order of HUNTER, C.J.B.C. of the 8th of February, 1926, dismissing a motion for an order *nisi* to shew cause why a writ of prohibition should not issue to the judge of the County Court of Westminster holden at Chilli-

wack and to the defendant to prohibit them from proceeding with an appeal from the decision of J. W. Winson and George F. Pratt, stipendiary magistrates in and for the County of Westminster, dated the 18th of November, 1925, dismissing the complaint of Elizabeth A. Ferguson under the Children of Unmarried Parents Act that a male child was born to her out of wedlock at the City of Vancouver on the 9th of September, 1925, and that Frederick Taylor of Abbotsford was the father of the child. Miss E. A. Ferguson appealed from the magistrate's decision to the County Court holden at Chilliwack and the appeal was argued before HOWAY, Co. J. at Chilliwack on the 9th of December, 1925, and at New Westminster on the 23rd of December, following, when he allowed the appeal and made an order that Frederick Taylor do pay $5 per week towards the maintenance of the child. The evidence disclosed that both plaintiff and defendant had lived near Abbotsford for many years and that sexual intercourse took place there which resulted in her pregnancy, but the child was born in Vancouver. Under section 77 of the Summary Convictions Act, the appeal is at the sittings of the County Court which shall be held nearest to the place where the cause of the information or complaint arose. The appellant claimed that as the child was born in Vancouver the appeal should have been taken to the County Court at Vancouver under the above section. The respondent claimed the cause of the complaint arose where intercourse took place in Abbotsford and that the nearest County Court was Chilliwack.

Statement

The appeal was argued at Vancouver on the 17th of March, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Mayers, for appellant: Her cause of action arose in Vancouver, where the child was born, and the appeal should have been to the Vancouver Court. We are entitled to prohibition: see *Farquharson* v. *Morgan* (1894), 1 Q.B. 552. No consent can give jurisdiction: see *Norwich Corporation* v. *Norwich Electric Tramways Co.* (1906), 75 L.J., K.B. 636.

Argument

J. W. deB. Farris, K.C., for respondent: The magistrate held there was no corroboration but the County judge held that there was. These proceedings may be taken after pregnancy.

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The seduction took place at Abbotsford. The cause of the complaint is the seduction. It is intercourse resulting in pregnancy that is the cause: see *Munro* v. *L.* ——— (1925), 1 W.W.R. 1113.

Mayers, in reply: He wants to introduce new language into section 7. The mere intercourse is not a ground of complaint.

Cur. adv. vult.

1st June, 1926.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The complaint was made under section 7(1) of Cap. 34, R.S.B.C. 1924, and was dismissed. An appeal was taken under section 77 of the Summary Convictions Act, to the County Court holden at Chilliwack, in the County of Westminster. The complaint had been heard by stipendiary magistrates in the City of Vancouver in another county, though the offence took place near Abbotsford, in the County of Westminster. The County Court holden at Chilliwack was the nearest County Court to Abbotsford. Said section 77 enacts that an appeal may be taken from the magistrate's Court to the County Court at the sittings thereof which shall be nearest to the "place where the cause of information or complaint arose." I think the "cause" of the complaint was the seduction and not the birth of the child, and that the appeal to the County Court at Chilliwack was properly taken.

The appeal should be dismissed.

MARTIN, J.A.

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

GALLIHER, J.A.

GALLIHER, J.A.: I agree with MACDONALD, J.A.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I concur in the dismissal of this appeal.

MACDONALD, J.A.

MACDONALD, J.A.: The only point involved is, Did the cause of complaint arise wholly within the County of Vancouver or within the jurisdiction of the judge of the County Court of Westminster? If the former then under section 77 of the Summary Convictions Act, Cap. 245, R.S.B.C. 1924, the appeal from the decision of the magistrate was not heard at a sittings of the County Court nearest to the place where the cause of the

complaint arose. If the place of conception determines the *locus,* the County Court judge had jurisdiction. If, on the other hand, the cause of complaint is the birth of the child out of wedlock, jurisdiction was lacking as it took place in Vancouver.

I would dismiss the appeal notwithstanding the wording of section 7 of the Children of Unmarried Parents Act, Cap. 34, R.S.B.C. 1924. The complaint is that a child was born out of wedlock but the cause of complaint is not so limited. Such a construction would render the Act inoperative in many cases. The place of the actual birth of the child has nothing to do with the matter. The wrong was committed when conception took place. That is the place where the "cause of the complaint arose" within the meaning of section 77 of the Summary Convictions Act.

MACDONALD, J.A.

Appeal dismissed.

Solicitors for appellant: *Phipps & Cosgrove.*
Solicitors for respondent: *George L. Cassady.*

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REX v. THORNTON.

REX
v.
THORNTON

Criminal law—Sale of a share in a company—Misrepresentation charged as to profits and liabilities—Investigation by purchaser on his own account—Jury—Conviction—Appeal—Misdirection as to obligations of company—Acquittal.

H. owned all the shares in a freighting company that operated four trucks. Two of the trucks (a Maple Leaf and a Ruggles) were not fully paid for there being a balance owing by the company and the other two (Federals) first purchased by H. and partially paid for, there being a balance of about $2,000 owing for which he gave his personal lien note, were handed over by him to the company. H. advertised for a purchaser of half the shares in the company and M. entered into negotiations with him, and later purchased the shares. After carrying on the business for a short time M. brought action for rescission of the sale of shares in the company on the ground of misrepresentation by H. and recovered judgment. Later at the instance of M. a charge of false pretences was laid against H. on the grounds that he had induced M. to purchase by saying that the profits of the business averaged $800 per month and that the company's liabilities did not exceed $1,500. He was found guilty by a jury and convicted.

Held, on appeal, reversing the decision of MCDONALD, J. (MARTIN, J.A. dissenting), that the evidence disclosed that M. made a complete investigation on his own account and was more concerned in future profits than what they had been. He knew before the sale that the liability on the Federal trucks was H.'s own personal liability and not the company's whose actual debts did not exceed $1,500. The charge to the jury did not touch upon facts favourable to H. on the question of the company's profits, nor was the jury informed that M. had found out from the manager of the Federal Motor Company Limited, before the sale of shares was completed that the debt on the Federal Motor Company Limited was a personal debt of H.'s and not one of the company's, The prosecution has the ear-marks of an attempt to use the criminal Courts for the collection of debts or punishment of a defaulting debtor and it should never have been commenced. The conviction should be set aside.

Statement

APPEAL by accused from the decision of MCDONALD, J. of the 16th of October, 1925, and the verdict of a jury, convicting him on a charge of false pretences. Thornton held all the shares in the Fraser Valley Motor Express Limited, its business being the freighting of goods through the Fraser Valley. The company had four trucks and two of these, Federal trucks, were

purchased by Thornton. They were partly paid for and Thornton gave his personal lien note for the balance due, about $2,000, and then delivered the trucks over to the company. The two other trucks, a Maple Leaf and a Ruggles, were not paid for in full there being a balance due from the company. Prior to the transaction in question Thornton had sold one-half of the shares in the company to four successive purchasers, but shortly after the purchase in each case the purchaser resold to Thornton at a loss. In April, 1925, he listed a half interest in the company with a broker for sale and one Miller came to negotiate with him, and eventually purchased half the stock in the company for $3,500. Miller complained that Thornton represented to him that there was an average profit of $800 per month and that the liabilities of the company did not exceed $1,500. The evidence disclosed that before purchasing Miller made a complete investigation on his own account in respect to the profits of the concern and he was informed by the managing director of the Federal Motor Company Limited, that Thornton still owed a substantial sum for the Federal trucks, and in consequence of his investigations he asked for and obtained from Thornton an undertaking in writing to pay any debts of the company or chargeable to any of its assets over $1,500. The jury found the accused guilty. He appealed and leave to appeal was granted by the trial judge on a ground involving a question of fact or a question of mixed law and fact, namely, Was the Fraser Valley Motor Express Limited, under any obligation or liability in respect to or for the purchase price of any of the automobile trucks referred to on the trial?

Statement

The appeal was argued at Vancouver on the 23rd and 24th of March, 1926, before MACDONALD, C.J.A. MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. W. deB. Farris, K.C., for appellant: The false pretence charge is based on his statement as to (1) profits; (2) liabilities. He is alleged to have said the profits were worth $800 a month and the liabilities $1,500. There is no evidence that the debt exceeded $1,500. There was misdirection in not instructing the jury as to the evidence given in respect of each of the alleged misrepresentations. He omitted to instruct the jury that

Argument

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Miller admitted that he neither relied on nor believed the alleged misrepresentations both as to earnings and liabilities and there was misdirection in saying "that Miller parted with his money believing the representation" when he should have told them that "the money in question must have been parted with in consequence of and through the false representation." The verdict of the jury is inconsistent: see *Rex* v. *Zambapys and McKay* (1923), 32 B.C. 510.

Argument

Craig, K.C., for respondent: It makes no difference whether Thornton or the company owes the $2,000 on the Federal trucks as the trucks could be taken anyway if the debt was not paid. The representation as to liabilities was untrue and he knew it. There should not be a new trial on the ground of misdirection as long as they could have found him guilty on the other point: see *Eberts* v. *The King* (1912), 47 S.C.R. 1. The evidence as to the profits is sufficient to support a verdict of guilty. There was in fact no misdirection.

Farris, in reply: What he says does not interfere with my argument on misdirection.

Cur. adv. vult.

1st June, 1926.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This is an appeal on points of law and also on mixed questions of law and fact on a certificate of the trial judge.

The appellant was convicted for having obtained money under false pretences. At the time of the transaction in question, a trucking business was being carried on by the Fraser Valley Motor Express Limited, the capital shares of which were owned by the appellant. Prior to this time he had had several successive "partners" in the business, each one of whom had purchased half the shares and was to take half the profits. Each one for various reasons resold his interest to the appellant, always at a loss. At the time he entered into negotiations with Miller, the complainant, he had just bought back from his last partner Falkner, Falkner's 5,000 shares, being half of the capital stock. The company owned four trucks and its business was the freighting of goods through the Fraser Valley. The appellant himself was one of the drivers and his partners from

time to time were the office men. In April, 1925, he listed the half interest which he had recently repurchased from Falkner, with a broker and in response to an advertisement Miller came in to negotiate. What took place is best stated in Miller's own words:

"I met Thornton in Easton's office, and we went over all the details of the business. The business was represented to be a business on a working basis and a paying basis."

"What was said about that [the profits]? Profits amounted to an amount around about $800 per month. . . . It amounted, the averaged income for a month was stated to be an amount of $1,350 gross, with the lowest month at $1,100. This was what was made during the past year. . . . ."

"So you investigated this business from the 3rd of March to the 11th before you bought in? Yes, sir.

"What investigation did you make? Every investigation I could make, finding it was a fair business with chances of good business. Everybody represented Thornton as being an A-1 fellow.

"Did you go through any books at all before you bought in? Easton shewed me a record of the freight receipts.

"Did he shew you these [Ex. 6]? Yes.

"The work sheets of the Company? Yes.

"Didn't Thornton tell you in Easton's presence that you were buying in at a very slack time? No, no.

"You are positive of that? Yes, there was nothing definite in regard to that. . . . They represented the winter months as being slack months. MACDONALD, C.J.A.

"Did you figure out the statement for yourself from the books? I had the books on my own idea of the business. It looked to me as if the business, as if the assets and liabilities were there.

"Do you say there was no statement at all shewn you for 1924? I do not remember any statement.

"Wouldn't you remember if there had been one? In a general way there may have been. What I was concerned with was any future business more than past business.

"Now, am I correct in stating when you bought in you thought the business would produce $200 a month for each of you and perhaps an increase in the future of $250 a month, is that correct? We thought there would be $200 a month and I would get a return on capital as well.

"If the liabilities were only $1,500 as represented and if you had been getting $200 a month, would you have been satisfied? Yes, if Thornton would run a proper business.

"Now, I am going to suggest to you that Thornton said, 'Before you buy into this business, I want you to go into it whole-heartedly and put your shoulder to the wheel'? Yes."

Thompson, one of the previous partners and a Crown witness said:

"What were the earnings of the business during that time? About

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$4,086.11. That was from April 19th to the end of July [the period of Thompson's partnership].

"So that I take it from your figures there was a net profit of $1,686? Yes."

The appellant on this point said, speaking of the work sheets:

"Those are the work sheets referred to."

"Would these work sheets shew your business takings and expenditure? Exactly.

"THE COURT: Expenses also? No, not the expenses, just the takings, the gas and oil that the truck consumed on the run."

"Did he have possession of these work sheets or access to them before he bought into the Fraser Valley Motor Express Ltd.? Yes. I took them to Easton's office and left them there for examination. He asked for the last year's takings of the Company [1924]. . . . I think I did say I thought the net profits would be around $800 per month."

"What was that based on, your work sheets? Yes.

"For the year 1924? Yes."

Now, in view of this evidence I think it must be apparent that Miller did not rely on the representation but made a complete investigation on his own account in respect of the profits of the company; all the material was before him. In fact Miller himself in his evidence says that he found months in which the net profit was more than $800, thus indicating the thoroughness of his examination. What Miller was counting on was his ability to increase the business by putting it on a better footing. The parties discussed the question of how much each could draw per month from the business and they put it at $200, which is only half of the alleged $800 profit and as Miller says, "it was the future profits more than the past profits which I was concerned with."

MACDONALD, C.J.A.

Before leaving this branch of the case, I shall only observe this, that in the charge to the jury, these facts, favourable to the appellant, were scarcely touched upon. *Rex* v. *Bundy* (1910), 5 Cr. App. R. 270; *Rex* v. *Finch* (1926), 12 Cr. App. R. 77.

Coming now to the other false pretence, namely, that the liabilities of the company would not exceed $1,500. Much stress was laid at the trial upon a statutory declaration made by the appellant at the request of Miller. In that document it was declared that the gross debts of the company would not exceed $1,500. Now, standing alone, that representation would not, while technically correct, be substan-

tially correct. Two of the trucks were owned by the company, but two others, the Federal trucks, had been purchased by Thornton before the incorporation of the company, and the company had not assumed the indebtedness on these. The vendors held a lien agreement in respect of them. Therefore the fact is, at all events, technically correct, that the gross liabilities of the company, leaving that of Thornton out of the question, would not exceed $1,500. Now Thornton claims that he was under the impression that he had completed his payments on these two Federal trucks, and a great deal of evidence on that point was gone into at the trial, necessitating an adjournment and a consultation between the manager of the Federal Company and an auditor of the appellant. It seems that certain books of the Federal Company had been lost or destroyed, making it difficult, if not impossible, to ascertain just what had been paid. The result, however, of the consultation was that about $2,000 was found to be still owing upon these trucks. That was not a liability of the Fraser Valley Motor Express Limited. It was Thornton's personal liability. Thornton says it was referred to at the time of the bargain and that Miller said, "I will see the Federal Company about that." It is also quite clear that the indebtedness of $1,500 was one on the other two trucks, and that the complainant Miller knew that.

It may be mentioned here that Miller first commenced a civil action against Thornton for rescission of the agreement, got judgment and when he found he could not collect, instituted this prosecution. Now, in the statement of claim in that action, he alleges this misrepresentation, "that while some moneys included in the gross liabilities of the company represented as aforesaid were payable in respect of the purchase of the Maple Leaf and Ruggles trucks, said Federal trucks were fully paid for and said Maple Leaf and Ruggles trucks were owned as assets as aforesaid and were in good standing as property of the company."

Now, we come to the very crux of this branch of the case. Miller says that it was represented that the Federal trucks were fully paid for. Assuming that that were so, he went to the Federal Company to satisfy himself with regard to it. This is his evidence:

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"Did you ever try to find out what was owing against the Federal motor trucks? Yes, I tried.

"Did you ask the Federal Motor Company for a statement? Yes. . . . He said the matter concerned Thornton, and had nothing to do with me at all.

"Never mind what Hansuld said [Hansuld was the manager of that company.]"

He was told by the Court to go on, and his answer was:

"I got the understanding from Hansuld after investigating that there was a good deal of money owing on these trucks, an amount exceeding $2,000.

"Still owing on the trucks? Yes."

Now, turning to the evidence of Hansuld, a Crown witness:

"Mr. Hansuld, did the complainant Mr. Miller approach you before the 12th of March and ask you how much was owing (before the date of the contract)? He did.

"What did you tell him? I refused to give him any information regarding the amounts.

"Did he tell you that he was buying into the Company? He didn't say he was buying into the company, he said he was negotiating with Thornton.

"Did you say to the complainant there was nothing owing except a small repair bill? I certainly didn't. As a matter of fact I let him know there was quite a sum owing.

"Why didn't you give him the amount? I am not at liberty to tell one man's business to another. He asked me if these trucks were paid up. I said, no, they are not. There was a considerable amount owing the company. He asked what type of fellow Thornton was, and asked me the value of the trucks, and what I thought of his business. . . . I told him we had found Thornton a very hard-working fellow, and I believed him to be honest as far as I knew, and I thought he had a good business with a future in it if it was properly handled. That is what I told him."

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Thus it appears conclusively that Miller knew, whether he knew the amount or not, that the Federal trucks were not fully paid, and therefore in entering into the contract he could not have entered into it on the faith of representation to the contrary. To protect himself, or rather to protect the trucks which were then the property of the Fraser Valley Motor Express Limited, subject to the liens, he asked Thornton for, and got, a letter in that behalf, reading as follows:

"11th March, 1925.

"In consideration of you agreeing to purchase 5001 shares from me in the Fraser Valley Motor Express Limited, I hereby agree to pay any business taxes or other taxes payable by that company up to this date or any debts of the company, or chargeable to any of its assets, over $1,500."

Now, what were those debts chargeable to any of its assets if not any possible liens upon these Federal trucks? Outside

of that indebtedness, assuming that the company would have to pay the lien to save the trucks, although not a liability of their own, there was no indebtedness beyond the said sum of $1,500. Can it be said that Miller relied upon a representation when after an investigation he insisted upon a personal guarantee?

The appellant claims that there were errors in the judge's charge to the jury, and in this, with great respect, I think he is right. It will be recalled that Miller endeavoured to find out the indebtedness against the Federal trucks before he concluded the bargain and that Hansuld refused to tell him the amount of that indebtedness, but said it was a considerable sum. It appears that counsel read to the jury a transcript of Miller's evidence with regard to this which was handed to the learned judge, for he says in his charge:

"There was one thing that came up in the address of counsel for the accused, which I think it is my duty to clear up. I was rather surprised when he produced the transcript that it appeared that Miller had said that before he bought in that he went to Mr. Hansuld and found that there was $2,000 or more owing to the Federal Motor Company. Now, that is not what Miller said, although I do not blame counsel for that because it is here as he read it to you, but I am quite sure you did not get that impression, and I did not. What Miller said was this, or what he intended to say was, 'I went to Hansuld before I bought in and Hansuld told me that the thing was in good standing, but there was about $390 owing on the repair account, but he wouldn't tell me and he didn't tell me what Thornton owed, but afterwards when I was in there and I began to get suspicious, and I saw things were not going right, then I went to Hansuld and after investigating, I got the understanding from Hansuld that there was a good deal of money owing on these trucks, an amount exceeding $2,000.' That was away after he was in and his money was gone."

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That statement to the jury was one of very serious import. I have already quoted the evidence of Hansuld, a Crown witness, in which he said that that incident took place before the sale and while Miller was negotiating with Thornton. There can be no manner of doubt about that, the time and the circumstances are clearly mentioned. Moreover, I think the learned trial judge was in error in not pointing out these circumstances to the jury in relation to the making of the statutory declaration.

This prosecution has the ear-marks of an attempt to use the process of the criminal Courts for the collection of a debt, or for the punishment of a defaulting debtor. It appears from the evidence of Miller himself, that he made no suggestion of false

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pretences against the appellant until after he had obtained judgment in a civil action. In his negotiations with the appellant, in an endeavour to get his money back, or some of it back, he did not suggest that he had been deceived by statements made before the contract was entered into. According to Thornton, he wanted his money out of the business in order to enter into another business in his own line, namely, in connection with logging, he having been an accountant in a logging company's employ. No suggestion was made that he had been misinformed, he was merely disappointed that the business did not "pick up," as he put it in his evidence. In these circumstances, the prosecution should never have been commenced.

The conviction should be set aside.

MARTIN, J.A.

MARTIN, J.A.: After a careful examination of all the evidence and the charge to the jury I am of opinion that there was ample evidence (taking exhibit 2 and the statutory declaration together) to support the indictment on both heads of the charge, *viz.*, the false representation regarding the profits and also that regarding the "payments due on trucks, $1,500," as mentioned specifically in said exhibit. It is clear from the evidence of the Crown's witness Hansuld and of the defendant's accountant Bawden (after the learned trial judge had been careful to have their figures specially checked by them both during an adjournment of Hansuld's evidence for that purpose) that the amount due on the date in question, 12th March, 1925, was at the least $2,135 instead of $1,500 as falsely represented, and it is to my mind clear on uncontradicted evidence, and despite the complexion that was sought to be given to the inconclusive letter of the 11th of March (given really as an additional security, and not till after $1,000 of the purchase-money had been paid on the contract in accordance with the representations in said exhibit 2) that Miller acted on that representation: the accused's own witness, Easton confirms the Crown's case on this main point. Such being the case, no sound objection can be taken to the charge and what the learned judge told the jury about Hansuld's evidence is in substance correct, as I find from a careful perusal of the evidence; hence the appellant was properly convicted, and so his appeal should be dismissed.

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GALLIHER, J.A.: My first impression was to grant a new trial, but on further consideration of the whole case, and the discretion given us under section 1014 of the Criminal Code, I think we would be justified in setting aside the verdict and directing a judgment and verdict of acquittal to be entered up.

MCPHILLIPS, J.A.: I concur in the judgment of my brother the Chief Justice, and would allow the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: After carefully reading the evidence, I fully agree with the conclusions reached by the Chief Justice.

Appeal allowed, Martin, J.A. dissenting.

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Criminal law—Evidence—Identification—Shewing photographs of suspected person to identifying witnesses—Admissibility—Charge—Adequacy.

The accused who was suspected with others of participation in a bank robbery in Nanaimo was arrested on suspicion by the police authorities in Seattle, Washington. Some of the eye-witnesses of the robbery were taken to Seattle to identify him but before leaving Nanaimo they were shewn a number of photographs of those suspected including several of the accused. Several persons including the accused were lined up and some of the witnesses identified him. This resulted in his being brought to British Columbia, where, after a trial in which said persons appeared as Crown witnesses, some of them identifying him as one of the robbers, he was convicted. Accused appealed on the ground of improper use of the photographs with relation to the witnesses, that the trial judge failed to properly direct the jury with relation thereto and that the photographs were improperly handed to the jury for inspection.

Held, affirming the decision of MURPHY, J. (MACDONALD, C.J.A. and MCPHILLIPS, J.A. dissenting), that police officers may, before sending prospective witnesses into a foreign state to identify persons therein detained on strong suspicion, take the precaution of shewing them sets of photographs in a fair and cautious way.

Rex v. *Fannon* (1922), 22 S.R. N.S.W. 427 adopted.

Held, further (MACDONALD, C.J.A. and MCPHILLIPS, J.A. dissenting), on the submission of non-direction as to the use of photographs that it is

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impossible to say, on the charge as a whole, that the accused suffered any prejudice therefrom.

Rex v. *Vassileva* (1911), 6 Cr. App. R. 228 applied.

APPEAL by William Bagley who was convicted on the 6th of November, 1925, at the Court of Assize at Nanaimo for that he did on the 12th of December, 1924, in Nanaimo being armed with a revolver unlawfully and by means of violence, then and there used by him to and against the person of Robert Husband, accountant, then and there in charge of the Royal Bank of Canada, at Nanaimo, to prevent resistance, violently steal against the said Husband's will the sum of $42,000. The evidence disclosed that there were six bandits in the bank together. The leader was one Willis and he with Larry went behind the counter and forced the accountant (Husband) into the vault. Costro was at the door, Johnson took charge of the customers and Stone (*alias* Rossi) walked between them. The sixth man who was sitting on a stool at the side covered the bank employees (four in all, three men and a girl). The Crown contended this sixth man was Bagley and the defence said he was O'Donnell. Four of the bandits pleaded guilty, *i.e.,* Stone, Costro, Johnson and O'Donnell, and O'Donnell has not been accounted for in any way unless he was the man sitting on the stool and holding up the staff. O'Donnell was 5 feet 4½ inches tall and Bagley was 5 feet 10 inches. The witnesses who identify Bagley all said he was a short man. The man on the stool had a cap pulled down well over his eyes and he had some growth of beard. Photographs were used to assist the witnesses in identifying the accused, there being photographs of both O'Donnell and Bagley.

Statement

The appeal was argued at Vancouver on the 12th and 13th of April, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. A. Russell, for appellant: The evidence shews clearly that there were six bandits in the bank. Willis was in charge and he with Larry took the acting manager into the vault. Costro was at the door, Johnson was covering the customers and Stone (*alias* Rossi) was walking between Costro and Johnson. A sixth man was sitting on a stool with a hat over his eyes and holding up the three bank clerks and the stenographer. Willis

Argument

and Larry have not been arrested, but four others, *i.e.*, Costro, Stone, Johnson and O'Donnell have all pleaded guilty. O'Donnell has not been accounted for. He admits he was there so he must have been the man sitting on the stool and holding up the bank clerks. O'Donnell is 5 feet 4½ inches tall, Bagley is 5 feet 10 inches tall. The clerks who identified Bagley say he was a short man. The witnesses were assisted in identifying the prisoner by photographs. O'Donnell was not called as a witness and I am applying to put in his affidavit to shew that he was sitting on the stool at the time of the robbery.

Argument

Johnson, K.C., for the Crown, was not called upon.

Per curiam: The application for leave to admit affidavit and for leave to appeal on facts is refused (McPhillips, J.A. dissenting).

Judgment

Russell, on the merits: There was no direction on the subject of the admission of evidence with regard to photographs: see *Rex* v. *Murray and Mahoney* (1917), 28 Can. C.C. 247. The principle involved is stated by Lord Alverstone in *Rex* v. *Dickman* (1910), 5 Cr. App. R. 135 at pp. 142-3; see also Roscoe's Criminal Evidence, 14th Ed., pp. 113 and 235; *Rex* v. *Bundy* (1910), 5 Cr. App. R. 270; *Rex* v. *Morrison* (1911), 6 Cr. App. R. 159 at p. 170; *Rex* v. *Finch* (1916), 12 Cr. App. R. 77; *Rex* v. *Gilling, ib.* 131; *Rex* v. *Haslam* (1925), 19 Cr. App. R. 59; *Rex* v. *Yousry* (1914), 11 Cr. App. R. 13. He insisted on putting in evidence that the prisoner was a bootlegger. On the question of identity, Miss Coles, the stenographer, who claims to identify the prisoner also identified Watson, and Watson was acquitted. As to how far the counts go in using photographs see *Rex* v. *Dwyer* (1924), 18 Cr. App. R. 145.

Argument

Johnson: The only question here is as to the use of the photographs. The following cases deal with the subject: *Rex* v. *Chadwick et al.* (1917), 12 Cr. App. R. 247; *Rex* v. *Goss* (1923), 17 Cr. App. R. 196; *Rex* v. *Melany* (1924), 18 Cr. App. R. 2; *Rex* v. *Palmer* (1914), 10 Cr. App. R. 77; *Rex* v. *Varley, ib.* 125; *Rex* v. *Wainwright* (1925), 19 Cr. App. R. 52; *Rex* v. *Millichamp* (1921), 16 Cr. App. R. 83; *Rex* v.

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Fannon (1922), 22 S.R. N.S.W. 427; *Rex* v. *Stoddart* (1909), 2 Cr. App. R. 217; *Rex* v. *Campbell* (1911), 6 Cr. App. R. 131.

Russell, replied.

Cur. adv. vult.

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MACDONALD, C.J.A.: This appeal, in my opinion, hinges wholly on the view one should take of the evidence of identification of the appellant, and the manner in which that evidence was put to the jury by the learned trial judge. Several witnesses testified at the trial that they recognized the appellant as one of the bandits who robbed the Royal Bank at Nanaimo. With the exception of Graham, they were all employees of the Bank. Some weeks after the robbery these employees were called to the police station at Nanaimo and shewn a number of photographs of suspects who were then in custody in the State of Washington, and were asked to pick out the photographs of any person or persons they could identify as having taken part in the robbery.

I do not propose to refer to this evidence of identification in detail. What took place then and at other times when photographs were used by the police, is, it was urged by counsel, ground for setting aside the verdict. These persons, including Graham, were afterwards called as witnesses and identified appellant as one of the robbers.

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Reference was made by appellant's counsel to the decisions of the English Criminal Court of Appeal as shewing that the course pursued here amounted to a substantial wrong and a miscarriage of justice. These decisions cover the whole period of the existence of that Court and embody the opinions of a large number of eminent judges. In these cases a distinction was drawn between exhibiting to witnesses such photographs before the arrest of the persons afterwards charged, and exhibiting them after the arrest. In the first example it was said that the photographs were shewn for the purpose of ascertaining who should be arrested and that was regarded as not altogether objectionable, but in some cases, if not in all, it was considered a fatal objection that the witnesses proposed to be called at the trial had been shewn, after the arrest, photographs, including those

of the accused. It was urged by Crown counsel, that the English rule in this regard, or what is tantamount to a rule, could not be applied in all its strictness in Canada, because of the difference in local conditions brought about by the extent of our sparsely settled territories and the inconvenience and expense of carrying witnesses long distances to make personal identification. I do not agree that any such distinction can be maintained. An accused person in Canada is entitled to as fair a trial as one in any other part of the Empire, and as the question involved here is one touching the fairness of the trial and the danger to the accused of the course which is here criticized, no question of inconvenience or expense can be allowed to affect that right. I do not regard the question as one of admissibility of the evidence, but of its weight, and therefore it is a question for the jury to decide after a proper direction by the judge. The evidence here in question is less dangerous than that of an accomplice, which has always been held to be admissible, but subject to this, that the trial judge shall warn the jury that they ought not to rely upon such evidence alone. Identification by photograph, before the arrest, fairly conducted for the purpose of ascertaining who should be arrested has been regarded by the Court of Criminal Appeal as not open to so grave an objection as that of the character given here. The decisions of that Court appear to me to go the length of holding that evidence such as is here complained of, particularly when the charge is unsatisfactory, is utterly worthless and that a conviction founded on it alone must be set aside. *Rex* v. *Haslam* (1925), 19 Cr. App. R. 59. A verdict of guilty where such evidence is concerned can only be sustained when the jury have been sufficiently instructed as to its character and weight. The judge should have warned the jury of the weaknesses and dangers of this method of identification; the character of the witnesses, their opportunities to observe the appellant in the bank; the presence or absence of suggestion by the police or by one witness to another, and all other circumstances which would assist the jury in weighing the evidence and in either discarding it or such part of it as they should think of little weight, should have been made unmistakably clear. Had there been a proper charge, I should have sustained the verdict, but I consider the charge was entirely inade-

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quate. The real objections to the evidence were not brought out. True, the learned judge told the jury correctly that the case was one entirely of identification and that they must weigh the evidence of that with the greatest of care. He referred several times to the fact that photos were shewn to the several witnesses, but he made no comment upon the effect of that on the weight of the witnesses' testimony. That phase of the matter was apparently not present to his mind, and in these circumstances the verdict cannot be sustained.

There should be a new trial.

MARTIN, J.A.: Several grounds of appeal were submitted to us but with one exception they do not require special elaboration and may be disposed of by saying that "no substantial wrong or miscarriage of justice has actually occurred" thereby within the meaning of amended section 1014 of the Criminal Code and therefore, whatever view might be taken of them, they do not constitute substantial reasons for setting aside the conviction of the appellant.

The exception is thus set out in the following grounds in the notice of appeal:

"1. That photographs of the prisoner taken after his arrest were shewn to those who afterwards became Crown witnesses, previously to their being sent to Seattle where the prisoner was confined for purposes of corporal identification of the prisoner herein.

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"2. That photographs of the prisoner with large numbers stamped on a ticket appearing upon his chest were improperly placed before witnesses in Nanaimo previously to their being called upon to identify the prisoner in Seattle.

"3. That photographs of the prisoner with large numbers stamped on a ticket appearing upon his chest were improperly placed before and handed to the jury for inspection.

"4. That the learned trial judge erred in failing to direct the jury that identification of the prisoner by the aid of the photographs referred to in the preceding paragraphs was unsound and improper and calculated to cause great injustice to the prisoner."

A bank robbery had been committed in Nanaimo in this Province on the 12th of December, 1924, and the accused, who was suspected of complicity therein, had been arrested and detained with other suspects on suspicion by the United States authorities in the City of Seattle, State of Washington, and certain eye-witnesses of the crime, resident in this Province, by

whom it was hoped to establish his identity, had been shewn by the police of Nanaimo photographs of the said suspect as a preliminary to going to Seattle to identify him in person. The said photographs were not shewn to the witnesses singly or distinctively but included in a set or bunch varying from about five to "perhaps a couple of dozen" of other photographs of suspects without any suggestion of identity and as a result of their identification of the suspect in Seattle in an identification parade or "line-up" of several persons in the ordinary way, he was brought to Canada on the 16th of October, 1925, by authority of a warrant from the Secretary of State of the United States.

It is to be noted that one of the said witnesses, Harding (not a member of the bank's staff), testified that though he saw certain photographs in Nanaimo before going to Seattle they were of no assistance to him and his identification there was based solely on his personal inspection of the suspect in the said line-up, and that John W. Graham (also not a member of the bank's staff) identified the accused in like manner at Seattle without having been shewn any photographs before or since.

MARTIN, J.A.

In support of the objection to the course pursued by the police reliance was placed upon the decisions of the English Court of Criminal Appeal and so I have examined with care, not only all those cited but all others, with the result that I find the attitude of that Court in the matter has been somewhat misapprehended. In the first place that Court has repeatedly recognized the propriety of shewing with due caution a number of photographs, without accompanying suggestion, to prospective witnesses for the purpose of enabling the police to arrest suspects upon identification from such photographs. See *Rex* v. *Palmer* (1914), 10 Cr. App. R. 77, wherein the Court, *per* Lord Chief Justice Reading said, p. 78:

> "The evidence of identification here is certainly more complete than such evidence often is, and we can see no reason for the view that it was not right to use the photograph in this way, nor do we think that any complaint can be made against the City police."

See also *Rex* v. *Varley, ib.*, 125, and *Rex* v. *Kingsland* (1919), 14 Cr. App. R. 8, wherein the same Court clearly and comprehensively held:

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"His [appellant's] counsel, when cross-examining the pawnbroker, elicited the fact that the police had called on him (the pawnbroker) and shewed him a number of photographs, from which he selected one as being that of the applicant. The applicant complains that that evidence was improperly admitted, as it shewed he was known to the police, who otherwise would not have had a photograph of him. Nothing of the sort. It did not follow that the photographs were photographs of convicted persons. The police have a duty in investigating these matters, and in executing that duty they have to deal with photographs, as in this case. What they did here was in every way proper."

This definite ruling was followed in *Rex* v. *Melany* (1924), 18 Cr. App. R. 2, wherein the Court said, *per* Lord Chief Justice Hewart:

"If a witness is asked to identify and that witness is shewn the photograph of the person before what has been called a 'corporal identification,' that is one thing. It is quite another thing where the person has not been arrested and the police are in the greatest doubt who is the culprit. If in that state of the evidence photographs are put before the prosecutor and he is invited to say who among these is the person who ought to be arrested, there is a great difference."

The "difference" alluded to is that considered in the case mentioned in the note, *viz.*, *Rex* v. *Goss* (1923), 17 Cr. App. R. 196, to be noticed later, wherein the suspect was already in custody.

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The next decision of the same Court on this particular point is *Rex* v. *Dwyer* (1924), 18 Cr. App. R. 145, which expressly approves *Rex* v. *Melany*. The Chief Justice said, pp. 147-8:

"The Court has been asked to formulate some principles relating to the use of photographs in the detection and the punishment of crime. It is not possible, nor, indeed, would it be useful, to attempt to produce a series of rules upon that matter. They are to be collected from the various cases which have been decided on the subject. But this observation is to be added: the circumstances of different cases differ greatly, and it is not easy to lay down general rules."

The Court proceeds to draw distinctions between what is proper and improper and says:

"The fair thing is, as was said in *Melany* (above), to shew a series of photographs, and to see if the person who is expected to give information can pick out the prospective defendant. And where that process has been gone through, no matter with what care, it is quite evident that afterwards the witness who has so acted is not a useful witness for the purpose of identification, or, at any rate, his evidence for the purpose of identification is to be taken subject to this—that he has previously seen a photograph. As I said, it is not easy, certainly not upon the spur of the moment, to formulate rules, but in this matter, as in all matters, as has so often been said in this Court, it is the duty of the police to behave with exemplary

fairness, remembering always that the Crown has no interest in securing a conviction, but has only an interest in convicting the right person."

It is to be noted that this is the first suggestion that the "usefulness" of a witness is seriously impaired by such a "fair" and "proper" course.

In *Rex* v. *Wainwright* (1925), 19 Cr. App. R. 52, no objection was taken to the course adopted of a witness identifying the suspect before arrest by means of "an album of police photographs" but the production and handing of that album to the jury by the prosecution as part of its evidence in chief was declared to be "unheard of" and the conviction was quashed on that ground. Finally in *Rex* v. *Haslam*, *ib.* 59, it was said (p. 60):

"One can see that sometimes it will happen that when a person has been shewn a photograph to assist in the arrest of a wrongdoer not yet arrested he may later give evidence of identification."

And on a later date, 7th December, the Court corrected an error into which it had fallen, the Lord Chief Justice saying, p. 62:

"In those circumstances it is apparent that no criticism is to be made upon the conduct of the police in relation to the shewing of those photographs to those persons who afterwards became witnesses. It is satisfactory and reassuring to find that the facts are so, and not as they previously appeared to be."

After this correction the conviction was quashed on another ground.

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So it is clearly settled that apart from the question of previous arrest the use of the photographs is entirely in accord with the English practice.

I have not overlooked *Rex* v. *Chadwick et al.* (1917), 12 Cr. App. R. 247, but it was held therein that the identification by photographs had been "by means which are not so satisfactory as those usually resorted to by the police" because the photographs of a "particular kind" had been mounted in such an unusual way as to suggest a selection from others shewn to the witnesses.

As to the aspect of the matter after arrest, the rule is not clearly laid down by the same Court that the use of photographs in the same way as before arrest is improper: the main decisions are *Rex* v. *Chadwick, supra; Rex* v. *Goss, supra; Rex* v. *Melany, supra,* and *Rex* v. *Haslam, supra,* and the facts in each of them must be closely scanned or the general observations will

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mislead. In the last decision what happened was, to quote the judgment, p. 60:

> "The appellant had already been arrested, and the effect of what was done was to give the witnesses—or certainly three of them—an opportunity of studying a photograph of the appellant before they were called on to identify him. That course is indefensible. It cannot be right that when a witness, or a possible witness, is being called on merely to identify a person who is already arrested, that witness, before the identification, should be shewn a photograph of the accused person. One can see that sometimes it will happen that when a person has been shewn a photograph to assist in the arrest of a wrongdoer not yet arrested he may later give evidence of identification. That is a different thing from what happened here. In that case the person is asked to identify the accused person, notwithstanding the fact that he has previously seen a photograph. A person who has seen a photograph of the accused person may identify him simply because he has seen a photograph of him."

Though that language is not precise yet it implies only one thing, *viz.*, that only one photograph had been handed to the proposed witness to "study" before identification, and, following the well-known principle laid down in *Quinn* v. *Leathem* (1906), A.C. 506, the decision should be restricted to the facts upon which it is founded. But if it is to be extended beyond its facts and applied to the usual admittedly fair and proper course where a number of photographs in a series have been shewn, then, I am, with all respect, unable to follow the reason given as a good cause, for drawing a sharp line of demarcation between looking at a series of photographs before and after arrest (though I can readily see a distinction if only one photograph is put forward because that imports a clear suggestion by way of exclusive selection), and that such evidence should be totally rejected is, to my mind, clearly untenable; because at most, any objection to it would go to the weight thereof only. In trying to reach a satisfactory conclusion upon such an important matter, I agree with what that Court said in *Dwyer's* case, *supra,* that it is "not possible, nor would it be useful to attempt to produce a series of rules upon the matter because the circumstances of different cases differ greatly," and in the present one I cannot perceive any good ground for holding that it was unfair to take the course adopted. It seems to me entirely reasonable that the Crown officers here should before sending prospective witnesses into a foreign state to identify persons therein detained on strong suspicion take the precaution

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of shewing them sets of photographs in the usual fair and cautious way that has long been in practice here instead of embarking them upon purely speculative and expensive journeys at great and unnecessary cost to the country, and it must be remembered that the police were dealing with no ordinary local crime but a daring incursion of a band of foreign criminals in which seven of them were engaged (as one of them, Rossi, confesses) and after successfully accomplishing their raid they fled the country and returned to Seattle where the raid was planned and there several of them were soon arrested as aforesaid pending identification.

I am fortified in this view by the fact that the Court of Appeal in *Rex* v. *Chadwick et al., supra* (*coram* Lord Reading, C.J., Ridley and Avory, JJ.) while sustaining an objection as aforesaid to the use of photographs of "this particular kind" in an unusual way, did not in any way intimate that they were otherwise objectionable, and yet that case was one in which the four accused had been arrested by the police in Sheffield and their photographs had been sent to Coventry for identification by the owner of the stolen goods and a companion, and the photographs were sent by the Sheffield police to the Coventry police to know whether they would further detain the four accused (whom they already had in custody under another charge) or not. There was no suggestion by plaintiffs' counsel or by the Court that any additional objection arose because of the adoption of the usual methods of identification while the accused were in custody (just as they were herein) and there is, to my mind, no difference in principle between the cases. The first suggestion of any distinction to be drawn does not appear till five years after, in *Goss's* case (1923), *supra* (assuming that the suspect therein was in custody though the loose report does not clearly say so), and it seems a strange thing that *Chadwick's* case was not cited or referred to by the Court, the probable reason why it was overlooked being that the members of the Court had entirely changed, Lord Chief Justice Hewart (recently appointed in 1922) and Sankey and Swift, JJ. constituting the Bench.

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It is, moreover, a further fortification to find that the Court of Criminal Appeal for New South Wales takes substantially

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the same view as we do in a very well reasoned recent decision in *Rex* v. *Fannon* (1922), 22 S.R. N.S.W. 427, wherein the same point was raised on appeal as is before us on a similar defence of *alibi,* two witnesses having identified the prisoners on a usual identification parade at the police station after arrest and after being shewn a number of photographs out of which they picked those of the accused. In its judgment the Court, after considering the decisions of the English Court of Criminal Appeal down to *Rex* v. *Kingsland* (1919), *supra,* said:

"An attack was made on the police authorities for using photographs at all in the course of their enquiries, but the practice, assuming that reasonable discretion is exercised, is not only unobjectionable, it is of the highest value for the efficient conduct of criminal investigation. If the police were not allowed to shew photographs to witnesses they would be deprived of one of the most effective instruments for the speedy discovery of the guilty person, and for the exoneration of others who might innocently be the object of suspicion."

And after pointing out that the

"most trustworthy evidence of identification, that by which the jury must always be chiefly guided, is that given in the witness box by witnesses who can say on oath, 'That is the man,' and whose evidence can be tested by cross-examination."

goes on to say:

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"In cases where there has been a considerable lapse of time between the offence and the trial, and where there might be a danger of the witness's recollection of the prisoner's features having become dimmed, no doubt it strengthens the value of the evidence if it can be shewn that in the meantime, soon after the commission of the offence, the witness saw and recognized the prisoner. And even where there has been no delay of the sort, in any case where a witness of the offence has not yet seen a person whom the police have afterwards arrested on the charge of having committed it, the question whether or not such a witness recognizes the person arrested as the offender may be of the greatest importance either in detecting the guilty or in clearing the innocent. Upon these grounds evidence has been admitted on criminal trials from time immemorial of the identification of the accused by witnesses out of Court. The practice has been for the witnesses to be asked to pick the person they recognize from a number of other persons so chosen as to remove as far as possible any suspicion of outside suggestion. The considerations applicable to the admissibility of evidence of personal identification seem to apply equally to the identification of photographs, and it is hard to see upon what grounds a different rule could be applied. In both cases of course it is equally important that care should be taken to exclude as far as possible the danger of influencing the identification by outside suggestion."

The judgment then proceeds to point out the possibility of error in substituting "the clear impression gained by looking

at a photograph for the perhaps hazy recollection of the face" the witness is trying to recall, and says:

"The possibility of error arising from this cause is a thing of which the defence is entitled to take the fullest advantage, and an injustice might be done to the accused if the fact of photographs having been shewn to witnesses were not disclosed."

And after noting the "need for caution" because it is almost impossible, as pointed out by the said English cases, that the jury will not be influenced by the fact—which they may infer—that the prisoner is known to the police, nevertheless the Court declares, p. 431:

"It is hard to see how this risk can be completely guarded against except by prohibiting altogether the production of such evidence by the prosecution, and this would be contrary to the established practice of the Courts. Where the evidence is given by the prosecution, it is the duty of the Court to decide whether in the circumstances of any given case substantial injustice has been done to the accused. In the present case the only evidence as to photographs given in the Crown case in the first instance was that of Mellos, who said that a detective shewed him some photographs, and that afterwards at the police station he picked out Fannon and another man who looked like Walsh, but was not Walsh. Nothing could have been more innocuous than that."

And the judgment concludes:

"Then the next witness, Miss Hammond, gave evidence that she was shewn a pile of about twenty photographs, and out of the twenty picked the photographs of the two accused. This was the evidence objected to. We think it was admissible on the grounds already stated. If there were any doubt as to its admissibility, we are satisfied that in view of the circumstances its admission did not occasion any substantial miscarriage of justice."

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The whole reasoning of the judgment is so much in accord with the practice and circumstances of this country, and also with the decision of the English Court of Appeal in *Chadwick's* case, that I adopt it in its entirety. Furthermore that reasoning is supported, as regards the desirability of taking prompt steps to identify criminals after arrest, by the judgment of the Court of Criminal Appeal in *Rex* v. *Gardner and Hancox* (1915), 80 J.P. 135, wherein the Court criticized the lack of it, saying:

"The only evidence of identification was that of witnesses who said they saw him coming away from the neighbourhood of the cottage carrying a bag. Not one of them had an opportunity of picking him out from a number of other men. Each one of them saw him for the first time after that day in the dock. It is impossible to say that any jury would have been justified in convicting him on that evidence alone."

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It also receives general support from a decision which has not been referred to in any of the cases cited though it is cited in all the leading text-books upon evidence and criminal law: I refer to *Regina* v. *Tolson* (1864), 4 F. & F. 103, wherein that exceptionally learned judge, Mr. Justice Willes, at the Surrey Assizes, on a charge of bigamy, permitted the identity of the first husband of the accused to be proved by calling witnesses to that fact by means of a photograph of her first husband which a sergeant in the same regiment thus deposed to:

"Being shewn the photograph, he said that was the man, and there was no other man of the same name in the regiment. This was admitted as proof of the first marriage."

In his charge to the jury the learned judge said:

"The photograph was admissible because it is only a visible representation of the image or impression made upon the minds of the witnesses by the sight of the person or the object it represents; and, therefore is, in reality, only another species of the evidence which persons give of identity, when they speak merely from memory. You must be satisfied of the identity of the prisoner on the occasions both of the first and of the second marriage, of which there is no evidence but that of the prosecutor, whom you are not bound to believe."

Here, then, is a criminal case of a grave kind in which a single photograph was put into the hands of a witness in open Court to prove the principal fact of the case, *viz.*, the prior marriage of the accused to a person solely identified, which though not the same in fact as establishing her own identity as the other party to the ceremony, is yet impossible to distinguish in principle. In divorce proceedings the Court permits identity to be established by photographs, though generally, but not always, requiring corroborative evidence, *Dawson* v. *Dawson and Rielly* (1907), 23 T.L.R. 716, and *Hills* v. *Hills and Easton* (1915), 31 T.L.R. 541.

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It is also to be noted that in the actual practice of identification the fairness of what was done here is proved by the fact that though Husband was shewn five or six photographs, including that of the appellant, he could not then nor later at the trial identify any one; that Harding did not identify by the photographs; that Graham, who went to Seattle to identify, never saw any photographs; that Miss Coles could not identify some of the other accused persons from their photographs; that Stephenson identified only two; and Hirst only one, the

accused; and that Griffith on being shewn the first group of six or seven photographs identified no one, but did so about a month afterwards, then identifying the appellant.

The result, therefore, of that careful analysis of the authorities which the question necessitates in their application to the circumstances before us, is that in our opinion no valid objection can be taken to the course adopted in the use of the photographs as aforesaid either in Seattle or Nanaimo.

A further objection is based upon the fact that the photograph of the accused with a number on it was shewn to the jury, but whatever might be the effect of this in other circumstances it is no valid objection here because that photograph was put in evidence as an exhibit in response to what was, in effect, tantamount to a request by the defendant's counsel for its production and so regarded by all concerned at the time—see *Rex* v. *Varley, supra*; *Rex* v. *Biddulph* (1910), 4 Cr. App. R. 221, and *Rex* v. *Wainwright* (1925), 19 Cr. App. R. 52. Furthermore, the production of the photograph to the jury at his own request did the accused no harm because instead of shewing him to be a previously convicted person, as was the fact in *Dwyer's* case, *supra*, p. 147, it, by the detailed endorsement on the back, contained the clear statement that he had been acquitted of a charge laid against him, *viz.*, "Case dismissed," and the same unmistakable information would be conveyed to the identifying witnesses if it were placed in their hands, and it must be borne in mind that in this Province numbers on police photographs of this kind are mere identification numbers and do not mean a conviction, as we were told they do in certain parts elsewhere.

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But assuming that there is some difference between our settled practice and the unsettled English one in this respect, and while it is most desirable that the broad principles of justice should be the same in Canada as in England, yet the practical application thereof must of necessity, and often does vary in the circumstances of a country of vast distances and different conditions such as exist in Canada as compared with the British Isles, and in many cases the rules of evidence are not the same, nor even the major means of securing justice, of which only two leading and striking examples need be cited: the first, that by the law of Canada (section 261 Criminal Code)

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mere words in all cases may constitute such provocation as to reduce culpable homicide to manslaughter, whereas in England "as a general rule no words or gestures however approbrious or provoking will be considered in law to" do so—Archbold's Criminal Pleading, 26th Ed., 883; and the second, that while this Court of Criminal Appeal has the power to order a new trial to attain justice, yet the corresponding Court in England still cannot do so despite its own declaration upon the subject in *Rex* v. *Stoddart* (1909), 2 Cr. App. R. 217 at p. 245, as follows:

"This appeal has brought out in strong relief the absolute necessity in the interests of justice of this Court having the power in exceptional cases to order a new trial. Such a power would be rarely exercised; but if there be in any case strong evidence upon which the jury, if properly directed, might have found a verdict of guilty, in the interests of justice, the Court should have the power to direct a new trial."

Turning then to the last objection to alleged non-direction in the learned judge's charge on the subject of the photographs, which it is submitted amounts to misdirection, the general rule thereon has been repeatedly laid down, and in *Rex* v. *Vassileva* (1911), 6 Cr. App. R. 228 at p. 231, it is thus stated by Lord Alverstone, C.J.:

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"I repeat what I said in *Stoddart's* case. It is not to be supposed that this Court approaches a summing up, especially after a long case, without regard to the way in which the case was carried on in the Court below. As Lord Esher said, omission is not of itself necessarily misdirection; it is only when the omission is such as is calculated to mislead the jury that it amounts to misdirection."

In this light I have examined closely the direction of the learned judge and collated it with the evidence of the various witnesses on the point, with the result that I find he has in an unusually detailed, clear and careful manner put the facts of identification to the jury, after reciting in every case the gist of the evidence upon the use of photographs, the whole being interwoven so as to present the matter in a way eminently fair to the accused, and after having done so in particular, he adds in general this final caution:

"It is a case, therefore, that you have to weigh with the greatest care. It is not a case of people swearing to someone whom they have previously known. It is a case of swearing to identify after they have had only one occasion in which to study the features of the man they are identifying."

It is apparent, therefore, that unless we are prepared to hold

that in all cases it is the duty of the judge (no matter how ably and clearly he has properly interwoven the use of the photographs with the evidence of the respective witnesses in his running commentary thereupon) to single out finally for special warning the use of the photographs, no misdirection in the true sense has occurred herein, and no case has been cited that supports such a proposition in general, or *a fortiori* in the particular way the learned judge adopted in dealing with the matter before him. This is not to say that in certain and appropriate circumstances the judge, having regard to the way he has dealt with the matter in his charge, might not well give a particular caution, but in the present case, from any point of view, the learned judge adequately discharged his duty, and we think it is impossible to say, on the charge as a whole, that the accused suffered any prejudice therefrom, and when the fullness of the charge before us is contrasted with the brief though clear and concise one (but much less favourable to the accused) that so distinguished a judge as Mr. Justice Willes thought sufficient in *Tolson's* case, *supra,* in circumstances of the same nature, all doubt upon the necessity or advisability of laying down a general intractable rule is removed, and it is a fortunate thing that so clear a model from so high an authority has been preserved, and that it was sufficient to inform the jury and protect the accused is shewn by the fact that they acquitted him.

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Since such reliance has been placed by the appellant upon the decisions of the English Court of Criminal Appeal it is well to cite the following very appropriate expressions from that Court's judgment in *Rex* v. *Stoddart* (1909), 2 Cr. App. R. 217, 246, wherein, because of its importance, five judges sat, instead of three as usual, *viz.*:

"Every summing-up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively. This Court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed, or whether other topics which might have been dealt with on other occasions should be introduced. This Court sits here to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice. Its work would become well-nigh impossible if it is to be supposed that, regardless of their real merits or of their effect upon the result, objections are to be raised and

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argued at great length which were never suggested at the trial and which are only the result of criticism directed to discover some possible ground for argument."

Applying, therefore, all the foregoing authorities to this appeal, we are of opinion that it should be dismissed.

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

MCPHILLIPS, J.A.: I have arrived at the same result as my brother, the Chief Justice, *i.e.*, I would direct a new trial. I have, though, arrived at that conclusion upon somewhat different grounds. The case wholly turns on identification. The prisoner the appellant, was under arrest when photographs were presented to persons who would most probably be called as witnesses for the Crown, and the photographs included a photograph of the prisoner, the object being to obtain identification of the prisoner then under arrest as being one of the bank robbers. These persons were later called as witnesses for the Crown and identified the prisoner as one of the robbers.

It may be further pointed out that one or more of the photographs of the prisoner had marks thereon shewing that he was an ex-convict. The course adopted was clearly wrong and against a long line of decision in the Court of Criminal Appeal in England, and the cases were cited at this Bar by the learned counsel for the prisoner. The evidence of identification obtained in this way and adduced at the trial was plainly illegal evidence and should not have, with great respect to the learned trial judge, been admitted. Having been admitted there can be but one result, in my opinion, and that is, as I have already stated, a new trial must be had as unquestionably substantial wrong was occasioned the prisoner at the trial. The evidence may have prejudiced the prisoner in the eyes of the jury. (See *Allen* v. *The King* (1911), 44 S.C.R. 331 at p. 341). The evidence so adduced was in this particular case the more dangerous because of the fact that the evidence of the Crown witnesses was in its nature very conflicting, and the possibility is that the illegal evidence had the effect of depriving the prisoner of the indubitable certainty that without this evidence the benefit of any doubt, owing to the conflicting evidence of identity, in the minds of the jury would have been given in

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favour of the prisoner. I can see no good reason for not following the decisions in the English Court of Criminal Appeal. They come from the fountain head of our criminal law and are always decisions exhibiting the embodied experience of most eminent and distinguished jurists, and the Courts throughout the Empire always follow these decisions when proceeding upon analogous criminal law—which is the case here—save when in conflict with decisions of the ultimate Court of Appeal of the respective Dominions. I am not aware of any controlling decisions upon this Court at all at variance with these decisions of the Court of Criminal Appeal of England in respect to the question here requiring determination. That being the situation, I unhesitatingly follow the decisions and may say that I unreservedly agree with the propositions enunciated therein.

I think that it is most fitting and indeed instructive to refer to the judgment of the Lord Chief Justice of England (Lord Hewart), in *Rex* v. *Dwyer* (1925), 2 K.B. 799. I take the liberty to quote the judgment in full as it is exceedingly able and apposite reasoning which in its entirety is not only explanatory of the abstract rule of caution necessary to be exercised in the introduction of identification evidence, but demonstrates beyond question that the evidence adduced in the present case and complained against was in its nature illegal evidence, and would prejudice the prisoner, the appellant, and "may have influenced the verdict of the jury and caused the [appellant] substantial wrong" (the Chief Justice in *Allen* v. *The King, supra,* p. 341) thereby resulting in a mistrial. The Lord Chief Justice, at pp. 801-3, said:

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"The question in this case was one of identity. The trial was satisfactory except in two respects, each of which was crucial. In the first place the witnesses who were to identify the prisoners, and who had seen them in the dark, had been shewn extremely good photographs of the prisoners before they were invited to identify them. It is true, as Mr. Somerset has urged on behalf of the prosecution, that the police in shewing those photographs to the persons who afterwards became witnesses were not intending to influence them in the task of identification or to equip them for it. On the contrary, the police officers were seeking only to ascertain who were the proper persons to be arrested. The fact remains, however, that the witnesses upon whose testimony the identification depended had seen very good photographs of each of the prisoners before the process of identification was formally entered upon. In the second place, during the trial photographs of the two prisoners were produced for the inspection of

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the jury and were inspected by the jury. Those photographs are now before the Court. There are two documents, each document containing two photographs. One document refers to one prisoner, the other document to the other prisoner, and there is shewn with great clearness upon each of those documents a photograph, full face and profile, of the prisoner referred to, and the prisoner is wearing upon his right breast a large ticket stamped with the prison number. These photographs having been handed to the jury, it was apparent to the jury that the prisoners had been previously convicted. It was just as clear a statement to the jury that the prisoners had been previously convicted as would have been sworn evidence to that effect. In those circumstances, counsel, who has urged the case for these appellants with so much clearness and force, says that these convictions cannot stand. In the opinion of this Court that is right. The appeals must be allowed and the convictions quashed.

"The Court has been asked to formulate some principle relating to the use of photographs in the detection and punishment of crime. It is not possible, nor indeed would it be useful, to attempt hastily to enunciate a series of rules upon that matter. They are to be collected from the various cases which have been decided. But this observation may be added. The circumstances of different cases differ greatly, and it is not easy to lay down general rules. One distinction, however, is quite clear. It is one thing for a police officer, who is in doubt upon the question who shall be arrested, to shew a photograph to persons in order to obtain information or a clue upon that question; it is another thing for a police officer to shew beforehand to persons, who are afterwards to be called as identifying witnesses, photographs of those persons whom they are about to be asked to identify. It would be most improper to inform a witness beforehand, who was to be called as an identifying witness, by the process of making the features of the accused person familiar to him through a photograph. But even where photographs are employed for the purpose of obtaining information on the question of arrest, it is fair that all proper precautions should be observed. I shall not attempt to enumerate all possible contingencies, but it would be manifestly open to remark if, in a doubtful case, the police were to shew one or two photographs to a person who was supposed to be able to give information and then, having obtained the assent of that person, to act upon that information. The fair thing is, as was said in *Melany's* case [(1924)], 18 Cr. App. R. 2) to shew a series of photographs and to see whether the person who is expected to give information can pick out the appropriate person. And where that process has been gone through, no matter with what care, it is quite evident that afterwards the witness who has so acted in relation to a photograph is not a useful witness for the process of identification, or at any rate the evidence of that witness for the purpose of identification is to be taken subject to this, that he has previously seen a photograph. As I said, it is not easy, upon the spur of the moment, to formulate rules, but in this matter, as in all matters, as has so often been said in this Court, it is the duty of the police to behave with exemplary fairness, remembering always that the Crown has no interest in securing a conviction, but has an interest only in securing the conviction of the right person."

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I would therefore quash the conviction and direct a new trial.

MACDONALD, J.A. would dismiss the appeal.

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

Solicitor for appellant: *Gordon M. Grant.*
Solicitor for respondent: *A. M. Johnson.*

McFARLAND v. LONDON & LANCASHIRE GUARANTEE & ACCIDENT COMPANY OF CANADA.

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McFARLAND v. LONDON & LANCASHIRE GUARANTEE & ACCIDENT CO. OF CANADA

Winding-up—Liquidator—Bond of indemnity—Secured creditor—Instructions to liquidator to realize on securities—Moneys realized not covered by bond—R.S.C. 1906, Cap. 144.

Messrs. D. E. Brown, Hope & Macaulay Limited, a firm in Vancouver, was ordered to be wound up under the provisions of the Winding-up Act and the defendant Lockwood was appointed official liquidator. He was ordered to furnish security in the sum of $15,000 and the defendant Company being approved as surety, he entered into a bond with the Company to secure this sum. Some years before the liquidation one Ormrod loaned D. E. Brown, Hope & Macaulay $30,000 and received as collateral security an agreement for sale on certain land, three mortgages and an equity in a fourth mortgage. Upon liquidation Ormrod declined to file proof of claim but two years later he gave Lockwood a power of attorney with instructions to foreclose his securities, vest title in Ormrod and sell. These instructions were carried out and Lockwood realized about $21,000. Of these moneys he remitted part to Ormrod direct and part to Ormrod's agents in Vancouver but appropriated to his own use a balance of over $9,000. He also misappropriated moneys of the Company, his total defalcations being over $18,000. It appeared from the books that Lockwood deposited Ormrod's moneys in the Company's account. Upon the plaintiff being appointed liquidator he brought action against the surety and recovered the full sum of $15,000.

Held, on appeal, reversing the decision of HUNTER, C.J.B.C. (MACDONALD, C.J.A., dissenting), that Ormrod having failed to prove his claim or value his securities and having realized on his securities through the

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agency of Lockwood he was debarred from ranking on the estate for any deficiency. Lockwood therefore acted solely as agent for Ormrod in realizing on his securities and outside the liquidation proceedings and the defendant Company under the bond did not guarantee the fidelity of Lockwood in respect to these transactions.

MCFARLAND v. LONDON & LANCASHIRE GUARANTEE & ACCIDENT CO. OF CANADA

Statement

APPEAL by defendant from the decision of HUNTER, C.J.B.C., of the 26th of October, 1925, in an action to recover $15,000 under a bond of the 26th of August, 1916. The plaintiff is the official liquidator of Messrs. D. E. Brown, Hope & Macaulay Limited. On the 26th of June, 1916, the said firm was ordered to be wound up under the Winding-up Act and on the 2nd of August of the same year Herbert Lockwood was appointed official liquidator. The security to be supplied by the liquidator was fixed by the registrar at $15,000 with approval of the London & Lancashire Guarantee & Accident Company of Canada as security for Lockwood in that sum, said Company supplying a bond accordingly. Lockwood continued to wind up the Company until the 27th of March, 1923, when by order of the Court he was removed from office and J. W. McFarland was appointed official liquidator in his place. The present liquidator claims that $18,329.02 was misappropriated by Lockwood and he now brings action against the defendant Company on the bond. It was held by the trial judge that the Company was liable on the bond for the full amount. It appeared in the action that the plaintiff claimed (1) $18,329.02 being moneys of the Company appropriated by Lockwood; (2) $734 the costs of making an audit of the liquidator's accounts; (3) $750 costs of removing old liquidator and appointing new one. The defendant Company appealed on the first item only, claiming that in 1913, one Ormrod loaned D. E. Brown, Hope & Macaulay $30,000 and received as security (a) an agreement for sale of certain property in New Westminster; (b) two mortgages of $8,500 and $3,000 on property in Point Grey; (c) mortgage for $10,462 on property in New Westminster District. It was contended that Ormrod being a secured creditor he did not come into the liquidation but when Lockwood was made liquidator Ormrod gave him power of attorney to realize on his securities and he carried on this work in his private capacity. Of the moneys misappropriated by Lockwood

he took from what was realized on Ormrod's securities the sum of $9,640 and the contention is that this amount was not covered by the bond.

The appeal was argued at Vancouver on the 9th to the 12th of March, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Pattullo, K.C. (*R. S. Lennie,* with him), for appellant: One Ormrod who lived in England loaned the Company $30,000 in 1913 and received certain securities. After the Company had gone into liquidation Ormrod did not come into the liquidation but instructed Lockwood to realize on his securities and from what he realized on these securities he appropriated to his own use the sum of $9,640, and this sum should be deducted from the full amount that Lockwood was short as far as the bond is concerned. Ormrod refused to come in and he is no longer a creditor: see *Canadian Bank of Commerce* v. *Martin* (1917), 24 B.C. 381; *Bell* v. *Ross* (1885), 11 A.R. 458; Mitchell on Canadian Commercial Corporations, 1367; *In re Hurst* (1871), 31 U.C.Q.B. 116; *Deacon* v. *Driffil* (1879), 4 A.R. 335; *Re Beaty* (1880), 6 A.R. 40; *Taylor* v. *Davies* (1917), 41 O.L.R. 403 at p. 438; (1920) A.C. 636. These moneys were Ormrod's and not the estate's: see *In re Longdendale Cotton Spinning Company* (1878), 8 Ch. D. 150 at p. 153; Emden on Winding-up of Companies, 8th Ed., 260; *In re Hill's Waterfall Estate and Gold Mining Company* (1896), 1 Ch. 947. On the question of liability see *Metropolitan Bank* v. *Pooley* (1885), 10 App. Cas. 210. On the question of costs if we succeed it is on the main item before the Court and we would be entitled to the general costs: see *Reid, Hewitt and Company* v. *Joseph* (1918), A.C. 717; *Seattle Construction and Drydock Co.* v. *Grant Smith & Co.* (1919), 26 B.C. 560.

Argument

Alfred Bull, for respondent: The condition of the bond shews that as long as he receives money as liquidator it is money for which the Company is liable on the bond. Secondly, the money received from these securities was money of the Company, and thirdly every cent of these defalcations was taken from the coffers of the company and not from Ormrod's. There must be a definite election by the creditor to stand out-

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Argument

side. *In re Hurst* (1871), 31 U.C.B.C. 116 is in our favour. In any case sufficient money of the Company was taken to make up the $15,000. The interest amounts to over $1,900. That we are entitled to interest see *Crosse* v. *Bedingfield* (1841), 12 Sim. 35; *Hyde* v. *Price.—Hart* v. *Cradock* (1837), 8 Sim. 578; *Harvey* v. *Wilde* (1872), L.R. 14 Eq. 438; *Wall* v. *Rederiaktiebolaget Luggude* (1915), 3 K.B. 66. As between two the rule in *Clayton's Case* (1816), 1 Mer. 572 applies: see *In re Hallett's Estate* (1880), 13 Ch. D. 696 at p. 704. It has been held that interest is part of the damages. We are entitled to the general costs: see *Reid, Hewitt and Company* v. *Joseph* (1918), A.C. 717.

Pattullo, in reply, referred to *In re David Lloyd & Co.* (1877), 6 Ch. D. 339. There was no demand ever made for interest.

Cur. adv. vult.

14th June, 1926.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: In 1913 D. E. Brown, Hope & Macaulay Limited borrowed off one Ormrod $30,000, and as collateral security therefor assigned to him rights in several parcels of real property, known as the Langley lots, the Eburne lots and the Dewdney Farm. There were two others but they do not concern this appeal.

In 1916, an order was made for the winding-up of said Company because of its bankruptcy, and one Herbert Lockwood was appointed liquidator thereof, and continued as such until March, 1923, when he was removed from office for misfeasance, and plaintiff appointed in his stead.

The defendant had guaranteed the integrity of Lockwood and this action is founded upon the bond of indemnity. There is no dispute about the amount of money which Lockwood misappropriated. The defendant did not contest its liability for moneys of the bankrupt estate misappropriated by Lockwood, but says that a portion of the moneys lost were not moneys of the estate but were moneys received by Lockwood as agent for Ormrod.

The Winding-up Act, Cap. 144, R.S.C. 1906, provides that creditors holding securities may put a value on them and that

the liquidator, with the consent of the Court, may either allow the creditor to retain the security at his valuation and rank upon the estate for the balance or take over the security at the creditor's valuation.

Ormrod sent in no claim to the liquidator, neither did he value his securities. Lockwood has sworn that he dealt with these securities as part of the assets of the estate and not as agent for Ormrod, and I think the documentary evidence amply supports his oath.

Ormrod resides in England; Richards, Ackroyd & Gall were his agents in Vancouver. Shortly after the winding-up order was made, Lockwood wrote to the latter suggesting that if they did not wish to act in this matter themselves he desired them to ask their principal to appoint an agent in Vancouver in their stead in order to facilitate the sale of the properties covered by said securities. Richards, Ackroyd & Gall recommended this and suggested that for convenience, Lockwood should be given power of attorney to act for Ormrod and make such conveyances as might be necessary on sale of the properties. Eventually, Ormrod sent out a power of attorney to Lockwood, as suggested. The correspondence makes it quite clear that both parties recognized the interest of the other and that their consent was necessary to the disposal of these assets.

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The Langley lots were, in the beginning, vested in Ormrod, subject to some charges, but only as security for the debt. After the winding-up commenced, it was decided that proceedings should be taken to foreclose other interests in the Eburne and Dewdney lands. These proceedings resulted in the vesting of title in Ormrod, in whose name the proceedings had been taken, but as Lockwood says, there was no foreclosure of the Company, nor indeed, could there be such without the consent of the Court. It is therefore quite apparent to me upon a consideration of the evidence of Lockwood, corroborated by the correspondence and by other circumstances, which can best be appreciated by one who has read the correspondence, which *inter alia*, shews that Ormrod would take no responsibility for the costs of realizing upon these securities, that they were got in by Lockwood as liquidator, Ormrod consenting thereto. I can find nothing in the correspondence nor in the evidence, at variance with the

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conclusion arrived at by the learned trial judge. I would, therefore, dismiss the appeal.

MARTIN, J.A.: I am so far in general accord with the reasons of my brother M. A. MACDONALD that I shall not add to them and therefore I think the appeal should be allowed, though not without some doubt on the most important of the points that it raises as to the position of the creditor Ormrod who had not proved his claim under the Winding-up Act.

GALLIHER, J.A.: Whatever may have been Lockwood's personal views as to the capacity in which he acted in realizing on the Ormrod securities, the matter is not determined by that. Ormrod's claim was either within or without the liquidation proceedings. They are not brought within those proceedings by reason of his views nor by his assuming to treat them as such.

No claim was made upon the general estate by Ormrod; no claim was filed or verified at all. There was no valuation of the securities held and none was requested by the liquidator. Up to that point it cannot be said that Ormrod elected to come in—by inference, quite the reverse. What, if anything, occurred afterwards to alter this? A power of attorney was given by Oliver Ormrod to Herbert Lockwood (described as broker) on the 9th of March, 1918, empowering Lockwood generally to deal with these securities and the property covered thereby. This power of attorney was given to Lockwood in his personal capacity and was as the correspondence discloses, for the purpose of expediting the transaction of business in regard to the properties mentioned therein.

GALLIHER, J.A.

Again, all moneys which were remitted to Ormrod direct or to his agents, Richards, Ackroyd & Gall, by Lockwood, were subsequent to the giving of the power of attorney. Of course, they were received by Lockwood afterwards and it could be said that even acting as liquidator, payments might be made in that way until Ormrod's claim was satisfied and the balance, if any, applied on behalf of the general creditors.

If there had been a shortage could Ormrod have claimed to share in the general estate? Clearly not, as he had failed to in any way comply with what was necessary to give him such

a *status,* nor do I think the correspondence bears out the view that he in any way considered Lockwood was acting, in realizing on these securities, as liquidator.

It may very well be that Ormrod would have been quite satisfied to receive the amount of his loan and interest by a realization of the securities and in case of any surplus that it should go to the estate, and that, I think, was the real understanding the parties had, but until the state when Ormrod would be paid off none of the moneys collected would be other than the property of Ormrod.

As I have stated before, nothing was done to create that situation nor do I think it was ever so intended between the parties. Taking this view, I am in agreement with my brother MACDONALD as to the other points raised.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MACDONALD, J.A.: This is an appeal from the judgment of the Honourable the Chief Justice in favour of the respondent, for $6,782.25, recovered on a guarantee bond for $15,000 executed by the appellant in respect to the fidelity of one Herbert Lockwood, first liquidator of D. E. Brown, Hope & Macaulay Limited (hereinafter called the Company). The appellant paid the balance of the $15,000 and does not dispute liability for a further sum of $734 and some costs, being expenses to which the Company in liquidation were put by reason of the misfeasance and breach of trust of Lockwood. The material part of the bond reads as follows:

"Now the condition of the above written recognizance is such that if the said Herbert Lockwood, his executors or adminstrators or any of them, do and shall duly account for what the said Herbert Lockwood shall receive or become liable to pay as Official Liquidator of the said D. E. Brown, Hope & Macaulay Limited, at such periods and in such manner as the judge shall appoint and pay the same as the judge hath by the said order directed or shall hereafter direct, then the above recognizance to be void and of no effect, otherwise, to remain in full force and virtue."

Lockwood misappropriated funds to the extent of over $18,000. The appellant contends that the bond was executed for the due accounting by Lockwood, as official liquidator of moneys belonging to the estate of the Company, in liquidation, which he should receive as liquidator or for which he was

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accountable, whereas the moneys in question in this appeal, *viz.*, $6,782.25, for which judgment was obtained did not belong to the Company at all, nor form part of its estate, but did belong to one Oliver Ormrod, a secured creditor of the Company. Ormrod did not file his claim or value his securities, nor was he required to do so.

Several years before the liquidation the said Ormrod, who resides in England, loaned to the Company $30,000, and received as collateral security an agreement for sale of real estate, three mortgages and an equity in a fourth mortgage. Two years after the winding-up order was made he delivered to Lockwood a power of attorney authorizing him to take possession of, and sell the securities referred to and take all necessary proceedings to foreclose and vest title in Ormrod. Lockwood was given powers by this instrument (*e.g.*, the right to sue) which as liquidator he could not exercise without the sanction of the Court. Under it (as agent for Ormrod, according to the contention of the appellant) he foreclosed all of said securities, had title vested in Ormrod afterwards disposing of the lands for approximately $21,000. He received the proceeds of sale, remitted part thereof to Ormrod direct, and part of it to Ormrod's Vancouver agents, Messrs. Richards, Ackroyd & Gall, and appropriated the balance, or over $9,000 to his own use as well as other moneys belonging to the Company of which he was liquidator. The appellant contends that the $6,782.25 for which judgment was obtained is part of this $9,000 so misappropriated as aforesaid, and as it is made up of moneys belonging to Ormrod, not the Company, it is not covered by the bond.

The question is, Did Lockwood in these transactions act solely as agent for Ormrod, outside the liquidation proceedings altogether, and if so, did the appellant, by the bond referred to, guarantee the fidelity of Lockwood in respect to these transactions? The main facts are not in dispute. Apart from mathematical computations not necessary to consider at this stage, it is solely a question as to the capacity in which Lockwood acted in respect to the Ormrod securities and the construction of the language used in the bond to determine its applicability or otherwise. The appellant contends that when Ormrod failed

or declined to file proof of claim and value his securities and took means, independent of the liquidation, to realize on his securities by giving a power of attorney to Lockwood, not *qua* liquidator, but as his agent, he ceased to be a creditor of the Company, having accepted the securities he held in full payment of his claim. Did the appellant in this so-called independent transaction guarantee Lockwood's fidelity? As pointed out by Burton, J.A., in *Bell* v. *Ross* (1885), 11 A.R. 458 at p. 463:

"Whenever that insolvency intervened the rights of all parties were left to be dealt with by a domestic forum, if the creditor chose to submit his rights to that forum by proving his claim and asking to rank on the estate."

Did Ormrod stand outside the forum created by the Winding-up Act? In the same case, Osler, J.A. at pp. 466-7 quotes the opinion of Chief Justice Moss, expressed in *Deacon* v. *Driffil* (1879), 4 A.R. 335, where he refers to sections 84 and 106 of the Dominion Insolvent Act of 1875 (and the relevant sections of the present Act are similar in import) as follows:

" 'The combined effect is to enable the secured creditor [as in this case] to assume any one of three positions. He may stand outside the insolvency proceedings, and realize upon his security in any manner the general law authorizes. . . . He may release his security, and prove in the Insolvent Court for the amount of his claim as an unsecured creditor. He may come into the insolvency proceedings and value his security, and then whether the estate take it at the valuation and 10 per cent. additional, or permits him to retain it, he may prove for the excess of his claim beyond the valuation.' "

The point may be tested by this question: Could Ormrod, having failed to prove his claim or value his securities after pursuing his own method of disposing of the securities and realizing through the agency of Lockwood, afterwards come in and rank as an unsecured general creditor for any deficiency? This question was answered in the negative by Morrison, J., in a dissenting judgment in *In re Hurst* (1871), 31 U.C.Q.B. 116, and his judgment was referred to with approval in *Deacon* v. *Driffil* (1879), 4 A.R. 335, where the judgment of the majority in *In re Hurst* was, if not overruled, certainly questioned or treated at all events as an authority not applicable to cases arising under the later Act of 1875, analogous to the present Act. Patterson, J.A. at p. 342 of the *Deacon* case,

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referring to the judgment of Morrison, J., in *In re Hurst,* says:

"I entirely agree with his reasoning and with the conclusion at which he arrived."

In *Re Beaty* (1880), 6 A.R. 40, may be usefully referred to. There it was held that a creditor holding a security at the time of the insolvency under the Insolvent Act of 1875, could not realize on the security and prove on the estate for the balance. That, of course, is not this case, but the principles enunciated are applicable. Burton, J.A., at p. 43, says:

"We are driven to consider whether a claimant holding security from an insolvent at the time of his insolvency is at liberty to realize his security, and rank for the balance, or whether he must by taking such course be held to have made his election, and to have debarred himself from ranking on the estate."

If Ormrod by disposing of his securities through an agent, elected to realize *de hors* the liquidation thus debarring him from ranking as a creditor for any deficiency, he must be regarded as standing outside the liquidation proceedings.

To quote further from Burton, J.A., at pp. 45-6:

"*In re Hurst*, [(1871)], 31 U.C.R. 116, the majority of the Court, under the Act of 1864, held that the mere fact of a creditor having realized his securities since the insolvency did not necessarily debar him from ranking on the estate. The grounds upon which the majority there proceeded may furnish an argument for amending the laws so as to give this additional right to a creditor, but I am unable to convince myself that the Act then under consideration or the present will bear any such construction, or that we are at liberty to import into them a provision not to be found there. I think, at all events, in dealing with a case arising under the Act of 1875, it is rather to be assumed that our Legislature, having before it the English mode of procedure and the scheme adopted by the Act of 1869, deemed it fairer to all concerned to leave the creditor to place a value on his security, with the option to the assignee to take it, and confined him to that mode of procedure. The present case furnishes a good illustration of the wisdom of such a provision. Securities of this nature fluctuate greatly in value. The holder might be quite willing to take what he could then realize for the bonds, having a right to rank on the estate for the difference; whereas, if the question had been submitted to the creditors, they might have possessed information which rendered it prudent for them to acquire them with the prospect of an early increase in value. By the sale the creditor has placed it out of the power of the assignee to exercise this option. I think that, upon a proper construction of the Act, persons in the position of creditors holding security at the time of the insolvency, are bound to make their election, and that if they choose to realize on their securities they cannot prove on the estate, as they have voluntarily placed it out of their power to perform the condition on compliance with which they alone become entitled to rank."

This reasoning is applicable to the present Winding-up Act, and shews that Ormrod having followed his own course could not, nor can he at any future time, rank against the estate for any deficiency. The evidence shews that there is a deficiency, yet, strengthening the suggestion of a definite election on his part he has not attempted to exercise this alleged right. On the contrary, he has pursued a course disassociated entirely from the liquidation proceedings, unless giving a power of attorney to the liquidator brings him within it. He might have, however, selected John Doe as his agent and attorney instead of Lockwood. Lockwood, as a matter of fact, accounted direct to Ormrod for a portion of the proceeds realized and to his regular Vancouver real estate agents for another portion, then to better enable him to misappropriate these funds placed the balance in the liquidation account. I may add, particularly as the learned trial judge does not necessarily rely on Lockwood's evidence, that I would disregard it in so far as it deals with the capacity in which he pretended to act. In any event, his view of the situation would not affect the legal principles applicable.

It would appear that although Ormrod can not prove against the estate for any deficiency, being no longer a creditor, by arrangement with the Company he seeks to recover it wholly or in part by these proceedings. Bills of costs of solicitor's fees filed as exhibits, contain items which seem to shew that he was to indemnify the liquidator against costs. This is further confirmed by an affidavit filed by the plaintiff Joseph Walter McFarland, who succeeded Lockwood as liquidator. He is endeavouring to realize the deficiency, not from the estate but from the appellant Company.

A further material feature is the right or otherwise of the liquidator to redeem. No steps were taken either to value the Ormrod securities, or to take an assignment of them. What, therefore, is the effect of thus standing by for a period of two years? I think Osler, J.A., correctly states the result in *Bell* v. *Ross, supra,* at p. 468, when he says:

"The effect of the secured creditor being allowed to retain his security . . . . . is, in my opinion, upon the proper construction of the 84th, 85th and 86th sections [Act of 1875] to make him the owner of it out and

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out, so that it becomes from thenceforth irredeemable by the assignee or the debtor."

It was suggested at Bar that under section 75 of the Act Ormrod might file his claim at a later date in the winding-up proceedings. We should, I think, neither assume nor find from the course followed, that he intended to do so.

In reference to the construction of the material words of the bond, it is, I think, clear that in order to hold the judgment obtained it must be shewn that Lockwood while liquidator misapplied or became liable or accountable for moneys of the Company or was guilty of breach of trust in relation to the Company, not simply in respect to one particular creditor (Emden's Winding-up of Companies, 8th Ed., p. 260). If, therefore, the judgment is in respect to moneys owing to Ormrod standing outside the liquidation and not in relation to the Company at all, it cannot stand. Lockwood was not injuring the Company in defrauding Ormrod. Counsel for respondent urged that so long as Lockwood received moneys as liquidator the appellant Company is liable. That may be true, if the Ormrod moneys were received *qua* liquidator. The suggestion was that even if Lockwood received moneys belonging to Ormrod and deposited them in the liquidator's account, the Company is thereby made a trustee for Ormrod and the Bonding Company is liable in respect to defalcations of these moneys. It would follow that if Lockwood was selected to act as agent for several parties, not creditors of the Company, and wrongfully placed these moneys in the liquidator's account only to abstract them again for his own use, the Bonding Company would be liable. Such an obligation was not within the contemplation of the parties, nor is it within the wording of the bond itself. It was not part of the liquidator's business in the administration of this estate to sell the property of others and place the proceeds in the Company's account thereby making it a trustee for moneys so received.

It was further submitted that the relationship of mortgagor and mortgagee existed between the Company and Ormrod at the date of the winding-up order; that the mortgagee was not in possession at that time and that therefore he cannot interfere with the title acquired by the liquidator by reason of the wind-

ing-up order and his appointment. The true situation depends, however, upon the action subsequently taken. The failure to file a claim, value the security, take an assignment, or redeem, together with the other incidents referred to, all shew an election to permit the mortgagee to take his securities in extinguishment of the debt. It is quite true, that, as disclosed by a letter from Ormrod's agents, Messrs. Richards, Ackroyd & Gall, dated January 19th, 1918, it is stated that the Company have an interest in the securities and the suggestion is made that Lockwood should have a power of attorney to deal with them. In fact, much of the correspondence suggests that the Ormrod securities were regarded by all parties as within the liquidation. A mistaken conception, however, of the position of the parties does not alter that position. The provisions of the Winding-up Act and the scheme there outlined cannot be ignored. Ormrod cannot be partly within and partly without that scheme. He apparently was anxious that the Company should bear the cost of any proceedings to realize on his securities, while at the same time treating them as his own free from any right on its part to value them or redeem. In this equivocal position we should look to the substance rather than to the form in determining whether or not he must be regarded as having made an election. The suggestion of counsel for respondent was that a course of conduct in disposing of the securities was adopted by mutual consent, having the same effect as if the Act were followed. Apart from the fact that this is an inference only which I do not think the evidence supports, I do not understand how when a domestic forum is created by the Act for winding up an estate any creditor may ignore it for one purpose and adopt it for another purpose. It affords a complete code of procedure and the liquidator cannot act except within its provisions.

MACDONALD, J.A.

The further ground was urged (and if sound, it would end the matter) that Lockwood in fact converted to his own use more than $15,000 apart altogether from the amounts taken from the proceeds of the Ormrod securities. When it is disclosed, however, by the auditor's report that the total shortage was $18,329.02, and the total withdrawals from the proceeds of the Ormrod securties is far in excess of the difference between $15,000 and $18,329.02, this contention would appear to be

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untenable. Further, if a calculation is made on the basis of the amount realized from the Ormrod securities, *viz.*, $21,266.43, the result is the same. Mr. *Bull* compiled figures, not from the auditor's report but from various sources to support his contention. He compiled different items making a total of a little more than $15,000, which he claimed were aside altogether from the proceeds realized by the sale of the Ormrod securities. I have gone through the figures submitted and find that, as I think he conceded, it is necessary to include a claim for interest on the amounts misappropriated to make up this sum. The appellant in making payment of the amount admittedly due under the bond, did not allow for interest on the defalcations from the different dates the money was taken by Lockwood. I find it difficult to check the amounts claimed for interest from the evidence. The witness testifying apparently checked the calculations of others and would not say if they were correct. However, I am assuming the amount suggested is correct. No mention, however, of interest is made in the auditor's report setting out the total defalcations and that report was made the basis of an order by MURPHY, J., ordering the deposed liquidator to make repayment of $18,329.02. That is the total amount misappropriated without interest. It would appear to me that the appellant was justified in dealing with the situation on that basis and should not now be confronted with a claim for interest. Under section 123 of the Act the judge might have provided for repayment with interest of the amount wrongfully withdrawn, but although the right was reserved to make a further application no such application was made. Interest was apparently ignored and the appellant was justified in so regarding it. I would not therefore give effect to the contention of counsel for the respondent on this point. The amount for which judgment was obtained represents moneys secured from the sale of the Ormrod securities.

MACDONALD, J.A.

I would allow the appeal.

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

Solicitors for appellant: *Pattullo & Tobin.*

Solicitors for respondent: *Walsh, McKim & Housser.*

McFETRIDGE v. CANADIAN PACIFIC RAILWAY COMPANY AND SPOKANE INTERNATIONAL RAILWAY COMPANY.

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McFETRIDGE v. CANADIAN PACIFIC RY. CO.

Damages—Negligence—Passenger on railway—Run down in railway yard—Jury's findings—Whether invitee or trespasser.

The plaintiff who was a passenger on a train of the defendant Company intended to change cars for Nelson at the Yahk station. His train did not go to the station at Yahk but stopped in the yard. He was deaf and, misconstruing instructions, was late in getting off the train and missed his Nelson connection. When he got off he walked through the yard to the station where he was told that he should proceed back of the station to reach a hotel, but instead of going as directed he again proceeded through the railway yard towards the spot where he got off the train and on the way was struck by a car from behind. The jury found the defendant negligent and that the negligence consisted in failure of proper transfer at R.R. Station, Yahk, and after finding there was no contributory negligence gave an affirmative answer to the question "If the plaintiff was guilty of contributory negligence could the defendant by the exercise of reasonable care immediately before the accident have avoided the accident?" Judgment was given for the plaintiff on the jury's findings.

Held, on appeal, reversing the decision of MACDONALD, J. (MACDONALD, C.J.A. concluding that he would dismiss the action) that the jury's answers to questions failed to make their meaning clear and there should be a new trial.

APPEAL by defendant from the decision of MACDONALD, J. of the 7th of January, 1926 (reported 36 B.C. 314) in an action for damages owing to the negligence of the defendant Company. The plaintiff was travelling on the railway from Spokane intending to go to Nelson. When the train arrived at Yahk he had to change cars and there evidently being another train at the station his train stopped before getting to the station. Being a deaf man he misconstrued information and was slow in getting off the train. He got out and walked to the west end of the station platform when he was told the Nelson train was gone and as there was no train until the next day he should go to a hotel. He was told the direction in which the hotel could be found, and he then (instead of going back from the platform on the regular path) went on the track again and walked towards

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where he got off the train. When he reached the point about where he got off the train (about 60 yards west of the platform) he was struck by a train that was backing up from behind him. He was injured and claimed damages. The jury answered questions as follow:

"(1) Was the defendant the Canadian Pacific Railway Company guilty of negligence? Yes.

"(2) If so, then in what did it consist? Failure of proper transfer at R.R. Station, Yahk.

"(3) Was the plaintiff guilty of contributory negligence? No.

"(4) If so, then in what did it consist? [No answer].

"(5) If the plaintiff was guilty of contributory negligence could the defendant through its employees, by the exercise of reasonable care and caution immediately before the accident, have avoided such accident? Yes.

"(6) Damages? One thousand, five hundred dollars plus hospital and doctor's fees, and incidental expenses in connection with the accident."

Statement

Judgment was given for the plaintiff on the verdict.

The appeal was argued at Vancouver on the 18th and 19th of March, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

McMullen, for appellant: The learned judge below said he was an invitee, but instead of going back from the station to the hotel he went along the track. He is an invitee only where it is reasonable for him to go. When he was on the platform he had no business to go on the track again: see *Walker* v. *The Midland Railway Company* (1886), 2 T.L.R. 450; *Westenfelder* v. *Hobbs Manufacturing Co. Ltd.* (1925), 57 O.L.R. 31; *Walsh* v. *International Bridge and Terminal Co.* (1918), 44 O.L.R. 117; *The Grand Trunk Railway Company* v. *Anderson* (1898), 28 S.C.R. 541 at p. 550; *Nightingale* v. *Union Colliery Co.* (1903), 9 B.C. 453. He was a trespasser or mere licensee and there at his own risk. As to the distinction between a railway company's premises and private premises see *Norman* v. *Great Western Railway* (1915), 1 K.B. 584; *Phillips* v. *The Grand Trunk Railway of Canada* (1901), 1 C.R.C. 399; *Linnell* v. *Reid* (1923), 32 B.C. 87; (1923), S.C.R. 594; *Grand Trunk Rway. Co.* v. *McKay* (1903), 34 S.C.R. 81; *Grand Trunk Railway* v. *McAlpine* (1913), A.C. 838 at p. 844. Even on the finding of the jury judgment should have been entered for the defendant Company.

Argument

Argument

A. Alexander (*W. C. Ross,* with him), for respondent: The train in which plaintiff was travelling stopped before it got to the station and he was asked to get off. He did so and walked to the platform where he was told his train had gone and as there was no train until the next day he should go to the hotel. He naturally walked back the way he came. In these circumstances he was an invitee. The judgment is in accordance with the jury's finding: see *Dunphy* v. *B.C. Electric Ry. Co.* (1919), 3 W.W.R. 1076; *Moore* v. *The Connecticut Mutual Life Ins. Co. of Hartford* (1879), 6 S.C.R. 634; *Dart* v. *Toronto R. Co.* (1912), 8 D.L.R. 121; *Mitchell* v. *Rat Portage Lumber Co., Ltd.* (1911), 1 W.W.R. 78; *Scott* v. *B.C. Milling Co.* (1894), 3 B.C. 221 at p. 254 and on appeal (1895), 24 S.C.R. 702; *Wabash Railway Co.* v. *Follick* (1920), 60 S.C.R. 375 at p. 384; *Nightingale* v. *Union Colliery Co.* (1901), 8 B.C. 134; *Rayfield* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 361.

McMullen, in reply, referred to *Andreas* v. *Canadian Pacific Ry. Co.* (1905), 37 S.C.R. 1.

Cur. adv. vult.

1st June, 1926.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff was travelling from Spokane to Rossland on a through ticket. He was obliged to change trains at Yahk, and by a misunderstanding of his instructions he missed connection and was left on the station platform. He was there directed by strangers to a hotel, the direction indicated being practically parallel with the railway tracks. He walked on these tracks for a short distance and was there struck and injured by cars which were being shunted in the railway yard. The particulars in the statement of claim allege, *inter alia,* these grounds of negligence on defendant's part: failure to make proper provision for the safe transferring of passengers from one train to the other; failure to give proper instructions to the plaintiff so as to enable him to safely make the transfer; and breach of a rule of the defendant Company No. 102 of General Train and Interlocking Rules, which reads as follows:

"When cars are pushed by an engine . . . a flagman must take a conspicuous position in front of the leading car."

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There are qualifications of this rule which I do not quote since I think it clear that they do not apply to the facts of this case.

The defendants having offered no evidence in defence, the jury found in answer to questions 1, 2, and 3, that defendant was negligent; that the negligence consisted of "failure of proper transfer at R.R. Station, Yahk"; and that plaintiff was not guilty of contributory negligence. In answer to the 5th question, which reads:

> "If the plaintiff was guilty of contributory negligence, could the defendant, through its employees by the exercise of reasonable care and caution, immediately before the accident, have avoided such accident?"

they said, "Yes."

The statement of claim, *inter alia,* alleges two distinct acts of negligence of which evidence was given (1) negligence in connection with the transferring of the plaintiff from one train to the other, (2) negligence in running the plaintiff down in the railway yard.

MACDONALD, C.J.A.

The verdict on the first ground cannot be supported, since that negligence was not the proximate cause of the plaintiff's injury as the undisputed evidence clearly shews. That ground of complaint should have been withdrawn from the jury, but this was not done. True, the learned trial judge refers to it, in what I may call, with great respect to him, a vague and inconclusive way, but he failed to specifically direct them on the law applicable to the facts proven, and this failure probably brought about the unsatisfactory verdict.

The second ground of negligence and the evidence in support of it might have supported a verdict, though it is unnecessary in the result to decide this. Eliminating, therefore, answer No. 2, can it be said that answer No. 1 may stand? Number 1 finds negligence, No. 2 declares such negligence to consist of something which cannot in law be the subject of damages. Can No. 1 be enlarged so as to include a finding that defendant was negligent in the shunting operations in the yard? I am afraid not.

There is no cross-appeal against the charge to the jury and I therefore find it difficult, however much I may think that the jury could and very probably would, had the legal position been defined to them, have found a verdict for the plaintiff based

upon the occurrence in the railway yard; the jury, however, did not found their verdict upon that, and I would therefore set it aside.

We have the power in a proper case, to order a new trial, but here, apart from the absence of a cross-appeal, a difficulty arises from the fact that both parties elected to stand upon the verdict.

On the whole, I am driven to allow the appeal and to order that the action be dismissed, but I trust the defendant Company, in the peculiar circumstances of this case in respect to which they themselves are by no means blameless, will not ask for costs either here or in the trial Court. If they should we cannot refuse them.

MACDONALD, C.J.A.

MARTIN, J.A.: Being of the opinion that there should be a new trial I shall say nothing about the evidence, but I do again express my regret that the proper course, so often laid down by this and other appellate Courts, was not followed, when it became apparent that the answer of the jury to the second question was obscure in meaning, *viz.*, to clear up any doubt by further reference to the jury with appropriate instructions, if necessary: see *Rayfield* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 361; *Shearer* v. *Canadian Collieries (Dunsmuir), Limited* (1914), 19 B.C. 277, 282; and *Dart* v. *Toronto R. Co.* (1912), 8 D.L.R. 121. The appeal therefore should be allowed with costs in the ordinary way, as the majority of the Court thought best to do in the *Rayfield* case, *supra*, in similar circumstances, and the costs of the former trial should abide the result of the new one.

MARTIN, J.A.

GALLIHER, J.A.: If the jury had not answered question 5, the verdict could not stand. It is the answering of this question that creates the difficulty.

While the learned judge in his charge did not in specific words charge the jury to disregard for the purposes of their findings, what had taken place up to the time the plaintiff found himself on the station platform and his train gone, yet he did point out to them that this evidence was

GALLIHER, J.A.

"only of importance, and very slight at that, in shewing the condition of affairs at that particular point."

And again:

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"The situation that existed upon that occasion in the yard is rather foreign to the question of a passenger, and it comes back to an individual who finds himself in a strange town, at a railway station, when he has a right to be on the platform seeking overnight a place of resort."

And again:

"I repeat it again because it seems to me if the plaintiff can succeed it is only on the ground that a breach of duty arises under the first portion of rule 102,"

and the learned judge's charge is then confined to what occurred after the plaintiff left the platform to seek a hotel, and a discussion of rule 102.

GALLIHER, J.A.

I should have thought that a jury could have been under no misapprehension in view of that charge, and yet apparently they were by their answer to question 2.

In view of their answers to 1, 2 and 3, it was not necessary to answer 5, and yet I feel I should not ignore their answer to 5 as it seems to be, or may have been, intended by them to be regarded as original negligence.

It is the uncertainty as to these conflicting answers and as to what the jury really intended thereby, that induces me to conclude that there should be a new trial.

In the present case I see no reason for departing from the ordinary rule as to costs.

MCPHILLIPS, J.A.

McPHILLIPS, J.A. would order a new trial.

MACDONALD, J.A.

MACDONALD, J.A.: I do not agree that the respondent at the time he was injured, was a trespasser and that a verdict for him, based on proper grounds, could not be sustained. He was an invitee. In such a capacity as laid down in numerous authorities, it is true, as pointed out by Middleton, J., in *Connor* v. *Cornell* (1925), 57 O.L.R. 35 at p. 37, that

"'The liability of the occupier is only commensurate with the extent of the invitation.'"

I cannot agree, however, in the light of all the facts, that the respondent did not pursue a reasonable course in attempting to leave the appellant's premises to reach the hotel. I think in doing so he was on a part of the Railway Company's property to which in law he was invited when the injuries were received. I do not think the principles laid down in *Walker* v. *The Midland Railway Company* (1885), 2 T.L.R. 450, are applicable

to the facts in this case. There the hotel guest was looking for a water-closet at night. He entered a service room by mistake and fell down a shaft. It was held that *prima facie* there was no breach of duty towards the plaintiff as the service room was in a place in which no guest "had any right or legitimate occasion to be and into which no guest was expressly or impliedly invited to go." In the case at Bar the respondent's character as an invitee was not lost until in the course of his relations as a passenger discharged from the Railway Company's train, he quitted its premises. It is not enough to suggest that another and safer means of egress might be taken when the route adopted was, if not equally safe, at least justifiable, under all the circumstances. The respondent might reasonably be supposed to be likely to leave the Company's premises in the direction taken by him in the belief reasonably entertained that he had a right to do so. If that is so he is not met with the principle laid down in the case referred to. To be within it we must find that his method of quitting the premises was unauthorized and unreasonable. I do not think it was either, particularly in a locality where notwithstanding the outline of streets which may appear well marked on plans there is no definite way of leaving the station so indicated as to catch the attention of strangers. We should also keep in mind the fact which was known, or ought to be known to the appellant—that the respondent and others passing through Yahk would not be well acquainted with the *locus*. Moreover, if the respondent was justified in following the course taken by him in going from the place where he alighted up to the station platform to make inquiries—and I think that is conceded—he was equally justified in retracing his steps as one part of the way out of the Railway Company's premises. We must assume that he alighted at a safe place for the discharge of passengers. He was placed in such a position that he might reasonably assume it was a proper means of egress. He did not cease to be an invitee when he reached the station platform to make inquiries; he would cease to be an invitee only after he quitted the railway premises in a way not unauthorized nor unreasonable. The true principle applicable is laid down in *Indermaur* v. *Dames*

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(1866), L.R. 1 C.P. 274 at p. 288, where it was said the rule is that the invitee

"using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact."

When this pronouncement is considered and applied in the light of rule 102, approved by the board of railway commissioners, and reading as follows:

"When cars are pushed by an engine (except when shifting and making up trains in yards where there are no public highway crossings at rail level, or where there are public highway crossings at rail level adequately protected by gates, or otherwise) a flagman must take a conspicuous position on the front of the leading car.

"Whenever in any city, town, or village, cars not headed by an engine are passing over or along a highway which is not adequately protected by gates, or otherwise, at rail level, a man must take a conspicuous position on the foremost car to warn persons on the highway."

it can readily be understood that a jury might reasonably find a verdict for the respondent.

MACDONALD, J.A.

It was contended that the rule was not applicable, first on the ground that it applies only in respect to persons rightly there, and secondly, that the outline of a flagman's duties as shewn at page 15 of the Book of Rules are not in relation to the public, but simply signs for the engineer's guidance. On the first point I think the respondent was rightly there; on the second point, while the flagman is required to signal the engineer, he should do so if he apprehends danger of running anyone down should an audible warning be insufficient. The flagman in the exercise of ordinary care should watch the track to avoid hitting a man in the position of the respondent. Nor is the appellant assisted by the lack of evidence shewing that no flagman was on the moving car. In either event the jury might find negligence. I may add that Mr. *McMullen* did not rely on the exceptions mentioned in the first paragraph of the rule. Mr. Flett, appellant's general superintendent, stated that the rule applied at this point.

There is, however, a serious difficulty due to the answers returned by the jury to questions submitted. It would appear

that the jury did not apply their minds to the real issue. The questions and answers follow: [already set out in statement,].

We should examine the answers in the light of the issues and the judge's charge to see if the verdict can stand. From the answer to question (2) read alone, it would appear that the jury thought the appellant negligent in failing to give right information and to properly direct the respondent in changing trains at Yahk. The conduct of the railway officials at that stage, however, did not constitute actionable negligence. It was not the cause of the accident. The learned trial judge told the jury that the occurrences prior to the respondent finding himself on the station platform were

"only of importance and very slight at that, in shewing the condition of affairs at that particular point."

Later he refers to rule 102 and directs their attention to the failure to give warning and to the incidents in connection with respondent's attempt to reach a hotel, including the backing up of the train and the impact. That is where the breach of duty, if any, occurred and it was placed before the jury. The true aspect of the respondent's case was therefore outlined for their consideration. Again, Mr. *Ross,* counsel for respondent, on the motion for non-suit, said:

"I am not contending for a moment that the circumstances leading up to the period is actionable."

He apparently meant to say "accident" instead of "period."

"THE COURT: Suppose all you allege took place, and they didn't have, in your opinion, or the opinion of Flett, in September this year just as perfect a system of transfer of passengers that came from Spokane and sought to go west, that has really nothing to do with this case.

"Mr. *Ross*: Except it is an element [or incident] leading to the final accident."

The jury therefore should have appreciated the real issue. But notwithstanding the foregoing incidents, evidence was given and stressed throughout the trial, touching the failure to properly transfer the respondent, and the jury were doubtless confused thereby. The Court may look at all the answers to ascertain if they are sufficiently intelligible to justify a finding of a general verdict, assigning, if one reasonably can, a meaning to each answer. The first answer finds general negligence. Can the answer to the second question be interpreted as a crude expression by laymen to indicate failure to take proper precau-

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tions at all stages of the transfer or at the point of transfer at Yahk? They speak of "failure of proper transfer," whereas, it is clear no transfer was made at all. Reading it literally one would think that the jury found the transfer was made, but it was an improper or negligent transfer causing damage. For purposes of elucidation the answer to question 5 may be looked at. Strictly they should not have answered question 5 in view of the negative replies to numbers 3 and 4. But the answer to 5 may be looked at to shew what may have passed in their minds. Part of that question is: "Could the defendant through its employees by the exercise of reasonable care and caution immediately before the accident avoided such accident?" The answer is "Yes." It may be that the jury had in mind the incidents immediately preceding the moment respondent was hit by the moving car. The word "immediately" arrests attention. They cannot reasonably be taken as referring to the failure to direct the respondent from one train to another. That incident took place probably ten minutes before. They make a finding of a negligent act through failure of "employees" to exercise care immediately before the accident, and if they had made that position clear the verdict would be intelligible and readily sustainable. I do not think, however, notwithstanding the charge, the discussion between Court and counsel, and the issues as presented, these answers can be given effect to as a general verdict in favour of the respondent. It is not as clear a case as that of *Dunphy* v. *B.C. Electric Ry. Co.* (1919), 3 W.W.R. 1076, where an indefinite answer was given by a jury. It is true that if the answers mean that the negligence consisted in lack of care in directing the respondent to change trains and the jury were properly directed on the other ground of negligence, *viz.*, absence of care in moving backwards, the only ground upon which the respondent could succeed, then it should be held that they exonerated the appellant on the latter ground and a new trial should not be directed: the judgment should be set aside (*Andreas* v. *Canadian Pacific Ry. Co.* (1905), 37 S.C.R. 1 at p. 10). I cannot think that the jury meant to do so. They may have intended to find that the accident was caused in part, at all events, by the negligence of employees of the Company immediately preceding the accident, but failed to

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make their meaning clear. I think, in view of the confused state of the answers and the fact that there is a case of actionable negligence to submit to the jury, free from irrelevant facts adduced in evidence, that it should be sent back for a new trial.

New trial ordered, Macdonald, C.J.A., dissenting.

Solicitor for appellant: *J. E. McMullen.*
Solicitor for respondent: *W. R. Ross.*

REX v. LEE.

MACDONALD, J. (In Chambers)

1926

July 20.

REX v. LEE

Criminal law—Habeas corpus—Application for—Grounds must be set out.

The grounds upon which an application for a writ of *habeas corpus* is founded must be stated in definite terms either in the notice or in the affidavit in support.

APPLICATION for a writ of *habeas corpus*. The defendant was convicted by the police magistrate in Victoria for having opium in his possession contrary to The Opium and Narcotic Drug Act. The application was supported by an affidavit of the defendant stating that he was illegally detained under a warrant of commitment, a copy of which was made an exhibit to the affidavit. Heard by MACDONALD, J. in Chambers at Vancouver on the 20th of July, 1926.

Statement

Stuart Henderson, for the application.

Creagh, contra: There is the objection that the grounds on which the application was based should be set out in the notice of motion or affidavit in support: see Halsbury's Laws of England, Vol. 10, p. 59, and Forms in Crankshaw's Criminal Code, 5th Ed.

Argument

Henderson, referred to Criminal Rules, 1906, and Crown Office Rules.

MACDONALD, J.: The objection is sustained and the application is dismissed. In addition to authorities referred to by counsel see also Chitty's Abridgment Canadian Criminal Cases, p. 454; *Re McMurrer (No. 1)* (1907), 18 Can. C.C. 41 and *Rex* v. *Mali* (1912), 1 D.L.R. 256.

Judgment

Application dismissed.

MURPHY, J. (In Chambers)

1926

Sept. 21.

ESQUIMALT & NANAIMO RY. CO. v. GRANBY CONSOLIDATED MINING, SMELTING & POWER CO.

ESQUIMALT & NANAIMO RAILWAY CO. v. GRANBY CONSOLIDATED MINING, SMELTING & POWER CO.

Practice—Interrogatories—Delivery of—Application for leave—Objection taken—Marginal rules 344 and 348.

The allowance by a judge of interrogatories to be administered to a party under marginal rule 344(2) even in the face of objection does not amount to a decision that the party must answer them, but leaves him at liberty under marginal rule 348 to take any objection to answering that he sees fit.

Statement

APPLICATION by the defendant for an order for delivery of interrogatories. Heard by MURPHY, J. in Chambers at Vancouver on the 16th of September, 1926.

Mayers, for the application.

Harold B. Robertson, K.C., contra.

21st September, 1926.

Judgment

MURPHY, J.: By marginal rule 344, the judge is required to consider the interrogatories sought to be delivered when the application for leave to deliver same is made. By that rule it is provided that leave shall be given as to such only of the interrogatories as shall be considered necessary either for disposing fairly of the cause or for saving costs. The suggestion, therefore, that the application is purely formal is erroneous and I find on enquiry that no practice contrary to the rule has been adopted by our Courts although it probably has happened that when no objection was taken the matter of allowing or disallowing any specific interrogatories has been left over to be dealt with under marginal rule 348. When, however, objection has been taken the question of allowing or disallowing specific interrogatories has been dealt with on the application for leave to deliver despite the fact that as a result of marginal rule 348, objection may be taken to answering interrogatories ordered to be delivered after such consideration.

That this is the proper practice appears to follow from the provisions of marginal rules 344 and 348, and from the case of *Peek* v. *Ray* (1894), 3 Ch. 282. The application should therefore come on for further hearing.

Order accordingly.

JANSEN *ET UX.* v. THE TEX.

MARTIN, LO. J.A.

1926

Sept. 14.

JANSEN v. THE TEX

Admiralty law—Master of gas-boat—Action for wages—Master's certificate —Necessity for—Acquiescence—R.S.C. 1906, Cap. 113, Secs. 72(c), 96 and 100—Can. Stats. 1912, Cap. 51, Sec. 1.

In an action for wages as master of a gas-boat the evidence disclosed that the plaintiff did not "possess a valid certificate" under section 96 of the Canada Shipping Act.

Held, that the interpretation of section 72(c) of said Act is wide enough to cover vessels of this class, said vessel not being within the exceptions mentioned in section 100 of said Act and amendments thereto, but as the managing owner of the boat, after he knew that the plaintiff was not certificated, continued to employ him, he elected to waive the disqualification and the plaintiff is entitled to judgment.

ACTION by the master of a boat and his wife for wages. The facts are set out in the reasons for judgment. Tried by MARTIN, Lo. J.A. at Vancouver on the 8th of September, 1926. Statement

Woodworth, for plaintiffs.
Ginn, for defendant.

14th September, 1926.

MARTIN, Lo. J.A.: This is an action for wages, the male plaintiff claiming $668 as master and his wife $161.33 as cook on the defendant ship which is a gas-boat of the registered gross tonnage of 21.02 tons, and used chiefly in towing barges.

The matter was fully gone into and much of the evidence is of a conflicting nature and the only point of general importance is the submission advanced by plaintiffs' counsel that it was not necessary for a ship of this kind, not being a sailing ship or steamship, to have a master who "possesses a valid certificate" under section 96 of the Canada Shipping Act, Cap. 113, R.S.C. 1906. It is clear, however, that the interpretation of section 72 (*c*) is wide enough to cover vessels of this class because it declares that Judgment

"Unless the context otherwise requires,—

"(*c*) 'Steamship' or 'steamer' includes any ship propelled wholly or in part by steam or motive power other than sail or oars."

There being nothing in the context to exclude this definition

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from applying to this vessel, she therefore, not being within the exceptions mentioned in section 100 as amended by section 1, Cap. 51, of 1912, should have had a certificated master which the plaintiff was not though he acted in that capacity, and there is not sufficient evidence to establish the charge that he was negligent in the performance of those duties.

The owners allege that he represented himself to be a duly-certified master at the time his services were engaged at $4 per day and his keep, and the view I take of what happened at that time is that he did express himself in such a way that the managing owner, Ragan, did derive that impression, but I also find that shortly thereafter when Ragan clearly understood the true position he elected to waive the disqualification and the said plaintiff continued in his employment without objection till he received sufficient notice upon New Year's day that his active engagement would forthwith terminate, pending an improvement in the owner's business affairs, but that he and his wife could remain on the vessel at their own charges in the meantime; therefore he is not entitled to wages after the 2nd of January.

Judgment

I allow the owners' set-off according to their statement, less $5, thus leaving it to stand at $122.

As to the wife's claim as a cook, I find that it has not been established, because not only is the direct evidence in support of it unsatisfactory, but having regard to all the circumstances of the case the account of the matter given by the owners is more in accord with the probabilities.

There will be judgment in pursuance of these findings with costs for the master, the claim of the wife being dismissed with costs.

The costs of the motion to reopen the judgment will go to the defendants: while it is true that the motion was irregularly made in Chambers yet no objection was taken to it on that account and the irregularity was cured when it was, at its conclusion, transferred into Court for formal adjudication.

Judgment for plaintiffs in part.

THE HOME BANK OF CANADA v. SULLIVAN.

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June 1.

THE HOME BANK OF CANADA v. SULLIVAN

Banks and banking—Deposit of cheques—Closing doors of bank—Stopping payment of cheque—Claim as set-off—Holder in due course.

The Home Bank of Canada closed its doors at head office in Toronto at 2:55 p.m. on the 17th of August, 1923, which by Standard Time would be 10:55 a.m. in Vancouver. Shortly after 10:55 in Vancouver defendant gave H. & Co. certain bonds and securities for which he received H. & Co.'s cheque for $17,373.71 drawn on The Home Bank of Canada. At about 2:20 p.m. on the same day H. & Co. sold the defendant certain bonds and received a cheque from him drawn on the Standard Bank of Canada for $10,657.70. The defendant then went to the Standard Bank of Canada to deposit his day's receipts when he was told that the cheque on The Home Bank of Canada could not be accepted as the bank had closed its doors. The defendant then stopped payment on the cheque for $10,657.70. The Home Bank of Canada as holders in due course recovered judgment for the amount of the cheque.

Held, on appeal, affirming the decision of GREGORY, J. that the contract between H. & Co. and the defendant remained good notwithstanding that the cheque given by the defendant was countermanded in consequence of the discovery of insolvency of The Home Bank of Canada. By deposit of the cheque The Home Bank of Canada became the holder in due course and was entitled to enforce payment.

APPEAL by defendant from the decision of GREGORY, J. of the 6th of October, 1925, in an action for $10,689.45 principal and interest on a cheque for $10,657.70 dated the 17th of August, 1923, drawn by the defendant on the Standard Bank of Canada payable to Harris & Company and endorsed by Harris & Company. The facts are that the Home Bank closed its doors at the head office in Toronto on the 17th of August, 1923, at 2:55 p.m. which would be four hours ahead of Vancouver and in Vancouver would be 10:55 a.m. on the same day. Shortly after 10:55 on that day the defendant Sullivan entered into negotiations with Harris & Company and the defendant gave Harris & Company certain bonds and securities of the value of $17,373.71 in consideration for which he received a cheque of Harris & Company drawn on the Home Bank for $17,373.71. This transaction was carried out for the Home Bank and on delivery to Harris & Company the securities were

Statement

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Statement

then delivered to the Home Bank. At about 2:20 p.m. in the afternoon, Harris went to Sullivan and sold him certain bonds for which Sullivan gave Harris & Company a cheque drawn on the Standard Bank for $10,657.70. Sullivan then went to the Standard Bank to make a deposit of about $35,000, which included Harris & Company's cheque for $17,373.71, but he was then advised that Harris & Company's cheque could not be accepted (being drawn on the Home Bank) because the Home Bank had closed its doors that afternoon. On receipt of this information Sullivan stopped payment of his cheque for $10,657.70 given shortly before to Harris & Company. The Home Bank now sues on the cheque and Sullivan contends he is entitled to a set-off as against his bonds that were left in the Home Bank by Harris. Judgment for the plaintiff.

The appeal was argued at Vancouver on the 12th and 15th of March, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

J. A. MacInnes, for appellant: The two transactions took place in fact after the Bank had closed its doors at head office. The Bank took Sullivan's bonds fraudulently and without consideration. On the question of set-off and counterclaim see Annual Practice, 1924, p. 343, marginal rule 199. As to when an insolvent bank has no right to accept cheques see Cyc., Vol. 5, p. 493; A. & E. Encycl. of L., 2nd Ed., Vol. 3, pp. 805 and 847; *Gaden* v. *Newfoundland Savings Bank* (1899), A.C. 281; *Re Central Bank and Wells* (1888), 15 Ont. 611. As to the effect of the action of the local officials of the Bank after the head office had closed its doors see *White* v. *Royal Bank of Canada* (1923), 53 O.L.R. 543 at p. 548. The Bank did not become holders in due course either of the cheque or of the bonds. It was a payment of an obligation of the Bank after it had been suspended. When suspension occurs any unauthorized payment immediately becomes illegal: see Halsbury's Laws of England, Vol. 7, p. 402, par. 833; *Davidson* v. *Fraser* (1896), 23 A.R. 439; (1897), 28 S.C.R. 272; *Raphael* v. *The Bank of England* (1855), 25 L.J., C.P. 33; *Tatam* v. *Haslar* (1889), 23 Q.B.D. 345. As to the bonds, the morning transaction was void on account of the mutual mistake as to the solvency of the

Bank: see Leake on Contracts, 7th Ed., pp. 229 and 230. The title to the bonds had not passed as the contract was void: see *Richardson* v. *New Orleans Coffee Co.* (1900), 102 Fed. 785. The Bank is wound up by the Court and the Court should not rob one customer for the benefit of another: see *Ex parte James. In re Condon* (1874), 9 Chy. App. 609; *Ex parte Simmonds. In re Carnac* (1885), 16 Q.B.D. 308 at p. 311; *In re Tyler. Ex parte Official Receiver* (1907), 1 K.B. 865; *In re Thellusson. Ex parte Abdy* (1919), 2 K.B. 735; *In re Opera, Limited* (1891), 2 Ch. 154; *Giraldi* v. *La Banque Jacques-Cartier* (1883), 9 S.C.R. 597. The Bank was not a holder in due course of either cheque or bonds.

Argument

Reid, K.C., for respondent: The right of set-off is not an equity. That we are not entitled to take a higher position than Harris see *Whitehead* v. *Walker* (1842), 10 M. & W. 696; *Oulds* v. *Harrison* (1854), 10 Ex. 572. There is no set-off for Sullivan of any nature, the transactions were distinct. As to the branches continuing business after the head office closes see *Brunelle* v. *Ostiguy* (1911), 21 Que. K.B. 302 at p. 308; *In re Wigzell. Ex parte Hart* (1921), 2 K.B. 835; *In re Home Bank of Canada* (1924), 4 C.B.R. 609.

MacInnes, replied.

Cur. adv. vult.

1st June, 1926.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appellant says that Harris and Sullivan, two Vancouver brokers, entered into a mutual contract of purchase and sale of stocks or bonds on the day that the Home Bank suspended payments at its head office in Toronto. He contends that notwithstanding that the officials of the Vancouver branch and Harris and Sullivan had no notice of this until after the transactions between them had taken place, nevertheless, these transactions were affected by the said suspension though the good faith of the parties has not been successfully impugned. He invokes the rule of law that a contract made in the mistaken belief of both parties, that the subject-matter of it is *en esse* is void. But this rule has no application to the facts of the present case. The insolvency of the Home Bank was a mere incident affecting payments under

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the contract and did not touch the substance of the contract at all. The contract between Harris and Sullivan remained good notwithstanding that the cheque given by Sullivan was countermanded in consequence of the discovery of the insolvency of the Home Bank. By the deposit of the cheque to meet the customer's overdraft and its application thereto the respondent became the holder in due course and entitled to enforce it. *Akrokerri (Atlantic) Mines, Limited* v. *Economic Bank* (1904), 2 K.B. 465. Moreover, the Bank took it free from all equities existing between Harris and Sullivan.

MACDONALD, C.J.A.

In my opinion the judgment appealed from should be affirmed.

MARTIN, J.A.

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

GALLIHER, J.A.

GALLIHER, J.A.: Much as I would feel inclined to come to the assistance of the defendant in the unfortunate position in which he finds himself, owing to the failure of the Home Bank, and give effect to the able argument of Mr. *MacInnes,* I find myself unable to do so, either upon the evidence or the law as I interpret it.

My view is that any business transacted in the Vancouver branch of the Bank in the ordinary and usual way up to the time the officials received notice of the insolvency, must be held to be binding on all parties. Otherwise, confusion would ensue and there would be no certainty in such business transactions.

The evidence satisfies me that Harris bought the bonds in question for himself and sold them to the Bank and that these transactions and the deposit of the $10,657.70 cheque were all completed in the Bank before second clearing house time arrived at one o'clock, and before the Bank officials had any notice of insolvency.

I am in agreement with the conclusions reached by my brother MACDONALD for the reasons given by him.

MCPHILLIPS, J.A.

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

MACDONALD, J.A.

MACDONALD, J.A.: This is an appeal from the judgment of GREGORY, J. in favour of the respondent Bank for $11,796.06, on a cheque for $10,657.70, dated August 17th, 1923, drawn by

appellant Sullivan on the Standard Bank of Canada, payable to Harris & Company and endorsed by it to the respondent. The cheque was given for bonds purchased from Harris & Company by Sullivan. The appellant counterclaimed for the return of certain other Victory bonds of the market value of $17,373.71, or for their value, delivered to the Bank by Harris & Company, who received them on the 17th of August, 1923, from the appellant, giving therefor a cheque on the respondent Bank in payment. On the same day the Bank suspended payment and this cheque was not paid. About $6,000 of these bonds were in the possession of the Bank when this action was launched. The counterclaim was dismissed and the appeal is from the whole judgment.

So far as the cheque sued upon is concerned, the appellant received full value for it in bonds duly delivered. He suffered by the sale to Harris & Company of the other block of Victory bonds for which he received a worthless cheque.

The appellant contends that the respondent was not a holder in due course of the cheque sued upon and that it was not taken in good faith, for the reason that it was carrying on business with knowledge of insolvency. The evidence accepted by the learned trial judge shews that the cheque was received and credited prior to the receipt in Vancouver of notice of suspension of the respondent Bank. On the counterclaim it was submitted that the transaction by which appellant parted with the bonds later transferred to the Bank was void on the ground of mutual mistake as neither of the parties concerned knew of the Bank's insolvency and were trading on the basis that cheques would be duly honoured.

MACDONALD, J.A.

I accept the evidence that for some time prior to the 17th of August the Bank was in an insolvent condition but not to the knowledge of the local officers of the Bank in Vancouver. Does that fact constitute fraud against the public and this appellant which would vitiate the entire transaction resulting in the exchange of cheques and the transfer of bonds? I do not think so. Counsel for appellant endeavoured to shew that at the actual time of suspension in Toronto, the cheque sued on was not deposited and that the Bank was a creditor of Harris & Company by way of a large overdraft of over $30,000 until

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2.20 or 2.30, when he covered it by a large deposit which included the cheque in question. In any event, the cheque was deposited before receipt of notice of suspension.

If Harris & Company had not transferred the cheque sued on and brought action against Sullivan they might be met with a defence by way of set-off in respect to the $17,000 worth of bonds Harris & Company received, for which they gave Sullivan a cheque on the Home Bank, which was dishonoured. We are not concerned, however, with equities as between Harris & Company and the appellant. The dealings between the respondent Bank and Harris & Company were entirely independent of the original transaction. The Bank received the cheque in question with others, to cover Harris & Company's indebtedness to it. Further, a right of set-off is not a defence against a subsequent holder. So far as the Bank is concerned any equities existing between Harris & Company and the appellant is an entirely collateral matter to which they were strangers. Even if the Bank had notice—which it had not—of the existence of a right of set-off, it would make no difference unless with notice there was such acquiescence as would amount to proof of an agreement to permit a set-off. *Whitehead* v. *Walker* (1842), 10 M. & W. 696.

MACDONALD, J.A.

So far as the counterclaim is concerned, in respect to the bonds they were purchased by the Bank and cannot be recovered at the suit of the appellant who was not a party to the transaction.

The question remains as to whether the whole transaction was vitiated by fraud or avoided by mutual mistake by reason of the insolvency of the Bank. Certainly, until the head office of the Bank closed its doors in Toronto no such claim could be made. Nor do I think the transactions taking place during the interval of time required for notification of suspension to the outlying branches can be impeached. The officials of the local branch must have actual notice and naturally transact business until notice arrives. To hold otherwise might cause greater injury, even to the party complaining in respect to cheques paid in the meantime. Nor can the principle laid down in *Ex parte James* (1874), 9 Chy. App. 609, and frequently followed that a Court of Chancery will not allow its officers—a trustee in bankruptcy

—to retain moneys for distribution to the general creditors, where it would be contrary to fair dealing to do so, a principle not confined to moneys paid under a mistake of law but of general application, be regarded as appropriate to the facts of this case.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *MacInnes & Arnold.*

Solicitors for respondent: *Reid, Wallbridge, Douglas & Gibson.*

CUDWORTH v. EDDY.

Real estate—Sale of—Agent—Commission—Licence—Time when cause of action arose—R.S.B.C. 1924, Cap. 53, Sec. 110; Cap. 143, Sec. 21.

On the 1st of September, 1924, the defendant employed the plaintiff as agent to find a purchaser for his ranch. She immediately proceeded to negotiate with a prospective purchaser but did not obtain a real estate agent's licence until the 16th of September. The purchaser assented verbally to purchase at the price stipulated on the 20th of September and the purchase was finally completed on the 27th. Section 21 of the Real-estate Agents' Licensing Act provides that "no person shall . . . . maintain any action . . . . for the collection of compensation . . . [unless] duly licensed . . . . at the time the alleged cause of action arose." It was held by the trial judge that the plaintiff had done all she was required to do to earn her commission before she obtained a licence and section 21 aforesaid was a bar to her action.

Held, on appeal, reversing the decision of BROWN, Co. J., that the right of action arose when the sale was completed. It was not completed in a binding fashion until the 27th of September and not even assented to verbally until the 20th, four days after she had obtained a licence. She had therefore a right of action for her commission.

Held, further, when the defendant asks for and obtains a non-suit and afterwards it is found on appeal that the plaintiff has made out a case, it is not usual to grant a new trial, and as it is apparent that the only defence is the alleged want of licence, the plaintiff should have judgment for her commission.

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CUDWORTH v. EDDY

Statement

APPEAL by plaintiff from the decision of BROWN, Co. J. of the 3rd of March, 1926, granting a non-suit in an action to recover $500 that the defendant agreed to pay as commission for procuring a purchaser for defendant's ranch of 610 acres situate about one and one-half miles east of Bridesville for the sum of $15,000. The plaintiff was so employed on or about the 1st of September, 1924. One B. C. Hunter agreed to purchase at the price stipulated on the 20th of September and the transaction was closed on the 27th of September. A real-estate agent's and salesman's licence was issued to the plaintiff on the 16th of September, 1924, pursuant to the Real-estate Agents' Licensing Act. It was held by the trial judge that the plaintiff had done all she was required to do in relation to finding a purchaser before the 13th of September and as she had no licence until the 16th of the same month, section 21 of the Real-estate Agents' Licensing Act was a bar to her action.

The appeal was argued at Victoria on the 10th of June, 1926, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

H. W. R. Moore, for appellant: The question turns on its interpretation of section 21 of the Real-estate Agents' Licensing Act. Did she have a licence when the cause of action arose? My submission is that it arose when the transaction between the purchaser and the agent was completed and he did not decide to buy at the price stipulated until the 20th of September, and she had obtained her licence on the 16th of that month. If we are right in this we are entitled to judgment for the amount claimed. In such cases a new trial is not ordered; the defendant stands or falls on his motion for non-suit.

E. A. Lucas, for respondent: Her work as an agent was completed on the 13th of September, three days before she purchased a licence. We submit that section 21 of the Act precludes her from obtaining any commission. Under section 110 of the County Courts Act the Court can order a new trial. In any case we are entitled to this as no defence was put in.

Moore, replied.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would allow the appeal on the ques-

tion of the necessity for a licence in this case. But the plaintiff was non-suited, and the respondent's submission is that another issue was raised by the pleadings which would, if proven, constitute a good defence to the action.

The Act, section 21, enacts that:

"No person shall bring or maintain any action in any Court for the collection of compensation for any act or expenditure done or incurred by him as a real-estate agent or real-estate salesman in respect of the negotiation of any sale, exchange, purchase, lease, or rental of real-estate, or in respect of the negotiation of any loan on real-estate, without alleging and proving that he was duly licensed under this Act as a real-estate agent or real-estate salesman, as the case may be, at the time the alleged cause of action arose."

My construction of that section is that at the time the cause of action arose he must shew that he was a licensed real-estate agent or salesman. And I find this, that the right of action arose when the sale was completed, and not before. And that might be when the agreement was finally entered into, binding upon both parties, or it might be when the agent had produced a purchaser ready, able and willing to purchase, and the defendant, the principal, had unwarrantably refused to accept the purchaser. In this case the sale was not completed in a binding fashion by writing until the 27th, it was not even assented to verbally before the 20th, and on the 16th, four days prior thereto, this agent had obtained her licence. It is clear to me that she was a licensed real-estate agent or saleswoman at the time the cause of action arose. Should a new trial be ordered? In the Supreme Court a non-suit is a judgment on the merits. When a defendant asks for and gets a non-suit in the County Court or judgment in the Supreme Court on the ground that the plaintiff has failed to make out a case and this is reversed, a new trial is not generally ordered. It is as if he had said, "I do not want this trial to go any further, I am prepared to stand on the failure of the plaintiff to make out his case." Then if it is afterwards found on appeal that the plaintiff has made out a case, the Court of Appeal will not usually grant a new trial. It is in the discretion of the Court to say whether we shall grant a new trial or not. This is a case in which the discretion of the Court should not be exercised in favour of a new trial, since I am convinced that the only defence was the alleged want of a licence. The

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plaintiff should have judgment for the commission. The appeal is allowed, and judgment ordered to be entered in the Court below for the amount of the commission claimed.

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GALLIHER, J.A.

GALLIHER, J.A.: I agree that at the important time, namely, on the 20th, when an outstanding term of the sale, without which the sale evidently would not have gone through, was consented to, the plaintiff had a licence. I agree that there should be judgment for the plaintiff.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal should succeed. With great respect to the learned trial judge in the Court below, I think he committed an error in law when he non-suited the plaintiff on the ground that the absence of the licence was fatal. What is sued for here is the commission upon a sale: and the commission upon a sale could only be recoverable in this way, that a purchaser is produced ready, able and willing to purchase. The ability might be proved in some other way, but the willingness to purchase must be established. And the best, and the only way to my mind that it could be established, would be to have the purchaser complete by executing the necessary agreement to purchase. Of course if it were a case of this kind that the commission agent produced a person, able, ready and willing to complete, and then that purchaser is refused by the principal a cause of action would arise by reason of that wrongful refusal. The cause of action which the plaintiff sues for did not arise and was not complete until the sale was effected. A real-estate agent cannot really recover his commission on the sale of property until the sale is evidenced, that is, evidenced in writing, being in respect of land. But he can recover if his principal refused to accept his purchaser who is ready, able and willing to complete. And that is well illustrated in the case I referred to during the argument of *Toulmin* v. *Millar* (1887), 58 L.T. 96 where a sale was made and completed behind the agent's back, and the agent was held entitled to his commission. The commission is not earned until the sale is made, or the purchaser produced by the agent is wrongfully refused. Dealing with section 21 of the Act I wish to make this observation that the section as drawn is rather involved;

it is difficult to say what it means but it would look to me that an agent might recover for something antecedent to the sale, but that does not affect the present case. The section reads as follows: [already set out in the judgment of MACDONALD, C.J.A.].

The present case is a completed sale and the sale was made after the licence was in the hands of the plaintiff. Therefore I cannot see that there is any difficulty whatever in the plaintiff's right to the recovery of the commission, it is not a case for a new trial. I think, of course, we are proceeding upon discretion here, and not laying down a precedent which is binding upon the Court, to always do this; but the circumstances of this case would seem to warrant the appeal being allowed without any further directions.

MCPHILLIPS, J.A.

MACDONALD, J.A.: I agree.

MACDONALD, J.A.

Appeal allowed.

Solicitor for appellant: *H. W. R. Moore.*
Solicitor for respondent: *C. F. R. Pincott.*

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WINLOW v. ROSS AND QUICKSTAD.

Practice—Costs—Action on promissory note—Maker and endorser, defendants—One set of costs only—Word "party" in tariff—To be read collectively.

WINLOW v. ROSS

The plaintiff recovered judgment in an action on a promissory note, the maker and endorser of the note both being defendants. The formal judgment recited "together with his costs of the action against each of the defendants to be taxed." The taxing officer only allowed one set of costs which was affirmed in the Court below.

Held, on appeal, affirming the decision of GREGORY, J. (MARTIN, J.A. dissenting), that although separate defences were pleaded by maker and endorser there was one cause of action only, that the taxing officer properly held that the words "any party" in the tariff must be read collectively and that the plaintiff could recover one set of costs only.

Statement

APPEAL by plaintiff from the order of GREGORY, J. of the 3rd of March, 1926, in an action on two promissory notes of $1,000 each made by A. R. Ross & Co. in favour of Henry Quickstad which were endorsed over to the plaintiff. The action was brought against A. R. Ross trading under the partnership name of A. R. Ross & Company, and Harry Quickstad, and the plaintiff obtained judgment, the order for judgment dated the 23rd of December, 1925, reciting "that the plaintiff do recover against the said defendants the costs of this action forthwith after taxation thereof." The formal judgment dated the 4th of January recited that "the plaintiff do recover against the defendants, jointly and severally, the sum of $2,086.81 together with his costs of this action against each of the said defendants to be taxed."

The taxing officer only allowed one set of costs and on appeal it was held by GREGORY, J. that only one set of costs should be allowed.

The appeal was argued at Vancouver on the 8th of April, 1926, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and MACDONALD, J.J.A.

Argument

W. S. Lane, for appellant: The new block tariff is in force. Each defendant had his own counsel throughout the trial and their defences were segregated.

[MACDONALD, C.J.A.: I have never known of an order for judgment being taken out except under the default rule. The order for judgment is in substance a judgment.]

Ross raised several defences. Quickstad withdrew his defence but appeared on the question of right of indemnity over against Ross: see *Prat* v. *Hitchcock* (1925), 35 B.C. 450; Seton's Judgments and Orders, 7th Ed., Vol. I., p. 296.

F. C. Elliott, for respondents: If he were entitled to separate bills against separate defendants the rule would have said so and the judgment would have said so. Argument

Lane, in reply: As to the word "party" see *Joyce* v. *Beall* (1891), 60 L.J., Q.B. 242 at p. 243.

Cur. adv. vult.

14th June, 1926.

MACDONALD, C.J.A.: The action was on a promissory note, against the maker and endorsers. Separate defences were set up, and the plaintiff in the action now claims that he is entitled to tax bills of costs against both defendants, and thus escape the limitation placed by Appendix N to the amount which may be taxable by "any party against any other party."

The appellant submits that Appendix N is *ultra vires* of the Rule makers, but this objection is without foundation. His substantial complaint is, as above, that he is entitled to tax distinct bills against each defendant. The judgment gives him the costs of the action against the defendants. The defendants are not complaining of that. There is no question such as that raised in *Hobson* v. *Sir W. C. Leng & Co.* (1914), 3 K.B. 1245 involved here. The plaintiff was allowed his whole costs, subject to the restriction imposed by Appendix N, and the costs have been taxed as costs following the event, as authorized by our statute. There is, therefore, no question of separate issues in the sense in which they were involved in *Hobson* v. *Sir W. C. Leng & Co., supra.* MACDONALD, C.J.A.

Appendix N is a new tariff of costs and declares:

"In all actions for liquidated amounts of money, damages, and other actions at common law, and for enforcement of all equitable remedies and all proceedings by way of appeal, there shall be taxable the amount set out opposite each respective tariff item in the columns hereinafter set out. That is to say:—"

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A list of tariff items is then set out with the amount taxable in respect to each according to the amount involved in the action. When the bill is taxed according to this tariff and the amount arrived at, it is reduced to the amount to which it is restricted by the tariff. If the amount recovered in the action be $3,000, or under, which is the case here, then the maximum amount of costs which shall be "taxable by any party against any other party" shall not in any event exceed the amount specified, which in this case is $350. The taxing officer held here that "any party" must be read collectively and that therefore the plaintiff could recover $350 only, and not up to $350 against each of the defendants. *Joyce* v. *Beall* (1891), 60 L.J., Q.B. 242, was the only authority to which we were referred which bears directly on the interpretation of the word "party" used in a rule requiring a deposit of £5 to meet the costs of discovery demanded by one "party." Vaughan Williams, J., Cave, J., agreeing, held that

"the mere fact that there are more plaintiffs than one, or more defendants than one, does not prevent the plaintiffs collectively from being 'a party,' or the defendants collectively from being 'a party'; nor do I think that the fact that the defendants sever their defence prevents the defendants collectively being a party where they are sued jointly in substance as well as in form. In order to ascertain whether two actions are being brought, it seems to me that you must look at the alleged cause of action. This seems to me the only case in which the collective plaintiffs and the collective defendants do not fall within the term 'party.'"

MACDONALD, C.J.A.

That language is equally applicable to this case. This action is one upon a promissory note, and is against the maker and endorser, separate defences were pleaded, but that does not change the plaintiff's cause of action, it is one cause only.

This conclusion is not affected by the many cases which in England as well as here, have been decided on the question of "separate issues." Any defendant may raise a defence different from that of his co-defendants, and if he succeed he may be entitled to the costs of it to be set off against the plaintiff's costs. That is a question not involved in this appeal, and is governed by *Strumm* v. *Dixon* (1888), 22 Q.B.D. 99, and many other cases decided since that case.

In the case at Bar, while several defences were set up none of them succeeded, and no claim is made by any defendant for costs of separate issues.

As pointed out in *Joyce* v. *Beall, supra,* there may be cases in which more than one cause of action are joined together, and in such cases it may not be proper to read the word "party" collectively, but this is not that case.

A further ground of appeal was taken founded on the fact that several interlocutory applications were heard in Chambers and the costs of them were disposed of by the Chamber judge ordering them to be paid forthwith, or in any event. These were costs in "an action"; interlocutory proceedings are in the action but the costs are costs which are not given by the judgment in the action. The tariff, however, does not confine the limitation to costs given by such judgment but declares that "in all actions" the costs shall be limited as aforesaid.

MACDONALD, C.J.A.

For these reasons I think that the registrar and the judge appealed from were right.

The appeal is dismissed.

MARTIN, J.A.: This appeal raises a question of the construction of the following paragraph in Appendix N, Tariff of Costs, 1925:

"In all actions in the Supreme Court of British Columbia to which the items in Columns 1, 2, and 3 in the above Tariff apply, the maximum amount of costs taxable by any party against any other party shall not in any event exceed the sums hereinafter set out, that is to say:"

The appropriate tariff therein to this case (the amount involved being under $3,000) is No. 3:

"In all actions or proceedings in the Supreme Court of British Columbia which have not been concluded by judgment in default of appearance or judgment in default of defence . . . . $350.00."

MARTIN, J.A.

with disbursements to be added thereto as defined by said Tariff.

It is submitted by the appellant (plaintiff) that in construing the expression "costs taxable by any party against any other party" regard must be had to the issues upon the record as raised by the pleadings, and though in this case the general order for costs in the judgment was "that the plaintiff do recover against the said defendants . . . . the sum of $2,086.81, together with his costs of this action against each of the said defendants to be taxed" yet because there were separate defences by separate solicitors on behalf of the two defendants each of said separate defendants must be regarded as being

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"against any other party" and therefore the plaintiff was entitled to bring in and tax a separate bill founded on each separate defence to the extent of $350 each, and not, as was taxed, one bill only of $350 as against all defendants in one common group; in other words, to put it still clearer, the expression "any party against any other party" does not mean the opposing groups in general in the hostile camps of plaintiff and defendant at large, but the particular parties who have by their proper pleadings put themselves in the position of being independent adversaries. I say by "proper pleadings" because the taxing master and the Court will look at the issues raised thereupon and consider them in the light of the circumstances to see if the defendants are entitled to sever, and if they are not will regard them as identical and defending jointly by right and in substance despite their severance upon the record, as to which view the decisions in England and Canada appear to be uniform: *cf., Stumm* v. *Dixon* (1888), 22 Q.B.D. 99; *Bagshaw* v. *Pimm* (1900), P. 148; *A. G. Spalding* v. *A. W. Gamage, Limited* (1914), 2 Ch. 405; *Conolly* v. *Hill* (1878), 7 Pr. 441; *Petrie* v. *Guelph Lumber Co.* (1885), 10 Pr. 600; *Melbourne* v. *City of Toronto* (1890), 13 Pr. 346; *Thompson* v. *Didion* (1894), 15 C.L.T. 16; and *Merchants Bank* v. *Houston* (1900), 7 B.C. 352, and it is said in *Ellingsen* v. *Det Skandinaviske Compani* (1919), 2 K.B. 567, that the practice in Chancery and at common law is the same. In the *Stumm* case, *supra,* the King's Bench Division said, *per* Lord Coleridge, C.J., p. 101:

MARTIN, J.A.

> "The point we have to decide is, whether, where two defendants have failed on the general cause of action, and are therefore properly liable to the general costs, and one defendant has, independently of the other, severed in his defence, and been beaten on his separate defence, the costs of this separate defence should be taxed against him alone. It is well established that if he had succeeded he would be entitled to recover them against the plaintiff alone. See Gray on Costs, p. 95, and the cases cited. It is conceded that if the defendants Dixon & Co. had succeeded on those issues they would be entitled to their costs without reference to Knight, who has failed on the general cause of action. It seems to follow by parity of reasoning that Dixon & Co., who have set up a distinct defence on which they have failed, should alone be liable for the costs of that in which they failed. It is right in principle, quite just, and borne out by analogy."

My late brother DRAKE, considered the exact point in *Mer-*

chants Bank v. *Houston, supra* (an apt reference for which I am indebted to our senior and most experienced registrar, his son), and as his judgment confirms the view I ventured to express during the argument and, as a concise statement of the practice, cannot be improved upon I quote it in full:

"The defendants separated in their defence. The judgment was for the plaintiff against all the defendants. The question now comes up on taxation of costs whether each defendant is liable for the whole of the costs incurred, or whether they have to be segregated in respect of the special costs occasioned by the act of each. I think the plaintiff is entitled to his costs of action against the defendants jointly, and that each defendant is liable separately for the costs occasioned by his defence, and that one defendant is not liable for costs solely occasioned by the other. The case of *Stumm* v. *Dixon* (1888), 22 Q.B.D. 99, is entirely applicable."

In the case before us it is conceded that the defences were properly severed; and I observe that not only do they set up distinct defences against the plaintiff but one defendant, Ross, also sets up "fraudulent scheme concocted by the plaintiff and the defendant Quickstad to obtain money from the defendant Ross without consideration." Surely it is "right in principle and quite just" as Lord Coleridge put it, that the costs of these separate defences should be taxed against him alone who sets them up, and, in my opinion, it follows that, as these are separate adversaries upon separate issues upon the record, the language in the tariff must be read in that light and "any party against any other party" taken, in such circumstances, to mean those adversaries who are properly severed and therefore "against" one another upon that record; and it further follows that the $350 limit applies to each of the separate defendants and not them both jointly.

MARTIN, J.A.

As to the costs of the interlocutory proceedings which are by the orders therein made directed "to go to such party as may be ordered" under item 7 of Appendix N, the question of their allowance depends upon the amount of their bill, but in any event if the limit of $350 (or as the case may be) is reached they cannot increase it: the practical result of this view upon the basis of separate bills in the present case will depend upon the respective taxations.

I have not overlooked the case of *Joyce* v. *Beall* (1891), 60 L.J., Q.B. 242, to which we were referred, but it is based on

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the essentially different language of a particular rule in different proceedings, and, after considering it carefully, I am unable to obtain any assistance from it either way.

The appeal should, I think, be allowed.

MCPHILLIPS, J.A. would dismiss the appeal.

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

Appeal dismissed, Martin, J.A. dissenting.

Solicitor for appellant: *John R. Green.*
Solicitors for respondent Ross: *Courtney & Elliott.*
Solicitors for respondent Quickstad: *Tait & Marchant.*

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SHEEPWASH v. DEER MOUNTAIN LUMBER CO. LTD.

Woodman's lien—Contract to do work—Labourers employed by contractor—Liens—Assignment—Proof of—R.S.B.C. 1924, Cap. 276; Cap. 135, Sec. 2(25).

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B. brought action for services in cutting and hauling logs and for enforcement of a woodman's lien filed in respect thereto and S. brought two actions of the same nature, one for his own services and a second as assignee of eleven workmen who had performed a like service. The defence was that B. was working as a contractor, that S. and the eleven workmen were employed by him and that there was no proof of the assignment to S. The actions were consolidated for trial and it was held by the trial judge that with the exception of S.'s claim on his own behalf the actions to enforce the lien failed but that the plaintiffs were entitled to judgment for services rendered in the three actions.

Held, on appeal, reversing the decision of MCINTOSH, Co. J., that there was evidence from which it should be inferred that B. was working under a contract with the Company and that the twelve workmen were employed by him and they had no right of action against the Company.

Per MARTIN, J.A.: As to S.'s claims as assignee of eleven workmen, they cannot be allowed because of absence of necessary legal proof of the assignment or of notice thereof which must be strictly proved if traversed. The decision in *Dempsey* v. *Kurek* (1923), 3 W.W.R. 1007, holding that in actions of this kind for wages the provisions of section

2(25) of the Laws Declaratory Act respecting "absolute assignments" of "any debt or other legal chose in action" do not apply, cannot be affirmed.

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APPEAL by defendant Company from the decision of McINTOSH, Co. J. of the 7th of May, 1925, in three actions for the balance of moneys owing by the said Company for services rendered in logging operations, liens having been filed by the plaintiffs for the sums claimed under the Woodmen's Lien for Wages Act. The first action was brought by W. D. Sheepwash for $191.67 for his own services, the second by W. D. Sheepwash for $623.79, as assignee of eleven workmen for wages earned by them, and a third by Abraham A. Dougan for $287.50 for services rendered by him as a logger. The actions were consolidated by consent and tried together. The defence was that the Company had contracted with Dougan for performance of the work in question and that he employed Sheepwash and those from whom Sheepwash had obtained assignments to do the work. The learned trial judge held that the proceedings by way of lien had failed as they had not complied with the statute in essential particulars but held that the alleged contract with Dougan had not been executed by the Company and the logging operations were actually in charge of the secretary of the Company who took on and discharged men and directed operations. He gave judgment for the plaintiff against the Company for services rendered in the first action for $191.28, the second for $499.28 and in the third for $287.50.

Statement

The appeal was argued at Victoria on the 22nd and 23rd of June, 1925, before MACDONALD, C.J.A., MARTIN and MACDONALD, JJ.A.

H. W. R. Moore, for appellant: The Company had a contract with Dougan to cut timber, and he worked from the 5th of April to the 15th of May. The Company could not pay him and he sued for wages. If he is a contractor he is not entitled to wages. The other wage-earners with the exception of two men working on the donkey-engine were hired by the contractor and they are not entitled to judgment against the Company. There is nothing to shew where the operations were carried on, and there was no proof of the assignment.

Argument

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J. R. Green, for respondent: There is no proper denial to section 4 of the dispute note setting out particulars of the lien, and defendant agreed that the lumber would not be moved. As to the liens and compliance with the Act see *Douglas* v. *Mill Creek Lumber Co.* (1923), 32 B.C. 13 at p. 19; *Dillon* v. *Sinclair* (1900), 7 B.C. 328; *Dempsey* v. *Kurek* (1923), 3 W.W.R. 1007; *Muller* v. *Shibley* (1908), 13 B.C. 343; *Ross* v. *McLean* (1921), 1 W.W.R. 1108; *Desantels* v. *McClellan* (1915), 7 W.W.R. 1221; *Stephens* v. *Burns* (1921), 30 B.C. 60; *McDonald* v. *Brunette Saw Mill Co.* (1922), 31 B.C. 77; 5 C.E.D. 533. The trial judge gave his judgment on a *quantum meruit* and his findings of fact are in our favour and should not be disturbed. As to the alleged contract it was not executed: see *Powell* v. *Lee and others* (1908), 99 L.T. 284; *Eliason* v. *Henshaw* (1819), 4 Wheat. 225 (see Anson on Contracts, 15th Ed., 38); *Mackay* v. *City of Toronto* (1917), 39 O.L.R. 34; on appeal (1918), 43 O.L.R. 17 and (1920), A.C. 208.

Argument

Moore, replied.

Cur. adv. vult.

13th October, 1925.

MACDONALD, C.J.A.: The plaintiffs' claims are for wages owing by defendant. They also claim liens therefor on logs and lumber produced by them.

The defence to the claims for wages was a denial, and it was proved, with deference to the County Court judge, that in respect of these wages the workmen were the employees of one Dougan, a contractor. As the lien statements do not comply with the requirements of the Woodmen's Lien for Wages Act in case of wages due from a contractor, the learned County judge was right in disallowing them.

MACDONALD, C.J.A.

I am loath to reverse a trial judge's findings of fact, but in this case there is so much support to the defence given by the workmen themselves—so much evidence from which it ought to be inferred that they were the employees of Dougan, that I am forced to the conclusion that the appeal must be allowed.

MARTIN, J.A.: The view I take of this complicated and confused case is, first, as to Dougan's claim; that he was working as an independent contractor, under a contract of the 4th of

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April, 1924, with the defendant Company which, as he sets up in his plaint, paragraph 2, was "at all material times . . . . the owner of the sawmill and timber limits" in question, and this allegation was admitted in paragraph 1 of the dispute note: if, as is now alleged, the Company was not then incorporated so as to be able to make a valid contract that only leaves him in a still worse position because he was not authorized by any one to do anything for the Company he is now suing.

Second, as to Sheepwash's personal claim: I understood Mr. *Moore* to say he did not now dispute the balance due him of $22.93.

Third, as to Sheepwash's claims as assignee of eleven workmen claiming "for work and labour," *viz.*, logging: I am of opinion that they cannot be allowed because there is an absence of the necessary legal proof of the assignment or of notice thereof, which as Odgers on Pleading, 8th Ed., says, p. 478, "must be strictly proved" if traversed; this objection, taken both here and below, was not met by the necessary evidence. I observe that in the case of *Dempsey* v. *Kurek* (1923), 3 W.W.R. 1007, there is a misunderstanding on the part of the learned County judge of the effect and *ratio* of the decision of the old Full Court (in which I took part) in *Wake* v. *Canadian Pacific Lumber Co.* (1901), 8 B.C. 358, upon section 27 of the Mechanic's Lien Act, Cap. 132, R.S.B.C. 1897, which gives to a workman a right of action by way of penalty against any person making certain payments without the production of the pay-roll as required by section 26, which is the same special statutory cause of action that was before me in *Dillon* v. *Sinclair* (1900), 7 B.C. 328, and it has no application to those claims "due for the labour or services" (section 3) as wages under sections 4 and 5 of the present Woodmen's Lien for Wages Act, Cap. 276, R.S.B.C. 1924, and for which the County Court is empowered to give a judgment "for wages . . . and costs" by section 8 thereof. The decision, therefore, in *Dempsey's* case, *supra*, that in actions of this kind for wages the provisions of section 2(25) of the Laws Declaratory Act, Cap. 135, R.S.B.C. 1924, respecting "absolute assignments" of "any debt or other legal chose in action" do not apply, cannot, with all respect, be affirmed: we were not referred to any section of the

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Woodmen's Act, which would take the case of assignees of claims thereunder (section 32) out of the ordinary rules of proof of their right or title under such assignments: an alleged assignee cannot be "duly authorized" to make the required verified statement under section 4, unless he holds a valid assignment.

With respect to the alternative submission that a contractor who works himself is a "person performing any labour or services" within the meaning of sections 2 and 3, I can find nothing to support such a view; on the contrary, the special provision in section 8 that the Court in its "judgment shall declare that the same is for wages, the amount thereof and costs," etc., directly negatives such an intention, which is, moreover, foreign to the whole spirit of the Act.

MARTIN, J.A.

The result is that the appeal should be allowed with costs, save as to Sheepwash's said personal claim. Such being my view, I do not consider in detail the other very serious objection that the "sawn timber" in question having been lawfully "sold in the ordinary course of business" before the trial, under the exception in section 6, it would be futile to make any declaration respecting liens thereupon which ceased to exist as soon as such authorized sale took place; it is sufficient to say that it would not only be "futile" but legally impossible for us to so declare a lien to exist after the statute itself had terminated it as the direct result of said sale authorized thereby.

MACDONALD, J.A.

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

Appeal allowed.

Solicitor for appellant: *H. W. R. Moore.*
Solicitor for respondent: *John R. Green.*

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Criminal law—Interdicted person—Liquor in her possession—Conviction—Appeal—Order made without evidence of excessive drinking—Nullity—R.S.B.C. 1924, Cap. 146, Sec. 66, Subsecs. (1) and (2).

A chief of police having previously made an interdiction order against the accused laid an information against her for having liquor in her dwelling-house being an interdicted person. Upon conviction an appeal was taken to the County Court judge who found that the interdiction order was made without any evidence of excessive drinking but as the order was made it had to stand and he was forced to dismiss the appeal.

Held, on appeal, reversing the decision of THOMPSON, Co. J. (MARTIN and MACDONALD, JJ.A. dissenting), that the requirements of section 66 of the Government Liquor Act are obligatory and as the chief of police admitted there was no evidence of excessive drinking by the accused the interdiction order was made without jurisdiction. The Court was not bound by the order and the conviction should be set aside.

APPEAL by accused from the decision of THOMPSON, Co. J. of the 12th of February, 1926, dismissing an appeal from the conviction of Mary Grant by the police magistrate at Cranbrook on the 14th of January, 1926, on a charge of being an interdicted person did have liquor in her dwelling-house contrary to section 66(2) of the Government Liquor Act. The accused had been previously convicted for selling beer and on the 22nd of September, 1925, the chief of police at Cranbrook made an interdiction order against her. On the 30th of November, 1925, the chief of police laid an information against her that on the previous day she had liquor in her dwelling-house, being an interdicted person. On the 16th of December, 1925, on the application of Mary Grant the interdiction order was set aside by the County Court judge. On the appeal from the conviction although the judge was of opinion that there was no ground upon which the interdiction order should ever have been made, he concluded that as it was made there was no other course for him than to dismiss the appeal.

Statement

The appeal was argued at Vancouver on the 23rd and 25th of March, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

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W. C. Ross, for appellant: The interdiction order was improperly made. The finding of the judge strikes at the root of the whole matter. Her conviction should be set aside: see *Reg.* v. *Charles Mount* (1899), 3 Can. C.C. 209; *McLeod* v. *Noble* (1897), 28 Ont. 528; *Rex* v. *Young Kee* (1917), 37 D.L.R. 121 at p. 126; *Rex* v. *Wilhelmina Davis* (1922), 31 B.C. 453.

Argument

Prenter, for the Crown: She had previously been convicted of selling liquor and the evidence shews that women were resorting to her house for the purpose of obtaining liquor. The cases referred to do not apply as the point is the order for interdiction was there when the conviction was made.

Ross, replied.

Cur. adv. vult.

14th June, 1926.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appellant Mary Grant was interdicted by order of the chief of police of the City of Cranbrook, under the authority of section 66 of the Government Liquor Act. Thereafter, being an interdicted person, she was found to have liquor in her possession contrary to subsection (2) of said section 66, and was convicted by a magistrate on that charge. She appealed to the County Court but her appeal was dismissed, the learned County Court judge holding that because of the existence of the interdiction order, he was estopped from granting relief to which he thought she was entitled. From that dismissal she appealed to this Court.

The question in appeal really hinges upon whether or not the order of interdiction was a nullity. Said section 66(1) enacts that:

> "Where it is made to appear to the satisfaction of any interdiction official . . . . that any person . . . . by excessive drinking of liquor, misspends, wastes, or lessens his estate, or injures his health, or endangers or interrupts the peace and happiness of his family, the interdiction official may make an order of interdiction directing the cancellation of any permit held by that person, and prohibiting the sale of liquor to him until further order."

The chief of police was such official. The only evidence of what was made to appear to him is contained in his own statement in the witness box, which is as follows:

> "The appellant Mary Grant was convicted a few days prior to the issuing

of this order [the interdiction order] of selling beer and I had;—the magistrate at that time expressed the opinion that we should cancel her permit. She said her permit was lost. I also had complaints that certain married women were obtaining liquor at her house and coming home drunk. In view of these circumstances I considered it right and proper to have her interdicted."

It was admitted by the chief of police on the appeal to the County Court that he afterwards discovered that there was no ground upon which his order could be sustained. If, therefore, the said order was a nullity, that is to say, made without jurisdiction or power on his part to make it, there is no obstacle to relief.

It appears to me that it was a condition to the exercise of the power given to the chief of police that it should be made to appear to him in some way whether by writing, or oath, or by oral statement or from his own knowledge that this woman by excessive drinking of liquor brought about the injuries mentioned in the section. Now, there is no pretence that any such thing was made to appear in any form or manner to him. In Craies on Statute Law, 3rd Ed., it is laid down as a general rule that statutes which enable persons to take legal proceedings under certain specified circumstances, must be accurately obeyed notwithstanding the fact that their provisions may be expressed in mere affirmative language; that when a statute confers jurisdiction upon a tribunal of limited authority, and statutory origin, the conditions and qualifications annexed to the grant must be strictly complied with, and it is pointed out that even in respect of Acts by which the writ of *certiorari* is taken away, that no justice of the peace can increase his limited jurisdiction by finding facts which do not exist.

MACDONALD, C.J.A.

The defect in the order of interdiction does not appear on its face but it does appear from the evidence of the chief of police himself, and this evidence is admissible to shew want of jurisdiction. *Reg.* v. *Bolton* (1841), 1 Q.B. 66. Where these requirements are obligatory and have not been observed no valid order can be made. In *The Liverpool Borough Bank* v. *Turner* (1860), 30 L.J., Ch. 379 at pp. 380-1, Lord Campbell said:

"No universal rule can be laid down . . . . as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the Legislature."

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And Lord Penzance, in *Howard* v. *Bodlington* (1877), 2 P.D. 203 at p. 211, said:

"I believe, so far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect, decide whether the matter is what is called imperative or only directory."

In my opinion there can be no doubt that the language used in section 66 is obligatory. It is not a matter of procedure. What is required is knowledge of the very gist and substance of the offence to which the power is directed. That the Court is not bound by an order made without jurisdiction has been decided by this Court in *Hannah* v. *Costerton* (1918), 26 B.C. 347, where the following quotation from the judgment of the Privy Council, in *Toronto Railway* v. *Toronto Corporation* (1904), A.C. 809, is made. The Privy Council said (p. 815):

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"The order of the Court of Appeal of June 28, 1902, was not, therefore, the decision of a Court having competent jurisdiction to decide the question in issue in this action, and it cannot be pleaded as an estoppel."

I would set aside the conviction with the usual protection to the magistrate.

MARTIN, J.A.: This is an appeal from the judgment of THOMPSON, Co. J. of East Kootenay affirming, on an appeal to him under the Summary Convictions Act, the conviction, by a magistrate, of the appellant, on the 14th of January, 1926 (on an information laid on the 30th of November previous), for having liquor in her possession at a time (29th of November, 1925) when she was interdicted from so having it under an order made by the chief of police of the City of Cranbrook on the 22nd of September, 1925, pursuant to the powers conferred upon him by section 66 of the Government Liquor Act, Cap. 146, R.S.B.C. 1924. The situation is unusual in this respect, *viz.*, that the said interdiction order had been set aside on the 16th of December, 1925, on an appeal taken (on the 2nd of December) to the same County Court judge, so that at the time of the conviction no interdiction order was in existence, though it was existing at the time the offence was committed on the said 29th of November, 1925, and when the information was laid on the following day.

MARTIN, J.A.

The submission of appellant's counsel is that the conviction should be set aside because at the time it was made there was no interdiction order, but the view taken by the learned judge as set out in his reasons is that since there was an ostensibly valid order at the time of the commission of the offence the subsequent setting aside of it did not impair the validity of a conviction based upon it. The situation is complicated by the fact that there is no appeal from the special power conferred upon the County Court judge as *persona designata* to review the special power conferred upon the chief of police to make such orders "where it is made to appear to his satisfaction" that a certain situation exists as therein specified. In the present case the interdiction order is in all respects valid on its face and therefore, cannot, beyond doubt, according to the authorities, be regarded as a nullity, and it was not claimed so to be by counsel, and so the case of *Reg.* v. *Charles Mount* (1899), 3 Can. C.C. 209 on an Ontarian statute of the same nature, but in different language, has no application, and furthermore that was a case of *certiorari*, which this is not, and the so-called order there was only a "mere note or memorandum."

MARTIN, J.A.

Here the ground for making the order is properly recited therein as being "by excessive drinking of liquor . . . . endangers or interrupts the peace and happiness of her family": the interdicted person is a woman of about seventy with two adult sons who make their home with her when in Cranbrook and have liquor permits of their own, and a few days before the making of the order she had been convicted of a violation of the said Act by selling beer and complaints had been made to him of married women being made drunk by obtaining liquor at her house, and keepers of disorderly houses had been seen resorting there by the chief of police himself. It is obvious that a very wide latitude is intended to be given to the said words "appear to the satisfaction," etc., and a corresponding discretion is conferred upon the proper officer which should not be disturbed unless in a case clear beyond all question. The amount of drinking that would be "excessive," so as to injure the health of a person or endanger the peace and happiness of his family obviously depends upon so many and ever varying circumstances of physical condition, age, environment, etc.,

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that it would be impossible to anticipate them, but the shameful spectacle of a tippling, dissolute and law-breaking mother would be a strong ground for supporting an order.

Upon the appeal from such an order to the County Court judge as provided by section 69 the judge could and would properly take all relevant evidence upon the point, not only that which was before the chief of police below, but any additional evidence, the consequence being that while that officer might and would be fully justified in making such an order at the time he was exercising his powers he might not feel "satisfied" to do so upon the additional evidence that the appeal to the County judge had been the means of bringing forth.

It is also to be observed that the judge has a power of reversal upon a special ground, *viz.*, that apart from any injury to the health or danger to family peace caused by excessive drinking, he may set aside the order "upon proof that the interdicted person has refrained from drunkenness for at least twelve months immediately preceding the" appeal. This is a peculiar provision with peculiar consequences, because a person may be injuring his weak state of health by what would be a relatively moderate indulgence in the case of a robust person, and yet never become "drunk" while so doing even though his own drinking was "excessive" in the statutory consequences it entailed.

MARTIN, J.A.

What, in fact, was the evidence before either the chief of police or the learned judge to establish their respective "satisfactions" was a matter wholly irrelevant to, at least and in any event, the opening by the Crown of the charge against the appellant of unlawfully having liquor while so interdicted, either before the convicting magistrate or the judge, and upon the appeal from the conviction on that charge the judge properly stopped the prosecuting counsel from going further into the matter, but unfortunately, if I may say so with respect, in his reasons he himself goes into it and refers to the action of the chief of police in issuing the order as being "absolutely foolish," an observation which, I think, should be entirely disregarded because the complete evidence on that point was not before him on that occasion, nor is it before us, though I do not wish it to be understood that my opinion is against the view

that it was open to the said nominated officer on the facts and circumstances before him to draw the inferences necessary to support his order: I simply do not pass upon that point as being, in the circumstances, not open for consideration.

The present difficulty has arisen from the fact that upon the said prosecution (the subject of this appeal) the said counsel, instead of relying upon the *ex facie* valid interdiction order in support of the charge, proceeded to give evidence to shew that, as he said, "there was absolutely no malice on the part of the chief of police in making this order," whereupon the judge properly ruled out further evidence of the kind and hence the matter was left in an incomplete and indeterminate state; as I read the evidence of the chief of police, as a whole, in that unsatisfactory state on that point, it means, so far as it was permitted to go, nothing more than that though he was originally satisfied of the propriety of his order yet the evidence (unknown to us) taken on the subsequent appeal caused him to change his view out of deference to the ruling of the County Court judge: and it is to be noted that the defendant's counsel accepted the ruling of the judge and asked no questions and called no evidence upon the point.

MARTIN, J.A.

In such circumstances I am of opinion that it is not open to us any more than it was to the learned judge below, to hold, on these proceedings, that the interdiction order was not a proper one when originally made, and we cannot tell what the reason was for its being set aside by him because the proceedings of that special tribunal in which the judge sat as a *persona designata* are not before us, and he was not, with all respect, at liberty to incorporate that special knowledge which he acquired in that extraordinary tribunal into these ordinary proceedings.

In considering special proceedings under special tribunals many situations arise which it is difficult to pass upon in an entirely satisfactory way because they are unknown to the law and so it is often difficult, if not impossible, to solve them upon established principles with which they are not in accord: here, *e.g.*, it is impossible in the circumstances to regard the original order after its reversal as being in the same position as an ordinary judgment as to which it was said in *Regina* v. *Drury* (1849), 3 Car. & K. 193, at p. 199, a "judgment reversed is the

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same as no judgment; upon a record without any judgment, no punishment can be suffered," and the learned judge below rightly took that view of the matter in refusing to set aside the conviction on that ground, which was the ground upon which the defendant's counsel solely relied before him on the point of the jurisdiction of the officer to make the order, and hence it was not, in fact, an issue that was raised or tried out before the Court below, nor is it one before us, assuming it was open to the defendant to raise it below, if so disposed, and so go behind the order, as to which I express no opinion because in the circumstances it is unnecessary, contenting myself at present by referring to the recent decision of the Privy Council in *Rex* v. *Nat Bell Liquors, Ld.* (1922), 2 A.C. 128; (1922), 2 W.W.R. 30; wherein their Lordships correct some "clearly erroneous" views respecting attacks upon the jurisdiction of magistrates even by those ordinary methods which are absent here.

MARTIN, J.A.

The result is that upon the record before us, and after rejecting, for the reasons aforesaid, all evidence relating to the making and reversing of said interdiction order, it is impossible to say that it was not a valid order at the time the offence charged was committed, whatever might have been the case at a later date, and it is a fair inference to draw from what is before us that there was, in fact, additional evidence before the judge upon the appeal to him from that order.

It follows that the appeal should be dismissed.

GALLIHER, J.A.: The first question that confronts us is, Was there a condition precedent to the giving the chief of police jurisdiction to cancel the permit and make the order of interdiction? He is given power to make the order if in the language of the statute, section 66 of Cap. 164, R.S.B.C. 1924, it is made to appear to him that any person resident in the Province by excessive drinking of liquor, misspends, wastes or lessens his estate or injures his health or endangers or interrupts the peace and happiness of his family.

GALLIHER, J.A.

The order recited that it was so made to appear to him as to endangering the peace and happiness of her family. The order was dated 22nd September, 1925.

Upon application to the County Court judge of East

Kootenay the interdiction order was set aside on the 16th of December, 1925. Between the time of the making of the order and its setting aside the appellant was charged that on the 29th of November, 1925, she then being an interdicted person, kept liquor in her dwelling-house and was convicted on the 14th of January, 1926, though the interdiction order had, between the date of the charge and the conviction, been set aside. This conviction was appealed to the said County Court judge and the appeal was dismissed. It is from this order that the appeal is taken to us.

If there was no jurisdiction in the chief of police to make the order of interdiction it was a nullity and the question is, can we look at anything beyond the order itself to ascertain this? If the chief of police was vested with jurisdiction, then, though he exercised that jurisdiction wrongly, I take it we could not, the order being regular on its face and setting out reasons which warranted its making. But if, on the other hand, it was a condition precedent to his having jurisdiction at all, that a certain state of things existed as set out in the statute, then I think we are entitled to look at anything in the way of admissions made by the police officer himself for the purpose of ascertaining whether such jurisdiction existed or not.

GALLIHER, J.A.

I think the statute makes it a condition precedent and we have before us the evidence of the chief of police in these words:

"Will you state briefly the reason which led you to make that order? The appellant, Mary Grant, was convicted a few days prior to the issuing of this order, of selling beer and I had;—the magistrate at that time expressed the opinion that we should cancel her permit. She said her permit was lost. I also had complaints that certain married women were obtaining liquor at her house and coming home drunk. In view of these circumstances I considered it right and proper to have her interdicted."

I would allow the appeal.

MCPHILLIPS, J.A.

McPhillips, J.A. would allow the appeal.

MACDONALD, J.A.

Macdonald, J.A.: Counsel for the appellant contended that the conviction was invalid because it was based upon an interdiction order made by the chief of police for the City of Cranbrook, on the 22nd of September, 1925, under section 66 of the Government Liquor Act, Cap. 146, R.S.B.C. 1924, afterwards set aside by Thompson, Co. J. on the 16th of December, 1925,

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under section 69 of said Act. The fact, however, that it was subsequently set aside would be immaterial, as the offence was committed before it was cancelled. The question has been raised, however, as to whether or not the interdiction order was made without jurisdiction in the first instance, and was therefore a nullity. That point in my view can not be raised on this appeal.

As stated, the conviction complained of was made after the interdiction order was set aside but for an offence committed while it was in force, *viz.*, that on the 29th of November, 1925, the appellant being an interdicted person, kept liquor in her dwelling-house. On this charge she was found guilty by the police magistrate and fined $200. On appeal to the County Court the conviction was sustained, hence this appeal.

It is now suggested that the interdiction order was invalid because there was no evidence before the chief of police to shew that the appellant

"by excessive drinking of liquor, misspends, wastes, or lessens his estate, or injures his health, or endangers or interrupts the peace and happiness of his family."

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The interdiction order *ex facie*, however, shews that it was made because it appeared to the satisfaction of the chief of police that the appellant "by excessive drinking of liquor endangers or interrupts the peace and happiness of her family." That order was filed on the hearing of the appeal to the County Court judge, but instead of resting upon it counsel for the Crown, notwithstanding objection by the Court, elicited evidence to shew the circumstances under which it was made and the facts supporting it. The chief of police testified that when he made the order he was honestly of the opinion that he had sufficient grounds, but admitted that afterwards he found that he had not. I take it he makes this admission because the order was subsequently set aside. He also states that he made the order because she was convicted a short time before for selling beer and complaints were made that certain married women were obtaining liquor at her house and coming home drunk and that keepers of disorderly houses visited the place. Whether or not these facts justified the order we are not, in my view, at liberty to inquire. The production of the interdiction order was conclusive. Even

if it were permissible to go behind the order I would still not regard it as a nullity. Certain facts were known to the interdiction official. It is true that these facts do not necessarily shew that the appellant "by excessive drinking" wasted her estate or interrupted the peace and happiness of her family. The facts proven might exist without appellant herself indulging in strong drink at all. But the chief of police may draw his inferences from the evidence before him, and although in our view they may not warrant the inference or the order made, it does not follow that he had no jurisdiction to make it. I refer to the judgment in *Rex* v. *Nat Bell Liquors, Ld.* (1922), 2 A.C. 128 at pp. 151-2 ((1922), 2 W.W.R. 30 at p. 50), where Lord Sumner says:

"It has been said that the matter may be regarded as a question of jurisdiction, and that a justice who convicts without evidence is acting without jurisdiction to do so. Accordingly, want of essential evidence, if ascertained somehow, is on the same footing as want of qualification in the magistrate, and goes to the question of his right to enter on the case at all. Want of evidence on which to convict, is the same as want of jurisdiction to take evidence at all. This, clearly, is erroneous. A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not. How a magistrate, who has acted within his jurisdiction up to the point at which the missing evidence should have been, but was not, given, can, thereafter, be said by a kind of relation back to have had no jurisdiction over the charge at all, it is hard to see. It cannot be said that his conviction is void, and may be disregarded as a nullity, or that the whole proceeding was *coram non judice*."

MACDONALD, J.A.

These observations are equally applicable in this case. Under section 66, it is not a condition precedent to jurisdiction that the facts disclosed must conclusively shew "excessive drinking," etc. If the facts in evidence satisfy the interdiction official he can make the order. It, of course, may be set aside by a judge of the County Court.

I would dismiss the appeal.

Appeal allowed, Martin and Macdonald, JJ.A., dissenting.

Solicitor for appellant: *W. R. Ross.*
Solicitor for respondent: *Nisbet & Graham.*

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COMMERCIAL PACIFIC CABLE CO. v. THE PRINCE ALBERT

COMMERCIAL PACIFIC CABLE COMPANY v. THE PRINCE ALBERT.

Admiralty law—Exchequer Court in Admiralty—Jurisdiction—Tort on high seas—Submarine cable—Damaged by ship's anchor—Arrest of ship in Canadian waters.

The Exchequer Court of Canada in Admiralty has jurisdiction to entertain an action against a ship arrested in Canadian waters for a tort committed on the high seas.

The Ship "D. C. Whitney" v. St. Clair Navigation Co. (1907), 38 S.C.R. 303 distinguished.

The plaintiff being the licensee or bailee of a submarine cable and in sole control thereof is entitled to damages for injury done to the cable by the defendant ship's wrongful use of it for deep sea anchorage.

Statement

CONSOLIDATED ACTIONS for damages for injuries sustained by the plaintiff's submarine cable by reason of the defendant ship on two separate occasions anchoring thereto some distance off the California coast thereby causing it to break and become inefficient. Tried by MARTIN, Lo. J.A. at Vancouver on the 3rd of January, and 5th and 6th of February, 1925.

Mayers, for plaintiff.

McPhillips, K.C., and *Maitland*, for defendant.

6th April, 1925.

Judgment

MARTIN, Lo. J.A.: These are two consolidated actions for damage amounting to $191,000 done to the plaintiff's submarine trans-Pacific (Honolulu) cable by the defendant ship in November, 1923, and again in January, 1924, on the high seas about 26 miles off Montara Point (near San Francisco) south of the Farallon Islands, California, by knowingly and wrongfully anchoring the said ship thereto and thereby causing it to break or become inefficient. The plaintiff Company is a foreign corporation, resident in the United States, and the ship was arrested within the jurisdiction (in this port) to answer said claim for damages, but it is objected *in limine* that in such circumstances this Court has no jurisdiction to entertain such an action.

The defendant's counsel supports his submission by the decision of the Supreme Court in *The Ship "D. C. Whitney"* v. *St. Clair Navigation Co.* (1907), 38 S.C.R. 303, but in that case the vessel was arrested not in Canadian waters in the ordinary sense but in the Detroit river when lawfully navigating its waters pursuant to international rights specially conferred by article vii. of the Ashburton Treaty of 1842 between Great Britain and the United States and hence Mr. Justice Davies said (Maclennan and Duff, JJ. concurring) p. 309:

"I do not think that the 'D. C. Whitney,' a foreign ship, while sailing from one port of a foreign country to another port of that country and passing through, in the course of her voyage, one of the channels declared by convention or treaty to be equally free and open to the ships, vessels and boats of both countries, can be said to be within any jurisdiction conferred on any Canadian Court by the sovereign authority in the control of the Dominion of Canada, even though that channel happened to be Canadian waters."

And at p. 311:

"Jurisdiction only attaches over the *res* when it comes or is brought within the control or submits to the jurisdiction of the Court and not till then. Such jurisdiction does not exist against a ship passing along the coast in the exercise of innocent passage or through channels or arms of the sea which, by international law or special convention, are declared free and open to the ships of her nationality, unless expressly given by statute. I do not think it is possible successfully to argue that the right to initiate an action, make affidavits and issue a warrant, can exist before the foreign ship even comes within our territorial jurisdiction."

Judgment

Being of this opinion the Court declined (p. 310) to entertain any discussion as to the alleged "limited character of the Admiralty jurisdiction conferred upon the Exchequer Court of Canada" as that question did not arise for adjudication. Mr. Justice Idington, who dissented, based his judgment upon the ground that in fact that part of the river's channel in which the ship was navigating was Canadian territory to such an extent that, p. 320, "we can suppose this arrest of the appellant to have taken place on the Thames in England," and therefore the Court had jurisdiction over the *res* being arrested within its jurisdiction. At p. 324 the learned judge, after a review of several leading authorities, says:

"This case rests upon the maritime lien that arises from a collision and attaches to the offending vessel by virture of such collision and the resulting damages in favour (to the extent thereof) of the owners of the innocent and damaged vessel. Wherever the offender goes, she is subject to that

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lien, and it becomes the duty of the Court having such right to enforce a lien of that kind whenever the offender comes within its jurisdiction, upon being applied to, to take steps to enforce the lien. To refuse it would be a denial of justice. Yet questions might in the exercise of such jurisdiction so arise that a proper discretion might lead to refusal to exercise it."

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The exact question raised in the Supreme Court upon the effect of the Ashburton Treaty was, apparently, not raised in the Court below (the Toronto Admiralty District of this Court) because that Treaty is not mentioned by the learned judge in his reasons—(1905), 10 Ex. C.R. 1—and he deals with his jurisdiction in the light of many authorities, upon the broad ground that where a tort is committed by any ship in foreign waters or upon the high seas it is answerable for that tort in any Court of Admiralty in whose jurisdiction it may be found even if the action is between foreigners, and concludes thus, p. 8:

"I must therefore hold that this Canadian Court of Admiralty, having the same jurisdiction over the like places, persons, matters, things as the High Court of Admiralty in England, has jurisdiction to try the maritime question of collision raised by the pleadings in this case."

Judgment

To the cases cited by my learned brother, I think it only necessary to add *The "A. L. Smith" and "Chinook"* v. *Ontario Gravel Freighting Co.* (1915), 51 S.C.R. 39, and the very recent one of *The "Jupiter"* (1925), 69 Sol. Jo. 347, a decision on disputed possession by Lord Merivale (affirmed on appeal, 94 L.J., P. 59; (1925), P. 69), wherein he is thus reported:

"He said that the subject-matter of the action—a ship lying in an English port—was a subject-matter over which that Court had jurisdiction, and although the Court had a discretionary power to refuse jurisdiction in an action between foreigners as to the ownership of a foreign vessel, he did not think that the present case was one in which he ought so to refuse jurisdiction."

The defendant's counsel laid much stress upon the words "subject to the provisions of this Act" in section 2(2) of the Colonial Courts of Admiralty Act, 1890, Cap. 27, as in some way reducing the jurisdiction of this Court below that of the "High Court of England" which it is declared to possess "in like manner and to as full an extent" as, and sections 3 and 4 of the Canadian Admiralty Act of 1891 (Cap. 141, R.S.C. 1906) are referred to and it is submitted that their effect is to "limit territorially or otherwise the extent of such [High Court] jurisdiction" as may be done under section 3 of the Act of 1890.

A careful consideration of these sections does not, however, in my opinion, support this view, and the expressions in said sections of our Canadian Act "within Canada," and "throughout Canada and the waters thereof," etc., do not limit this Court's jurisdiction to those merely domestic matters which with all their attendant circumstances arise within Canada's borders: such a view is moreover at complete variance with the concluding direction in section 2(2) that the newly established Canadian Court "shall have the same regard as that [High] Court to international law and the comity of nations." The correct view of the effect of the said statutes is, I think, that taken by Idington, J., in the *"D. C. Whitney"* case, *supra,* p. 319:

"The jurisdiction of the Court must be exercised within Canada. Again it must be exercised throughout Canada and the waters thereof. These terms designate the place within which the jurisdiction is to be exercised; and the place within which the appellant came and was seized clearly and indisputably was within the area thus designated. That by no means implies that the offences or the contract out of which the necessity for proceedings may arise, *in rem* or *in personam*, must have taken place within Canada or upon the waters thereof."

And at p. 320:

"It seems to me as if to all intents and purposes the result is just the same as if the Parliament and sovereign power that enacted the Colonial Courts of Admiralty Act, 1890, had constituted the Canadian Court a branch of the High Court in England, for convenience sake, to exercise the powers which that Court might at the time of the passing of the Act have been endowed with."

Judgment

In this Court the jurisdiction now questioned has been exercised in several cases for over twenty years to my knowledge and no good reason has been shewn in this case for discontinuing to do so.

Turning, then, briefly to the facts, it is sufficient to say that I have no doubt that the defendant ship wilfully caused the serious injury complained of to the cable by improperly using the same as a deep sea anchor in a place and manner contrary to all rules of good seamanship with the object of keeping herself in a favourable position off the California coast for the purpose of smuggling liquor into the United States, and I regret to say that, in essentials, I can place no reliance upon the very unsatisfactory evidence of the principal witnesses on her behalf, and in particular her master, J. F. Nichol. What was done was, in short, an extraordinary and reprehensible abuse of the rights

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of navigation, and where a ship is found conducting itself in the unprecedented and unseamanlike way this vessel was doing it has itself to blame if its more than suspicious conduct makes it difficult for it to establish clearly the propriety of such actions.

The damage done here was not occasioned by the lawful endeavour to make a port in the usual course of navigation but in the attempt to keep a fixed position on the high seas away from a port with the object of thereby assisting in the unlawful importation of goods into a foreign country.

Objection was also taken to the right of the plaintiff Company to maintain this action, but at the least it is the licensee or bailee of the cable and in sole control and operation thereof and in such circumstances that possession would be sufficient to found an action for damage thereto of the nature disclosed by the facts before me—*The Clara Killam* (1870), L.R. 3 A. & E. 161; *Glenwood Lumber Company* v. *Phillips* (1904), A.C. 405, 410; *The Swift* (1901), P. 168; *The Winkfield* (1902), P. 42; and *The Zelo* (1922), P. 9. In the first case, which was the first one of this description in the Admiralty Court, Sir Robert Phillimore said, p. 165:

Judgment

"I must consider that this telegraph cable was lawfully placed at the bottom of the sea, and in the spot where it received the injury. I must also consider that the vessel which did the injury to it was in the exercise of her right both in navigating the surface of the sea, and in dropping her anchors where and when she had let them go. The law requires that each party should exercise his right so as, if possible, to avoid a conflict with the right of the other."

The ship was held liable because though she had in a gale properly dropped her anchors which fouled the cable yet in weighing them she did so in a way which, contrary to ordinary nautical skill, caused unnecessary injury to it: in the case at Bar, the circumstances, as have been shewn, are much stronger against this offending ship and constitute a wilful improper use of the cable contrary to all nautical usage and therefore judgment will be entered in favour of the plaintiff for the damage so occasioned, the amount thereof to be assessed by the registrar with merchants in the usual way.

Judgment for plaintiff.

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CANADIAN AMERICAN SHIPPING CO. v. S.S. WORON

Admiralty law—Exchequer Court in Admiralty—Jurisdiction—Imperial legislation—Effect of—10 & 11 Geo. V., Cap. 81 (Imperial).

The jurisdiction of the Admiralty Court of Canada marches with that of the High Court of England and increases or decreases as the case may be in accordance with Imperial legislation affecting the High Court.

MOTION by the owners of a ship arrested in an action for damages, to set aside the writ and warrant of arrest, on the ground that the Court had no jurisdiction to entertain the action. Heard by MARTIN, Lo. J.A. at Victoria on the 17th of May, 1926.

Statement

Alfred Bull, for the motion.
Sidney A. Smith, contra.

6th July, 1926.

MARTIN, Lo. J.A.: This is a motion to set aside the writ and warrant of arrest on the ground that the Court has no jurisdiction to entertain this action for damages, by the charterers of the ship, occasioned, as alleged, by deviation from a specified route across the Pacific from Vancouver to Yokohama in November, 1925, and by not going to the nearest port in the Aleutian Islands for coal, if necessary, instead of to Honolulu.

The question turns upon the construction of section 5 of the Imperial Administration of Justice Act, 1920, Cap. 81, as follows:

Judgment

"5. (1) The Admiralty jurisdiction of the High Court shall, subject to the provisions of this section, extend to—

(*a*) any claim arising out of an agreement relating to the use or hire of a ship; and

(*b*) any claim relating to the carriage of goods in any ship; and

(*c*) any claim in tort in respect of goods carried in any ship;

"Provided that—

(i) this section shall not apply in any case in which it is shewn to the Court that at the time of the institution of the proceedings any owner or part owner of the ship was domiciled in England or Wales; and

(ii) if in any proceedings under this section the plaintiff recovers a less amount than twenty pounds, he shall not be entitled to any costs of the proceedings, or, if in any such proceedings the plaintiff recovers a less amount than three hundred pounds, he shall not be

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entitled to any more costs than those to which he would have been entitled if the proceedings had been brought in a county court, unless in either case the court or a judge certifies that there was sufficient reason for bringing the proceedings in the High Court.

"(2) The jurisdiction conferred by this section may be exercised either in proceedings *in rem* or in proceedings *in personam*."

It is conceded that if the effect of this section* extends to Canada then there is jurisdiction, but otherwise none. Said jurisdiction is primarily derived from the Imperial Colonial Courts of Admiralty Act, 1890, Cap. 27, and the Canadian Admiralty Act of 1891, Cap. 29, now Cap. 141, R.S.C. 1906. Section 2(2) of the former Act provides that:

"The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters, and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations."

And subsection (3) declares:

"Subject to the provisions of this Act any enactment referring to a Vice-Admiralty Court, which is contained in an Act of the Imperial Parliament or in a Colonial law, shall apply to a Colonial Court of Admiralty, and be read as if the expression 'Colonial Court of Admiralty' were therein substituted for 'Vice-Admiralty Court' or for other expressions respectively referring to such Vice-Admiralty Courts or the judge thereof, and the Colonial Court of Admiralty shall have jurisdiction accordingly."

Judgment

To carry out the intention of the said Imperial Act, the Parliament of Canada passed in 1891 the said "Admiralty Act" of that year, and its title declares that it is—

"An Act to provide for the exercise of Admiralty Jurisdiction within Canada, in accordance with The Colonial Courts of Admiralty Act, 1890."

Sections 3 and 4 provide that:

"The Exchequer Court of Canada is and shall be, within Canada, a Colonial Court of Admiralty, and as a Court of Admiralty shall, within Canada, have and exercise all the jurisdiction, powers and authority conferred by the [Colonial Courts of Admiralty Act, 1890] and by this Act.

"Such jurisdiction, powers and authority shall be exercisable and exercised by the Exchequer Court throughout Canada, and the waters thereof, whether tidal or non-tidal, or naturally navigable or artificially made so, and all persons shall, as well in such parts of Canada as have heretofore been beyond the reach of the process of any Vice-Admiralty Court, as elsewhere therein, have all rights and remedies in all matters (including cases

*Re-enacted in the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. V., Cap. 49), Secs. 22(1) (*a*) (xii.) and 33(2).—A.M.

of contract and tort and proceedings *in rem* and *in personam*), arising out of or connected with navigation, shipping, trade or commerce, which may be had or enforced in any Colonial Court of Admiralty under The Colonial Courts of Admiralty Act, 1890."

For the motion it is submitted that the Imperial Act of 1920 does not extend its increased British jurisdiction to Canada because our Canadian jurisdiction was "stereotyped" by the Imperial Act of 1890 and so this Court "cannot exercise powers conferred by Imperial statutes of a later date . . . . unless such statutes in terms are made applicable to the Colonial Courts." In answer to this the plaintiff's counsel submits that the exact question is not whether the Imperial Act of 1920 is in force here but whether when any new jurisdiction is conferred upon the Admiralty Court in England this Court "falls heir to the same jurisdiction"—*The King* v. *The Despatch* (1915), 22 B.C. 365-6. There is no decision upon the exact point but there are some cases which require attention. Thus in *The Harris Abattoir Co.* v. *S.S Aledo* (1923), Ex. C.R. 217, in the Quebec Admiralty District of this Court, it was decided that an action *in rem* for damages for goods carried or to be carried out of a Canadian port to a foreign country could not be entertained for lack of jurisdiction under section 6 of the Admiralty Act, 1861 (extended to all Canada by the conjoint operation of the Acts of 1890 and 1891, *supra*), but, unfortunately, the existence of the statute of 1920, which repeals section 6, escaped the attention of Court and counsel and therefore the present point was not even considered. There is, however, this expression of appropriate value at p. 219:

Judgment

"Section 6 above referred to has been the subject of many judicial decisions in the English Court of Admiralty, and being remedial of grievances which British merchants had against the owners of foreign ships for short delivery of goods brought to England in foreign ships or their delivery in a damaged state, ought to be construed with as great latitude as possible so as to afford the utmost relief which the fair meaning of its language will allow; *The St. Cloud* (1863), Br. & Lush. 4; *The 'Pieve Superiore'* (1874), L.R. 5 P.C. 482, and *The Cap Blanco* (1913), P. 130."

To these cases should be added *The Bahia* (1863), Br. & Lush. 61, a decision of Dr. Lushington which was approved by the Privy Council in *The "Pieve Superiore"* case, *supra* at pp. 490 and 492, their Lordships saying, p. 492:

"The statute being remedial of a grievance, by amplifying the jurisdiction of the English Court of Admiralty, ought, according to the general rule

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applicable to such statutes, to be construed liberally, so as to afford the utmost relief which the fair meaning of its language will allow. And the decisions upon it have hitherto proceeded upon this principle of interpretation."

It is in this light, therefore, that the solution of the present question must be approached, as later to be considered.

The point is not touched by the decisions of the said Quebec District of this Court in *Ferns* v. *S.S. Ingleby* (1923), Ex. C.R. 208, because in it there was the express declaration in the Imperial Merchant Shipping (Stevedores and Trimmers) Act, 1911 (1-2 Geo. V., Cap. 41), section 3, that "all the Courts having jurisdiction in Admiralty" could enforce it, which clearly included this Court as it is the Imperial Parliament that, alone, can confer jurisdiction upon it.

Then in *The Ship "D. C. Whitney"* v. *St. Clair Navigation Co.* (1907), 38 S.C.R. 303, Mr. Justice Idington, at p. 320, in a dissenting judgment referred to the present point as one which "may become an interesting inquiry" and went on to say "But, in the view I take of this case, the necessity for following such inquiry . . . . does not arise," and so no assistance is to be derived from his decision so reserved, nor do I think that, having regard to the subject-matter and context, any real light is derived from the expressions used by the Privy Council in *Bow, McLachlan & Co.* v. *"Camosun" (Owners)* (1909), 79 L.J., P.C. 17 at p. 22.

Judgment

It is to be noted that by section 21 of the said Administration of Justice Act, 1920, said section 6 of the Act of 1861 is repealed and said section 5 in effect substituted therefor with a considerable amplification of jurisdiction admittedly covering the facts of this case.

Approaching, then, the subject in the light hereinbefore indicated, it was said by Lord Chancellor Halsbury in *Herron* v. *Rathmines and Rathgar Improvement Commissioners* (1892), A.C. 498 at p. 502 that:

"The subject-matter with which the Legislature was dealing, and the facts existing at the time with respect to which the Legislature was legislating, are legitimate topics to consider in ascertaining what was the object and purpose of the Legislature in passing the Act they did."

And in *Eastman Photographic Materials Company* v. *Comptroller-General of Patents, Designs and Trade Marks* (1898),

A.C. 571 the same very learned judge said, also in the House of Lords, p. 576:

"My Lords, it appears to me that to construe the statute now in question, it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the later Act which provided the remedy. These three things being compared, I cannot doubt the conclusion."

These remarks are most appropriate to the present case, and in proceeding to apply them to the consideration of the said Acts of 1890 and 1891 one major "evil" to which their "remedy" of "amplifying the jurisdiction" was directed was the very unsatisfactory state of affairs in Canada occasioned by the exercise of Admiralty jurisdiction under various Imperial statutes (*vide* said Act of 1890, *passim*) by many Vice-Admiralty Courts in the several Provinces with no appellate tribunal in Canada from their disconnected decisions but only to the Privy Council in London (as in *e.g.*, *Redpath* v. *Allan* (1872), L.R. 4 P.C. 511, 517) with attendant delay and expense so great in many cases as to lead in practice to a denial of justice, and also a lack of harmony in decisions.

This very important question of local appeal is remedied by section 5 of the Act of 1890 and the existing ultimate appeal to His Majesty in Council is preserved by section 6 (as to which, see Mayers's Admiralty Law and Practice, p. 295) but with certain restrictions as therein provided.

Judgment

By section 17 of the same Act the Vice-Admiralty Courts in Canada were abolished upon the coming into force of this Court as established under the Canadian Act of 1891, but if those former Courts were still in existence and exercising locally the jurisdiction of the High Court of Admiralty, it would, I apprehend, be clear that their jurisdiction would march with that of said High Court and increase or decrease as the case might be in accordance with Imperial legislation affecting that Imperial Court. Such being the case it follows, to my mind, that the present Admiralty Court of Canada (*i.e.*, the Exchequer Court) being substantially and essentially the substitute for and successor of all the said Vice-Admiralty Courts (with additional inland powers and jurisdiction *cf.* sections 4 and 17) likewise marches in the same jurisdiction and it would require clear language to the contrary to deprive it of

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the same continuous jurisdiction as is cumulatively possessed by the Imperial Court for the local exercise of whose jurisdiction it is in reality the local machinery and nothing more, within that same Court's powers.

This construction is so appropriate to the comprehensive "object and purpose of the Legislature" in 1890 that I find myself unable, after very careful consideration to take any other view of it. Bearing in mind the common object of the two statutes in the special circumstances, I can find nothing in reason to support the view that the two Legislatures concerned intended to reduce the local application of this special Imperial jurisdiction to a stereotyped form and thereby arrest its local progressive development to meet those new conditions which must inevitably arise in the case of all legislation of an important general nature such as this. By the Interpretation Act of Canada, Cap. 1, R.S.C. 1886, section 7(3) "the law shall be considered as always speaking" and this is only a declaration of an ancient principle of construction of English statutes, and in my opinion, it was not contemplated by either of the said Legislatures that the voice of that executive one which was "speaking" at large at the time should thereafter be silenced locally so as to retard that beneficial progress which could be attained by the various Imperial possessions marching together in maritime legislative development in pursuance of a general and harmonious scheme, subject always to minor exceptions for special reasons.

An additional indication of this intention is to be found in the unusual, but in the circumstances very appropriate way in which the desired result is obtained by simply making interchangeable expressions between the names of the new Colonial Courts of Admiralty and the old Vice-Admiralty Courts, and also the repeal of said section 21 of the Act of 1861 and the substitution of section 5 therefor, as before noted, supports this view.

I do not, in brief, think that it is necessary to resort to implication to sustain the jurisdiction invoked because, having regard to the subject-matter and obvious intention, the object in view has been clearly attained by that "liberal" construction of the

statutes in the manner hereinbefore laid down as the guiding principle therefor.

The plaintiff's counsel in support of his position submitted in his favour the view taken by the learned author of that work of exceptional merit, Mayers's Admiralty Law, *supra*, p. 5, as of assistance, and it unquestionably is so, and in many circumstances (conveniently set out in Craies's Statute Law, 3rd Ed., 136) the Court will entertain the views of text-writers, and in this case I may say, adopting the language of the Master of the Rolls (Sir George Jessel) in *In re Warner's Settled Estates* (1881), 17 Ch. D. 711 at 713, that:

Judgment

"I should not have any difficulty without the assistance of the text-writers, but it is very satisfactory to find they have considered it independently in the same way."

It follows that the motion is dismissed with costs to the plaintiff in any event.

Motion dismissed.

WALL v. WELLS.

Costs—Security for—Application for additional security—Promptness required—Security for past costs not allowed—Marginal rule 981.

The plaintiff who resided abroad commenced action in November, 1923, and on demand paid into Court $150 as security for costs. On the defendant applying for additional security in March, 1926, it appeared that up to February, 1925, his costs were allowed to accumulate to $350 in excess of the security and that since that date and prior to this application by reason of commissions abroad and examinations for discovery a further sum of $500 in costs had been incurred. It was also estimated that a further sum of $500 would be required for future costs. An order was made to cover the future costs and $350 of the unsecured past costs.

Held, on appeal, varying the judgment of MORRISON, J. that the additional security should be reduced to the sum of $500.

Per MACDONALD, C.J.A.: The defendant should apply for security promptly whether for a first or for a subsequent order, and while it is in the discretion of the Court to grant it even where there has been some delay, it will never be granted in respect of past costs where there has been substantial accumulations thereof.

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Statement

APPEAL by plaintiff from the order of MORRISON, J. of the 30th of March, 1926, directing that additional security for costs be given by the plaintiff in an action brought by him for rescission of a sale of certain timber licences and for damages. The defendant lives in Revelstoke and the plaintiff resides in the City of Buffalo, in the State of New York, U. S. A. The defendant claims that up to the 9th of February, 1925, the taxable costs would exceed $500 and that since that date two commissions were issued and other costs incurred that would bring the total taxable costs up to $1,000. The defendant also claimed that a further sum of $500 would be required for future costs, bringing the total sum required up to $1,500. The plaintiff paid in $150 originally as security for costs and an order was made increasing the total security required to $1,000 and that an additional $850 should be paid into Court.

The appeal was argued at Victoria on the 18th and 21st of June, 1926, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

Argument

F. C. Elliott, for appellant: The affidavit in support of the motion is insufficient and it should be made by the party himself: see marginal rule 523. The Courts have always refused to give an order for additional security for past costs: see Daniell's Chancery Practice, 8th Ed., Vol. 2, p. 1621; *Brocklebank* v. *Lynn Steamship Co.* (1878), 3 C.P.D. 365; *Massey* v. *Allen* (1879), 12 Ch. D. 807; *Republic of Costa Rica* v. *Erlanger* (1876), 3 Ch. D. 62; *Willmott* v. *Freehold House Property Co.* (1885), 33 W.R. 554; *Sturla* v. *Freccia* (1878), W. N. 161; *Bentsen* v. *Taylor, Sons & Co.* (1893), 2 Q.B. 193; *Robertson* v. *McMaster* (1879), 8 Pr. 14; *Bell* v. *Landon* (1881), 9 Pr. 100; *Bertudato* v. *Fauquier* (1901), 38 C.L.J. 79. Unexplained delay in applying for additional security is a bar: see *Pooley's Trustee* v. *Whetham* (1886), 33 Ch. D. 76; *Star* v. *White* (1906), 12 B.C. 355; *Charlebois* v. *Great North-West Central Ry. Co.* (1893), 9 Man. L.R. 60; *Crossman* v. *Purvis* (1915), 23 D.L.R. 883; *First Mortgage Investment Co.* v. *Noud* (1925), 36 B.C. 104.

E. L. Tait, for respondent: The order below is in the discre-

tion of the judge who heard the application and should not be disturbed. Security for both past and future costs may be ordered: see *Daniels* v. *Spoke* (1922), 2 W.W.R. 278. An application for security may be made at any time: see *Cameron* v. *The Royal Bank* (1914), 7 W.W.R. 693; *Re Smith; Bain* v. *Bain* (1896), 75 L.T. 46; *Reum* v. *Rutherford* (1917), 2 W.W.R. 1104; *Matuso Co.* v. *Wallace Shipyards* (1919), 2 W.W.R. 549; *Byers* v. *Ferndale School District* (1896), 3 Terr. L.R. 440 at p. 442; *Morton* v. *Bank of Montreal* (1897), *ib.* 14; *Mather & Noble Ltd.* v. *Diamond Vale Supply Co., Ltd.* (1918), 3 W.W.R. 581. Taking a commission is an unexpected step that is a ground for supporting the order.

Argument

Elliott, in reply, referred to *Trevelyan* v. *Myers* (1895), 15 C.L.T. Occ. N. 135 and *D'Ivry* v. *World Newspaper Co.* (1897), 33 C.L.J. 202.

Cur. adv. vult.

5th October, 1926.

MACDONALD, C.J.A.: The plaintiff who resided abroad commenced this action in November, 1923. Rule 981 of the Rules of Court, reads:

"In any cause or matter in which security for costs is required, the security shall be of such amount, and be given at such times, and in such manner and form, as the Court or a judge shall direct."

Security was demanded and was given in the sum of $150. This sum was spoken of by counsel as the usual security, but I am not aware that there is any usual security. When security is demanded the defendant should make an estimate of his probable costs and should demand that sum. In this case it was shewn that the costs of the defendant up to the 9th of February, 1925, amounted in all to $500—$350 in excess of the security ordered. It is also shewn that since that date by reason of commissions to take evidence abroad and examinations for discovery, a further sum of $500 in costs have been incurred by the defendant. And it is estimated that a sum of $500 will be required for future costs, making in all $1,500.

MACDONALD, C.J.A.

The order appealed from directs the plaintiff to pay into Court as security generally an additional sum of $850, within 10 days, staying the action in the meantime, and in default, giving leave to apply to dismiss it. That is to say, the learned

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judge made an order for additional security for all the costs of the action past and future which would bring the original $150 up to $1,000.

We have been referred to a large number of cases from which I have endeavoured to extract the general principle which ought to be borne in mind when dealing with cases of this kind. The practice in the Court of Chancery before the Judicature Act, has been entirely supplanted by the rules under that Act from which the one quoted above has been adopted. The practice of the Courts of Common Law, was, in my opinion, substantially the same as is provided for by our rule. The rule is, in effect, a restatement of the rule of practice of the Common Law Courts. Under the common law practice, unlike that of the Court of Chancery, the judge could order security to be given in addition to that previously ordered, and the only question we are concerned with here is, under what circumstances will additional security be ordered and for what costs—past or future? One rule, which so far as I can find, has never been departed from by English Courts, is that the defendant must apply promptly. Cases are to be found in which security was not applied for until considerable costs had been incurred, but when examined they will be found not to be inconsistent with the rule that security must be promptly applied for, for example, when the right to security comes into existence in the middle of litigation by reason of bankruptcy or by reason of the departure of the plaintiff from the country. It can safely be said that where the defendant is entitled to security for costs at the beginning and does not apply with promptitude, having regard to the circumstances of the particular case, the Court will seldom, if ever, order security to be given. The reason so often expressed has been concisely restated by Cotton, L.J. in *Ellis* v. *Stewart* (1887), 35 Ch. D. 459, in these words:

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> "It is the duty of a respondent who applies for security for costs to be prompt in his application, that the appellant may not go on incurring expenses which in the event of his being ordered to give security for costs and being unable to find it will be wholly thrown away."

Such authorities as *Republic of Costa Rica* v. *Erlanger* (1876), 3 Ch. D. 62; *Sturla* v. *Freccia* (1878), W.N. 161; *Brocklebank* v. *Lynn Steamship Co.* (1878), 3 C.P.D. 365; *Massey* v. *Allen* (1879), 12 Ch. D. 807; *Re Smith; Bain* v.

Bain (1896), 75 L.T. 46; *Pooley's Trustee* v. *Whetham* (1886), 33 Ch. D. 76; *Bell* v. *Landon* (1881), 9 Pr. 100; *Standard Trading Co.* v. *Seybold* (1902), 5 O.L.R. 8, and many others, shew that the applicant must come promptly whether for a first or for a subsequent order, and while it is in the discretion of the Court to grant it even when there has been some delay it will never be granted in respect of past costs where there has been substantial accumulations thereof. From November, 1923, to February, 1925, the costs had been allowed to accumulate to a sum of $350 in excess of the security. This was well known to the defendant, yet while he knew that expensive further proceedings were contemplated, having had notice of applications for commissions, he still refrained from making demand for further security. It was only in March, 1926, when the costs had mounted to the gross sum of $1,000 with another $500 in prospect, that the application was made and the order obtained to cover not only these future costs but also $350 of the unsecured past costs.

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Now while the discretion of the learned trial judge who made the order is not lightly to be interfered with, yet when the exercise of it is so opposed to the settled practice, I would venture, with great respect, to overrule him and reduce the additional security ordered to $500, the estimated amount of the costs yet to be incurred and would limit it to those. If the application had come before me in the first instance, I should have dismissed it but as I cannot say that he was clearly wrong in the exercise of his discretion, I will let the order as to future costs stand.

GALLIHER, J.A.: I agree with the Chief Justice in allowing the appeal in part.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I agree with the reasons for judgment of my brother the Chief Justice, the appeal to be allowed in part only.

MCPHILLIPS, J.A.

Appeal allowed in part.

Solicitors for appellant: *Courtney & Elliott.*
Solicitor for respondent: *W. I. Briggs.*

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WOODWARD'S LIMITED v. UNITED STATES FIDELITY AND GUARANTY COMPANY.

Insurance, burglary—Policy covering burglary from safe or vault—Safe inside vault—Vault burglarized—Money taken inside vault but not in safe—Right to recover.

The plaintiff held two policies of insurance against burglary in the defendant Company. It had a safe inside a vault on its premises. The vault was burglarized but the moneys taken although inside the vault were not in the safe as the safe would not hold all the moneys on hand at that time. The insuring clause in the policies contained the words "from the interior of any safe or vault described in the schedule." *Held*, that the doctrine *verba chartarum fortius accipiuntur contra proferentem* should be applied and there should be judgment for the plaintiff.

Statement

ACTION upon two policies of insurance under which the defendant insured the plaintiff against loss by burglary. The facts are set out in the reasons for judgment. Tried by MCDONALD, J. at Vancouver on the 14th of June, 1926.

J. E. Bird, and *H. I. Bird*, for plaintiff.
St. John, and *Noble*, for defendant.

18th June, 1926.

MCDONALD, J.: This is an action upon two policies of insurance which are practically identical in terms except as to the amount insured, under which the defendant insured the plaintiff against loss by burglary.

I have wavered in my opinion during my hearing and consideration of the case, but have finally reached the firm conclusion that the plaintiff is entitled to succeed. For the purpose of clearness each policy may be read as follows:

Judgment

"The United States Fidelity and Guaranty Company in consideration of the premium paid does hereby agree to indemnify the assured in the amounts specified in the Schedule for all direct loss by burglary of money, securities and/or merchandise described in Statement 8 of the Schedule occasioned by the felonious abstraction of the same from the interior of any safe or vault described in the Schedule."

The following provision is contained in the policy:

"2. This policy shall not cover any loss or damage:

"(c) Unless all vault, safe and chest doors are properly closed and locked by a combination or time lock at the time of loss or damage."

When we look at the Schedule we find Statements 5 and 6 reading as follows:

STATEMENT 5. The safes or vaults, the contents of which are insured hereunder, are described as follows:

A chest, safe or vault shall not be considered burglar-proof unless it shall have steel walls at least one inch thick and steel doors at least one and one-half inches thick.

VAULTS

Name of Maker and number on Door Handle	The Safes or vaults are Burglar proof or Fire proof (State which)	There is or is not a Burglar-proof Chest inside (Yes or no)	Thickness of Outer Door exclusive of Bolt Work	Thickness of Inner Chest Door exclusive of Bolt Work	Outside Door is secured by Combination or Time Lock	Chest Door is secured by Combination or Time Lock	The Safes or Vaults were bought as New or Second hand (State which and when)	Price paid for each Safe or Vault by present owner was	Approximate maximum value of contents of each Safe or Vault	Amount of Ins. applicable to contents of each Safe or Vault respectively
J. & J. Taylor No. 22151	Burglar-proof	No.	2″	....	Comb.	....	New: 15 Yrs.	$600.	$35,000.	$10,000.

Safe is contained in vault with Goldie-McCullough Vault Door ½″ Comb.

STATEMENT 6. The insurance under this policy shall attach to and apply specifically as follows:

$ Nil. (a) On merchandise, as described in Statement 8 of the Schedule, while contained within the safe or vault above described, and known as number.....Premium $ Nil.

$10,000 (b) On money and securities, while contained within the safe or vault above described and known as number 22151 Premium $57.75,

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with the exception that in one policy the amount insured is $10,000 and in the other the amount is $15,000.

On the 27th of December, 1925, the plaintiff was feloniously robbed of $6,457.89 which sum was in the vault described in the policy but was not in the safe, it having been impossible to put into the safe all the funds which were on hand at the time. The defendant contends that the contents of the vault were not insured but only the contents of the safe within the vault. The policy is certainly not very carefully nor artistically drawn, but applying the doctrine *verba chartarum fortius accipiuntur contra proferentem,* I think a reasonable construction to put upon the policy may be arrived at by simply looking at the words in the insuring clause "from the interior of any safe or vault described in the Schedule" and then turning to the Schedule where we find the vault described as "vault with Goldie-McCullough Vault Door ½" Comb." It is true that the words contained in Statement 6 rather militate against this construction. Nevertheless I think the instrument will bear the construction which I am placing upon it and that being so there should be judgment for the plaintiff.

Judgment

There being other co-existent insurance, it was agreed that the plaintiff can recover only five-eighths of the amount of the loss and there will accordingly be judgment for $4,036.18.

Judgment for plaintiff.

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Infant—Tort—Liability—Deceit—Bogus contract for purchase of motor-car —Assignment of contract to plaintiff.

Infants are liable to be sued for torts of all kinds and, except where the action is founded upon malice or want of care, the tenderness of the infant's age is immaterial.

The defendant, a minor, was induced by one M. to sign an agreement and accompanying promissory note for the purchase of a motor-car from M. who told the defendant that he needed the agreement in order to obtain the release of the car from the company selling it to him. Instead of so using the documents he discounted them with the plaintiff Company. After default in payment under the agreement the plaintiff seized the car but later surrendered it to a *bona fide* purchaser who had possession of it under a later agreement. An action for damages against the defendant alleging deceit and fraudulent conspiracy was dismissed.

Held, on appeal, reversing the decision of MURPHY, J. (MACDONALD, C.J.A. and MACDONALD, J.A. dissenting), that the defendant on his own admissions knew he was entering upon a bogus transaction and notwithstanding his being a minor was liable in damages for the amount paid by the plaintiff to M. for the assignment of the spurious documents.

APPEAL from the decision of MURPHY, J. dismissing the plaintiff Company's claim for $575.75 in respect of the discounting of an agreement for the purchase of a motor-car. Defendant was a minor, and was represented by a guardian *ad litem* in the suit. The plaintiffs are a company who, among other financial activities, discount agreements for sale for the purchase of motor-cars, and on August 10th, 1925, a man named Martin, carrying on business at New Westminster under the trade name of Martin Motors, brought to their office in the city an agreement for sale signed by the defendant, together with a note for the balance of the purchase price of this particular motor-car. This agreement for sale is signed by the defendant and shews on its face that the total purchase price is the sum of $923, that a sum of $275 had been paid in cash and also that the defendant is in receipt of a monthly salary of $125. Accompanying the agreement for sale was a note signed by the

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defendant for the sum of $648, dated August 10th, and maturing in instalments on various dates.

The plaintiff discounted this agreement and handed its cheque for the sum of $574 to the man, Martin, and in the ordinary course of business notified the defendant that it had discounted the note and gave the necessary particulars as to where to make proper payment, and it heard nothing more for weeks. It subsequently turned out that there was no truth in any of these statements, the car had not been bought by the defendant and he had paid no money, and in point of fact he had received from the man, Martin, the sum of one dollar for filling up these papers.

Statement

The trial judge came to the conclusion that the defendant, a mere boy out of school, had not shewn any evidence of conspiracy; that he had got into the hands of a scoundrel who imposed on him; that he had derived no benefit from the transaction; had acted in good faith and had no idea he was doing wrong in lending his name to the agreement sued on. The judge also was of opinion that to give judgment against the boy he must find him a criminal, and on the evidence there was nothing to shew a criminal intent.

The appeal was argued at Victoria on the 4th and 7th of June, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Mayers, for appellant: There was actual fraud on the part of the infant. He never intended to buy a car at all and *Derry* v. *Peek* (1889), 14 App. Cas. 337 is distinguishable. As to the effect of the fraud of an infant see *Edwards* v. *Porter* (1925), A.C. 1. That it is a tort that can be sued upon see *Wright* v. *Leonard* (1861), 11 C.B. (N.S.) 258; *R. Leslie, Limited* v. *Sheill* (1914), 3 K.B. 607 at p. 620; *Burdett* v. *Horne* (1911), 27 T.L.R. 402 at p. 404; *Earle* v. *Kingscote* (1900), 2 Ch. 585 at p. 592; *Liverpool Adelphi Loan Association* v. *Fairhurst* (1854), 9 Ex. 422; *Burnard* v. *Haggis* (1863), 14 C.B. (N.S.) 45.

David Whiteside, K.C., for respondent: The defendant was young and careless in signing these documents. There was no duty cast on the defendant to be careful as far as the plaintiff

company is concerned: see *Le Lievre* v. *Gould* (1893), 62 L.J., Q.B. 353 at p. 357; *Angus* v. *Clifford* (1891), 60 L.J., Ch. 443. He cannot be liable in tort for procuring a contract by means of fraudulent representations: see Salmond on Torts, 5th Ed., 73. Assuming there was fraud he must shew an injury has been sustained: see *Armishaw* v. *Sacht* (1917), 24 B.C. 53; *Cotterell* v. *Jones and Ablett* (1851), 21 L.J., C.P. 2 at p. 6. Martin sold the car in question to one Brown, that was a conversion that the plaintiff could have sued on: see Pollock on Torts, 12th Ed., 264. Martin got the car from Bray Motors Limited with money obtained from the plaintiff. Defendant had nothing to do with it: see *McClary* v. *Howland* (1903), 9 B.C. 479.

Argument

Mayers, in reply, referred to *West London Commercial Bank* v. *Kitson* (1884), 13 Q.B.D. 360 at p. 362.

Cur. adv. vult.

5th October, 1926.

MACDONALD, C.J.A.: The action is for damages for wrongful conspiracy between one Martin and the defendant, then an infant, to obtain money from the plaintiff by false pretences.

The learned trial judge has found that the defendant had no wrongful intent; that there was no moral turpitude so far as he was concerned, and dismissed the action.

In an action for conspiracy to defraud, as in any other action of deceit, the plaintiffs must set out on the face of their statement of claim, the very fraud which they complain of and must strictly prove it. *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1 at p. 6; *Bowen* v. *Evans* (1848), 2 H.L. Cas. 257; *McCormick* v. *Grogan* (1869), L.R. 4 H.L. 82 at p. 97.

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The facts are that Martin, in whose employ the defendant had lately been for a short time, came to him at his parents' home and requested him to sign an agreement to purchase an automobile, representing that it was one he had purchased from, I think it must be inferred, the Bray Motors; that he wanted to get the automobile from them and that if defendant would oblige him by signing the agreement and the accompanying promissory note, those documents would enable him to get the car and that as he expected to sell it in a day or two, defendant

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would not be troubled further about it. The defendant signed the agreement and the note. It must be conceded that this transaction must have been known to the defendant to be a fictitious one. It was on Martin's part intended to enable him to commit a fraud. Instead of using the documents with the Bray Motors to obtain the release of the car, Martin sold them to the plaintiff. The defendant so far as shewn by the evidence, had no knowledge of this intention and knew nothing of the plaintiff, whose name or that of any other money-lender had not been mentioned or referred to in the conversation between himself and Martin.

Now the first, and to my mind, a decisive question is, has the plaintiff shewn that the defendant meant to deceive it and not merely the Bray Motors? I will assume for the purpose of this question that he meant to deceive the Bray Motors, but did he mean to deceive the plaintiff? Unless he did then the plaintiff has no cause of action. Unless he owed a duty to the plaintiff to refrain from putting these documents in Martin's hands, it cannot complain. The documents on their faces were not addressed to anyone. They merely shew a transaction between the defendant and Martin alone. They are in a different category to that of a prospectus or an advertisement. Nevertheless if defendant intended Martin to use them to deceive anyone who might be induced to advance money upon them, the defendant would be liable for misrepresentation, to a person who had acted on the faith of them. *Swift* v. *Winterbotham* (1873), L.R. 8 Q.B. 244 at p. 253. To determine this one must look outside the documents themselves, at what took place between Martin and the defendant at the time of the transaction. The only evidence of this is that of the defendant himself. He said:

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"He [Martin] told me he was buying a Star auto on the instalment plan and that he could not pay the next note and he wanted me to sign up the papers so that he could get the car, that he would sell it in about two days and everything would be fair; that he would not have anything against me at all."

"Did he tell you where the car was? Yes, at Bray Motors."

On cross-examination he was asked:

"Martin told you that he wanted you to do this so that he could get this car from someone else? Yes."

The fair inference from this is that the "someone else" was

the firm who had possession of the car. The defendant was not asked whether or not he had intended that Martin should sell the documents to the plaintiff or to someone else. That essential point was not touched on at all. Now the burden was on the plaintiff to prove the conspiracy alleged and part of its case was to prove that defendant conspired with Martin to deceive it, not the Bray Motors. This it has failed, in my opinion, to prove.

The intention though it need not be alleged, yet must appear by legal inference from the facts proven; motive is immaterial but intention is all material. *Herring* v. *Bischoffsheim* (1876), W.N. 77. Martin by telling the defendant that the car was at the Bray Motors and that he wanted these documents in order to get possession of it, clearly intimated that he intended to use the documents with the Bray Motors for that purpose. That is, I think, the fair inference to draw from the evidence. The other inference contended for, that he intended the documents to be used to raise money for Martin either by sale or pledge of them to a money-lender, is inconsistent with the other statements that Martin would sell the car in two days and the defendant would have nothing further to do with the transaction.

It is well settled that, when two alternative inferences may be drawn from facts, that one which is in favour of innocence must be drawn: *Hamilton* v. *Kirwan* (1845), 2 Jo. & Lat. 393 at p. 401; *Bullivant* v. *Attorney-General for Victoria* (1901), A.C. 196; *Angus* v. *Clifford* (1891), 2 Ch. 449 at p. 479; *Mowatt* v. *Blake* (1858), 31 L.T. Jo. 387.

But there is another answer to the action. To sustain a claim for damages for deceit, the plaintiff cannot succeed unless it prove that it relied upon the representation and acted upon it. Now let us see what Westall, plaintiff's manager, says:

"Martin was the only one you paid any attention to in this matter, wasn't he? Yes.

"You trusted entirely to Martin's representations when you made the deal with him? Yes, surely."

He qualifies this by saying:

"You sized up the car from what Mr. Martin told you about it and your security was the car, wasn't it? The car would be the security in the case, combined with the purchaser's signature."

And again, in answer to a question, he said:

"The auto represented sufficient security to liquidate the note, no question about that."

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In face of this evidence as well as for the other reasons mentioned and of the judge's findings, the plaintiff has failed to make out its case.

The appeal should be dismissed.

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MARTIN, J.A.: This is an action to recover damages against the defendant infant for deceit and fraud arising out of an alleged conspiracy between him and one Martin to enable Martin to obtain money from the plaintiff Company on the strength of an agreement for sale, dated 10th August, 1923, by 12 monthly instalments (accompanied by a promissory note for $648, likewise payable in 12 concurrent instalments) of a motor-car for $923 in which a cash payment of $275 was falsely stated to have been made at the time of sale, and said agreement and note were, for valuable consideration paid to Martin, assigned by him to the plaintiff. In view of the defendant's admissions at the trial it is clear that in his "purchaser's statement" of the facts of the transaction, signed by him and endorsed on the agreement, he knowingly made several material and grave false statements, *e.g.*, as to his salary being $125 per month, when he was out of work; as to his age 22, when he was then 20½, and as to not having "previously bought a motor-vehicle on credit" when he had purported to do so in form, as here, on the previous day; and he also knew that not only had he not paid the cash deposit of $275 to Martin, but that Martin had paid him $1 to sign the spurious documents. I have no doubt on his own admissions that the defendant acted in complete bad faith and with full knowledge that in signing the papers and note he was participating in a bogus transaction with the clear intention of enabling Martin to use the said documents for fraudulent purposes in general.

MARTIN, J.A.

The plaintiff duly registered its agreement and later, on 19th September, seized the car after default in payment, but upon its being subsequently claimed by one Brown (who had obtained possession of it under a later and genuine agreement for sale) it was surrendered to his solicitors on the 20th of November. It is difficult to see what other proper course the plaintiff could have adopted when it found itself in the unfortunate position of having seized the car upon an agreement which was ostensibly

bona fide and valid but in reality only the evidence of a sham transaction upon which no title could be founded. In these circumstances no question of the criminality as distinguished from the undoubted moral turpitude of the defendant arises, the latter alone being sufficient to support the action as one of deceit *solus,* and in the absence of any contract at all by the infant no question arises as to the "tort being so connected with his contract as to be part of the same transaction" as Lord Cave put it in *Edwards* v. *Porter* (1925), A.C. 1 at p. 15.

The action then being purely tortious comes within the general rule, which is not disputed, and is sufficiently expressed in Clerk & Lindsell on Torts, 7th Ed., p. 43, and Salmond on Torts, 5th Ed., p. 71; in the former at p. 43 it is succinctly stated:

"Infants are liable to be sued for torts of all kinds, and, except when the action is founded upon malice or want of care, the tenderness of the infant's age is immaterial."

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It was objected that no damages were proved but having regard to the exceptional circumstances I am of opinion that they are established by the amount paid by the plaintiff to Martin, *viz.,* $574.74 (*per* cheque Exhibit 2) when it took the assignment of defendant's said spurious note of $648 to Martin; though other considerations would have arisen had the plaintiff been entitled to keep the car.

Something was said about the form of the pleading and though it probably does contain some unnecessary allegations respecting a conspiracy that superfluity does not detract from the sufficiency of the essential allegations of fact which have been substantiated by evidence.

I would therefore allow the appeal and enter judgment for the plaintiff for $574.74 and interest at five per cent. from 11th August, 1925.

GALLIHER, J.A.: An infant may be liable for tort generally. He is not answerable for a tort directly connected with a contract which, as an infant, he would be entitled to avoid—Lord Sumner in *R. Leslie, Lim.* v. *Shiell* (1914), 83 L.J., K.B. 1148.

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Was there representation without fraud? If so, no action for deceit will lie: *Peek* v. *Derry* (1887), 57 L.J., Ch. 347. "[If] fraud is distinctly separated from the contract, and can

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in no sense be said to be the means of effecting it," then it being a contract recovery could not be had as against an infant: Collins, L.J., in *Earle* v. *Kingscote* (1900), 2 Ch. 585 at p. 593. In that case it was held that the fraud might have been committed altogether independently of the contract.

The principle laid down in *Liverpool Adelphi Loan Association* v. *Fairhurst* (1854), 9 Ex. 422, and referred to with approval by Collins, L.J., in *Earle* v. *Kingscote, supra,* is:

> "When the fraud is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction, the wife cannot be responsible."

If the contract here that was induced by the representations of the defendant had been with him, then no recovery could be had. But shortly, here, the contract which was induced by the representations of the defendant was a contract between the plaintiff and a third party, and the action here is not to enforce a contract as against the infant defendant but for damages suffered by the plaintiff due to the tort of the defendant which induced the contract with the third party and the question is—Does this come within the principle that a minor is in general liable for his torts in the same manner and to the same extent as an adult?

GALLIHER, J.A.

What are the facts when we examine them? The defendant entered into what he knew was a fake agreement to purchase the car in question from Martin in which he misrepresented himself as being of age, that he was earning $125 per month, that he had paid in cash on the purchase price the sum of $275, he gave his note for the balance of the purchase-money, $648, payable in monthly instalments and he did all this knowing the falsity of such representations and knowing that these documents were to be used for the purpose of obtaining a release of the car and to enable Martin to obtain possession of same, which Martin did, by discounting these documents with the plaintiff.

It is true he says that he glanced over these documents, that he did not really read them, but that he knew the nature of them and had executed similar documents for Martin once before, relying on Martin's representations that he, Martin, would sell the car again in a couple of days and that his responsibility would cease as had taken place on the previous occasion.

Martin did sell the car, but discounted the agreement with a different firm, became insolvent and wound up in custody and the plaintiff has lost the amount it paid Martin.

This young man of over 20 years of age lends himself to a scheme of this kind through which others are defrauded while conducting a legitimate business. Moreover, he was put upon his guard the day following the transaction by notification from the plaintiff that it was the holder of his agreement and note and that payment was to be made to them of the balance of the purchase-money to which he paid no attention, other than mentioning it to Martin, who he says, assured him he would look after it.

I do not think *Peek* v. *Derry*, *supra*, governs this case. The intention to deceive here is shewn by the wilfully making false and fraudulent statements by act and deed, which he knew were false and fraudulent and which he intended to be taken as true, and as in my view the action here is one of tort, and not contract, as applied to the defendant, the principle of liability as to torts generally, should apply and the plaintiff's action should succeed.

GALLIHER, J.A.

Money was needed for the purpose of having this car released, and the purpose of executing this spurious contract was not that it should be given in exchange for the release of the car by the holders, but for the purpose of procuring the money for effecting such release. That being so, the offence was against anyone who acted upon the faith of the false representations.

I would allow the appeal and give judgment for the plaintiff below.

McPHILLIPS, J.A.: I am in complete agreement with the opinion of my brother MARTIN and would allow the appeal.

MCPHILLIPS, J.A.

MACDONALD, J.A.: So far as the facts and inferences therefrom are concerned, I think the findings of the learned trial judge should not be disturbed. Particularly with a young man of his age he would have an opportunity from his manner and demeanour to determine whether he simply acted foolishly as the tool of Martin, or with the deliberate intention of joining with him in committing a fraud. The trial judge finds under all the circumstances that the defendant acted in good faith,

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believing the representations made to him by Martin, *viz.*, that if he would sign a conditional sale agreement and promissory notes it would enable Martin to complete the purchase of a car and resell it in a couple of days. He did not know that Martin would take advantage of his foolish act to commit a fraud on the plaintiff, nor was he a party to a conspiracy to defraud the plaintiff. It is true the learned trial judge says:

"That, of course, involved his [*i.e.*, the defendant] allowing Martin to do something which he must have known to be wrong."

This is scarcely accurate, because the defendant did not know that Martin intended to discount the notes and agreement with the plaintiff. The utmost that can be said—and it should be so found—is, that when the defendant received the notice of assignment and demand for payment, he realized more fully that he did a wrongful act in becoming a party to a fictitious transaction. Still trusting Martin, however, he adopted the natural course under all the circumstances in handing the letter to him. On that state of facts is the defendant, who was an infant, liable?

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The action is not, and in any event in the case of an infant, could not be based upon contract; nor could the infant be sued for a tort arising *ex contractu*. There was in fact no contract. Neither party to the pretended sale intended it to so operate. The action is based on fraud independent of contract.

If the claim as set out in the pleadings is grounded on a conspiracy it wholly fails. I will deal with it, however, on the basis submitted to us as an allegation of fraud on defendant's part.

As decided in *Derry* v. *Peek* (1889), 14 App. Cas. 337, a false statement made through carelessness and without reasonable grounds for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud. The defendant did not execute the notes and documents with a consciousness that they would be used for any purpose other than that stated to him by Martin. He did not read them over or fully acquaint himself with their contents. In his innocence the defendant did not believe that his act would be used to perpetrate a fraud on the plaintiff, and the fact that he had no reasonable grounds for thinking so would be immaterial. We might concede that he

knew the representations he in effect made, *viz.*, that he was the purchaser of the car, was false, yet it would not necessarily follow that it was made fraudulently. As pointed out by Lord Herschell at p. 375:

"In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud."

and a finding of fraud is essential in an action based on deceit.

I would dismiss the appeal.

Appeal allowed, Macdonald, C.J.A., and Macdonald, J.A. dissenting.

Solicitors for appellant: *Wilson, Whealler & Symes.*

Solicitors for respondent: *McQuarrie, Whiteside & Duncan.*

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Trial—Action for libel—Venue—Application for change of—Fair trial—Discretion—Appeal.

An action was brought for damages for libelous statements published at the instigation of the defendant in Vancouver in January, 1924, in a pamphlet entitled "The Searchlight" under the heading "A petition for Royal Commission." The writ was issued in Nanaimo and the defendant applied for change of venue. Nine affidavits were read in support of the application, all expressing the belief that a fair trial could not be had in Nanaimo because the plaintiff was returned at the previous Provincial election for Nanaimo; that he was a minister of the Crown; a resident of Nanaimo for many years; was popular amongst the people of the town and was a man of great influence in this comparatively small place. It was held by the judge who heard the application that the defendant had reasonably established that a fair trial could not be had in Nanaimo and ordered a change of venue.

Held, on appeal, reversing the decision of MACDONALD, J., that the affidavits submitted by the defendant were mere expressions of opinion founded on the plaintiff's popularity that he is a minister of the Crown representing the constituency and of considerable influence. In order to found a case for change of venue facts must be set out, not opinions. The judge below not only founded his order upon insufficient evidence but proceeded on a wrong principle in accepting opinion evidence supported as above without any act of misuse of his popularity or influence, and the venue should be restored to Nanaimo.

Statement

APPEAL by plaintiff from the decision of MACDONALD, J. on an application by the defendant for change of venue in an action for libel from Nanaimo to Vancouver or some other place in the Province, heard by him in Chambers at Vancouver on the 13th of May, 1926. The facts are set out fully in the judgment of the trial judge.

A. H. MacNeill, K.C., for the application.
J. W. deB. Farris, K.C., contra.

18th May, 1926.

MACDONALD, J.

MACDONALD, J.: Plaintiff, who is provincial secretary and minister of mines for the Province of British Columbia, in this action for libel, has fixed the place of trial at Nanaimo, being his place of residence.

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Defendant seeks, as a special jury is being applied for by the plaintiff, and will doubtless be granted, to obtain a change of venue from Nanaimo to Vancouver or some other place in the Province.

The application for such change does not, as usually occurs, require consideration as to the balance of convenience, but is based upon the ground, that a fair trial cannot be obtained by the defendant at Nanaimo.

It is alleged that the libel was contained in a pamphlet entitled "The Searchlight," published and circulated in the month of January, 1924. The extract therefrom which is complained of, is set out at length in the statement of claim. It is contended that, shortly put, such extract meant, and was intended to mean, that the plaintiff, while a candidate at a previous general provincial election, had been bribed by the promoters of the Pacific Great Eastern Railway Company to the extent of $50,000 to accord them protection and favourable treatment and that this object had been accomplished.

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Defendant, at the time of the publication of the pamphlet, was the leader of what was known as the Provincial Party, and it is averred that the subject of such alleged libel was discussed during the general election which took place in the year 1924. Assuming this statement to be correct, then it is a fair deduction that it has not been forgotten by the voters in the meantime, especially in the City of Nanaimo, where plaintiff, during such election, commenced this action, in June of that year, though it remained dormant for a considerable period, and was not ripe for trial, until September, 1925.

The practice in this Province, as to fixing the place of trial, differs from that in England, where the venue is determined by the Master, upon a summons for directions. Plaintiff, under our Rules, has the right to select the place of trial and this right is not lightly to be interfered with. The onus is upon a party applying to change the venue to shew that the discretion of the Court should be exercised and a change made. Numerous authorities have been cited to me for and against the application, but, as Boyd, C. said in an application of this nature in *Dowie* v. *Partlo* (1893), 15 Pr. 313 at p. 314: "The facts in each case are to be considered." He then added:

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> "It is a safe general rule that the venue will not be changed unless the defendant shews that some serious injury and injustice to his case will arise by trying it where the plaintiff proposes to have it tried."

It is not contended that this action could not be as conveniently tried at Victoria, Vancouver or New Westminster as at Nanaimo, so that the sole question to decide is, whether the right of the plaintiff, in the first instance, to name a place of trial, should be interfered with, through the reasonable probability of there not being a fair and impartial trial at the place selected by him. There is no doubt, however, that the question, as to whether the privilege or advantage thus possessed by a plaintiff is being utilized to the detriment or prejudice of a defendant, in a jury trial, is a fit subject for consideration by a Court in the interests of justice and proper exercise of its discretion. However, before considering what may be termed the merits of the application, I should deal with the contention of the defendant that section 15 of the Libel and Slander Act is applicable to this action. I do not think that the pamphlet or campaign sheet called "The Searchlight" comes within the terms of such Act. There was no material filed shewing that it was a public newspaper or other periodical publication, within the definition prescribed by the legislation. Then again such section provides, that the trial may be held at the place where the plaintiff resides, so it does not, in any event, form a bar to the plaintiff selecting Nanaimo as the place of trial. The latter part of the section is entitled to comment and has some relation to this application. It permits an application to be made to the Court for the trial of the issues in any other county "if it be made to appear to be in the interest of justice or that it would promote a fair trial." This provision is instructive and applicable generally as shortly outlining a ground upon which the defendant must, in this Province, base his application in order to succeed. In England the plaintiff in a libel action does not have the same advantage over the defendant as in this Province in fixing the place of trial. See Odgers on Libel and Slander, 5th Ed., p. 617, where the author, after referring to the fact, that the plaintiff has no longer a preponderating voice, and no *prima facie* right to have such trial fixed in the place that bests suits himself and his witnesses, adds that:

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"If either party can satisfy the Master that he will not have a fair trial in the place which seems naturally most convenient (*e.g.*, because his opponent is especially popular or powerful in that neighbourhood), the Master will fix on some other place where he is sure the jury will be impartial."

Then again, Pollock C.B., in *Penhallow* v. *The Mersey Dock and Harbour Board* (1859), 29 L.J., Ex. 21 at p. 22, in the course of the argument, as to whether the special jurors who might try the case at Liverpool would be prejudiced or not, said:

"It is not a mere question of personal bias or prejudice; but when a matter has been for some time discussed in a large community public opinion is involuntarily, unconsciously influenced; and it is impossible to say how far the case may not have been prejudged. All other considerations must give way to that of a fair trial. The learned Baron who tried the former cause is of opinion that this cause would not be fairly tried at Liverpool."

In Gatley on Libel and Slander at p. 453 the course pursued by the Master as to the place of trial is put in a somewhat different way as follows:

"On the application of either party the Master will alter the place of trial if he is satisfied that, owing to local prejudice or partisan feeling, there is no reasonable probability that a fair and impartial trial will be obtained in the place originally fixed, or for any other good cause shewn."

It should be borne in mind, however, that the designation of the place of the trial, thus referred to, was not, in the first instance, made by the plaintiff but by the Master upon the order for directions when both sides could be heard.

Without a lengthy discussion of the numerous authorities cited, I think I should, in coming to a conclusion, be guided by the remarks of Pollock, C.B. that "other considerations must give way to that of a fair trial." To the same effect King's Law of Defamation, p. 330, states that "the obtaining of a fair trial must overbear every consideration of mere convenience." In *Roche* v. *Patrick* (1870), 5 Pr. 210 at p. 213, Mr. Dalton, after discussing the matters of convenience and expense, concludes:

"I entirely agree with Mr. Paterson, that if it be reasonably established that a fair trial cannot be had in Leeds and Grenville all the above considerations are overborne."

In support of his application a number of affidavits have been filed by the defendant, asserting that a fair trial of the action could not be obtained at Nanaimo. The plaintiff, in his sole affidavit filed in reply, states that he is advised and believes "that the only issue of fact to be tried is the issue as to the truth

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of the libel recited in the defendant's plea of justification." He also states that, in his opinion, there is no place in British Columbia, where a fairer trial of this action can be had, than in Nanaimo. Assuming that the statement of the plaintiff be correct, as to the only issue to be tried, then the truth or falsity of such an issue is one, upon which both parties should desire a fair trial. Wherever the trial is held the burden of the proof of such a plea of justification rests upon the defendant.

Plaintiff, through his counsel, contends that the defendant should proceed with such proof at a trial to be held at his home town with a jury selected under the provisions of the Jury Act. While, on the contrary the defendant prefers to have the trial at Vancouver, stating his belief that a fair trial is not obtainable in Nanaimo. Both plaintiff and defendant are prominent citizens who have taken an active part in public life and are presumably strong in their convictions upon a subject of controversy discussed more or less throughout the Province.

With this contradiction between the parties and the balance in favour of the plaintiff, I should turn to consider the affidavits filed on behalf of defendant by residents of Nanaimo and determine whether they outweigh the position of vantage otherwise possessed by the plaintiff.

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Affidavits as to defendant not obtaining a fair trial in Nanaimo were made by William E. Bray, Merchant; Peter Conroy, Merchant; James A. Irvine, Merchant; Senator Albert Edward Planta; Alex. S. Moffatt, third engineer of S.S. Princess Patricia; Amy M. Moffatt, his wife, and Mrs. Amy Kenilworth Gilchrist, widow of Captain William Gilchrist, and now residing in North Vancouver. It is indirectly suggested that I should not fully accept the statements contained in these affidavits and give them full effect because the deponents were supporters of the Provincial Party, of which defendant was leader, at the last local general election. While this might indicate that their sympathies were with the defendant in this action, still it should not be sufficient to destroy the effect of their statements under oath. No attack has been made upon their character or veracity and their sworn statements are entitled to due consideration. Without discussing such affidavits in detail, it will suffice to state they in some cases express

a belief and in others only an opinion on the part of the deponent that a fair trial of the action is not obtainable in Nanaimo.

In some cases reasons are given for arriving at their conclusions. The affidavit of *Francis Drew Pratt,* solicitor for the defendant, gives a history of a visit made by him to Nanaimo, and the difficulties he met with, in interviewing citizens, as to the probability of a fair trial of the action before a jury in that city. He states that he interviewed more than 25 citizens for that purpose and in every instance but one the parties so interviewed expressed an opinion, under a promise of secrecy as to non-disclosure of their names in most cases, that the defendant would not receive a fair trial in Nanaimo.

During the course of the argument, as a solution of the difficulty, I inquired from counsel for the plaintiff, whether his client, who was present at the time, would be willing to have the trial before a jury in some Coast City, other than Vancouver, say, Victoria or New Westminster, but the suggestion was fruitless. The plaintiff's desire is apparently very strong to have the trial at Nanaimo, in fact his counsel, assumedly so instructed, volunteered the remark when I reserved my decision, that he would appeal if it were adverse to his contention.

The position taken by the plaintiff has invited more consideration of the authorities than would have been deemed necessary in an action of this nature, where a person sued by a minister of the Crown for libel, seeks to have another place chosen for the trial, than the one selected by the plaintiff.

While not overlooking the superior position held by plaintiff, I should, however, as Chief Baron Pollock said, bear in mind that "all other considerations give way to that of a fair trial" and that the right of naming the place of trial, possessed by the plaintiff, under our practice, should not militate against the defendant so that "a serious injury and injustice would arise to his case." From the material filed, I believe that, if the trial were held in Nanaimo, this result would follow. This has been "reasonably established" and substantial justice requires a change, in order to have a fair trial. The application of the defendant should be granted for a change of venue, but not to Vancouver. I give the plaintiff the option, without prejudice

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to his rights, of selecting either Victoria or New Westminster as the place of trial. They are convenient and a speedy trial can be held at either of them. If the plaintiff does not make such selection, then I will do so, when the order is submitted to me for signature. Costs will be costs in the cause.

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From this decision the plaintiff appealed. The appeal was argued at Victoria on the 28th and 29th of June, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

J. W. deB. Farris, K.C., for appellant: The action was commenced in Nanaimo where Mr. Sloan lives, and the venue was changed to New Westminster or Victoria. We submit that there is no ground for the change. There is nothing to shew that Sloan has tried to use his influence: see Gatley on Libel and Slander, p. 453; *Sapiro* v. *Leader Publishing Co., Ltd.* (1925), 2 W.W.R. 167. The plaintiff has the right to lay the venue and it should not be changed unless substantial justice requires it: see *Abbott* v. *Western Canadian Ranching Co.* (1919), 27 B.C. 241 at p. 242; *Walker* v. *Brogden* (1864), 17 C.B. (N.S.) 571; *Starratt* v. *Dominion Atlantic R. Co.* (1912), 5 D.L.R. 641. There must be substantial grounds: see *Gage* v. *Reid* (1917), 39 O.L.R. 52 at p. 58; *Campbell* v. *Doherty* (1898), 18 Pr. 243; *Regina* v. *Nicol* (1900), 7 B.C. 278. They must shew that a fair trial cannot be had at Nanaimo: see *Roche* v. *Patrick* (1870), 5 Pr. 210. The case of *Centre Star* v. *Rossland Miners Union* (1904), 10 B.C. 306 was cited by the other side. We submit it is in our favour. The learned judge below followed *Penhallow* v. *The Mersey Dock and Harbour Board* (1859), 29 L.J., Ex. 21. The affidavits supporting the motion do not disclose sufficient grounds to change the venue: see *In re Anthony Birrell Pearce & Co.* (1899), 2 Ch. 50; *The King* v. *Licence Commissioners of Point Grey* (1913), 18 B.C. 648 at pp. 650 and 655.

A. H. MacNeill, K.C., for respondent: The circumstances shew clearly that the defendant cannot obtain a fair trial at Nanaimo. The trial judge has found that this is so and he should not be disturbed. *Abbott* v. *Western Canadian Ranching*

Co. (1919), 27 B.C. 241 is in our favour on this point: see also *The Assyrian* (1888), 4 T.L.R. 694; *Soley and Co. (Limited)* v. *Lage* (1896), 12 T.L.R. 191; *Foxwell* v. *Van Grutten* (1897), 14 T.L.R. 145; *Thorogood* v. *Newman* (1906), 23 T.L.R. 97. A fair trial is the first consideration and expense secondary: see *Jacobson Goldberg Co.* v. *Livingstone* (1920), 28 B.C. 35. The plaintiff has no *prima facie* right to have the trial fixed in the place that best suits him: see Odgers on Libel and Slander, 5th Ed., 617. As to admission of new material see *Marino* v. *Sproat* (1902), 9 B.C. 335; *Moggey* v. *Blight* (1920), 53 D.L.R. 132; *Covlin* v. *Spangler* (1923), 4 D.L.R. 281 at pp. 285 and 288.

Craig, K.C., replied.

MACDONALD, C.J.A.: The appeal should be allowed.

My difficulty in sustaining the judgment of the judge below is that there are no facts brought out in the evidence upon which the Court can say that the venue ought to have been changed. Usually where prejudice is alleged, certain facts, or propaganda, or influence, indicated by acts, are set forth, from which the Court can draw the conclusion that a fair trial cannot be obtained in a particular case. Here all we have are the affidavits of several persons who give their opinions. I will say nothing about the deponents' associations with the parties, because I do not think that that has anything to do with the appeal. I will assume that they are non-partisan. They say that because of the popularity of Mr. Sloan in the community in which he lives it would be impossible to obtain a fair trial there. These are simply expressions of opinion, the deponents found their opinions upon popularity alone. They do say in addition that he is a minister of the Crown, is the representative of the district, and has considerable influence, but they do not say that he has used his influence to further his interests in this litigation. That sort of evidence could be got in any jury case. Any number of men might be induced to say, and perhaps honestly say, that in their opinion one party or another party could not obtain a fair trial in a named county. The witness takes the place of the Court; he says, From my knowledge, or, from my information, or, in my opinion, a fair trial could not

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be got. It is for the Court to draw that inference from the facts, not for the witness.

Mr. *Pratt* makes an affidavit on information and belief. He tells us plainly enough, probably the truth—I have no doubt it is the truth—that a number of persons he met declined to express an opinion, because they were afraid of the effect it might have on their standing as citizens of Nanaimo, or on their business. He does not name those persons, he simply makes a statement that certain persons have refused to give him information. There is no possibility of the appellant testing that evidence, because the persons whom Mr. *Pratt* interviewed are not named. True, he might have been examined upon his affidavit, but the person who applies for a change of venue must make out a case. It will not do to say, I make certain statements without disclosing the names of my informants and it is for you to find out the facts in regard to them by examination of me.

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So far as the affidavits on both sides are concerned, I get very little assistance from them, and if I were to found a judgment upon material of that kind I should be going much further than I think a Court ought to go. In one of the cases cited, *The Queen* v. *Ponton* (1899), 18 Pr. 429, in which the question of venue was involved, Mr. Justice Robertson, who heard it, pointed out that in order to found a case for change of venue, facts must be set out, not opinions. Mere opinions are of little value. I have no doubt, therefore, that the learned judge was in error in changing the venue. He not only founded his order upon insufficient evidence, but proceeded on a wrong principle—upon the principle that opinion evidence unsupported by a single fact except popularity was enough, without evidence of any act of the plaintiff of misuse of his popularity or his influence in connection with the case. I therefore think, with great respect to the learned judge, that his judgment should be set aside and the venue restored.

MARTIN, J.A.

MARTIN, J.A.: In my opinion this appeal must be allowed.

However regarded, whether under the old practice, upon the English cases which existed up till 1902 (and I pause here to say that the dates of the change are conveniently set out at p. 562 of the Yearly Practice, 1926), or under our present practice,

which was the same as that in England before the change in 1902, I am of the opinion that the judgment of the judge below can not be supported, upon this ground: that I think he has proceeded upon evidence which is not admissible, and that he has proceeded upon a wrong principle, in this way, that he has not given due regard to the right that the plaintiff has to select his place of trial. Many cases have been cited as to the discretion of the learned judge under both the old English practice, which is ours, and the new, and I think that perhaps the best example of that is *Thorogood* v. *Newman* (1906), 23 T.L.R. 97; 51 Sol. Jo. 81, and *Shroder, Gebruder, & Co.* v. *Myers & Co.* (1886), 34 W.R. 261, wherein the Court of Appeal, Lord Justice Esher, said this:

"The defendants have not brought their case within any rule of practice. The plaintiffs' suggestion is that you could not get twelve Liverpool jurymen to give an honest verdict in this case. The suggestion is to my mind a shocking one. The defendants have to shew a serious injury to their case and no injury to the plaintiffs' for having the venue changed. No such injury has been shewn by the defendants."

I think these expressions are very succinctly put, and most helpful to this case and elsewhere, viewed in the light of the ground upon which it was asked for, and that ground is best set out in the affidavit of *Pratt,* in which after his examination of 25 persons, he says this, as is the ground upon which the application is really based; after interviewing these 25 different persons, with one exception: "they informed me in every instance that due to the great influence and popularity of the plaintiff, in the opinion of my respective informants that the defendant would not receive a fair trial in the City of Nanaimo." He then proceeded to interview one F. S. Cunliffe, the President of the Associated Boards of Trade of Vancouver Island, and was told by him, although he did not care to make an affidavit, of the popularity of the plaintiff. That is the 26th person he interviewed, and then he says: "I do not believe, because of this—because the sympathies of those residents of Nanaimo who are eligible for jury service are with the plaintiff—that a jury could be selected from the County of Nanaimo which would not be so influenced in favour of the plaintiff by reason (1) of the political nature of this action; (2) the influence; and (3) the popularity of the plaintiff as aforesaid." And ends up in this

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way: "I verily believe that the information I received as hereinbefore set out indicates the general trend of public opinion in and about Nanaimo."

So we see he there specifically alleges the general trend of public opinion, which he finds adverse to the respondent, to be based upon the appellant's influence and popularity. Now having thus defined the ground, I need only say that, although I have listened with great attention to this case, I have not heard one case cited which supports the opinion that because a person of influence resides in a community, and that because he is popular in that community, these are grounds against him. The statement we have is that a jury could not be selected from the County of Nanaimo which would not be influenced in favour of the plaintiff. This as a ground is not supported by authority. In regard to politics, the suggestion of political influence, we have the decision of DRAKE, J., in one of the greatest libel cases ever tried in this Province—*Regina* v. *Nicol* (1900), 7 B.C. 278, where an action was brought in Victoria by two members of the Provincial Executive, upon a criminal prosecution launched by them. One of them was Premier of the Province and both resided in Victoria. One would have thought in a libel of this kind the question of political influence would be particularly acute, because it was an attack on them at that time for the way they were utilizing their public offices for their private advancement. And yet this is what my late brother DRAKE said about the matter:

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> "The affidavit alleged that the prosecution are interested in politics in the City and County of Victoria, and have been for a number of years, and that owing to the nature of the libel the deponent believes it will be impossible to obtain a fair and impartial trial in Victoria.
>
> "The grounds alleged for a removal of the indictment are of the very slightest character. The prosecution being interested in politics is a fact applicable to most people in the Province."

He goes on to say:

> "If being interested in politics is a ground for change of the place of trial, I should consider it impossible to name a place in the Province where the same objection might not be raised."

Now I am sure that there can only be one view as to the most sensible, if I may say so, view of my late brother DRAKE when he laid down that rule, and I propose to adhere to it, because to say in a case of this kind that it has a certain

political aspect, of course would mean, if you apply that rule, as Mr. Justice DRAKE says, it would mean you could not try the case at all in this Province. And if I may be allowed to refer to my very long experience as a trial judge, in the course of which I frequently visited Nanaimo, I cannot shut my eyes to the fact that never the slightest intimation came to me that a jury empanelled to do justice in that county was in any essential particular different from a jury in this county.

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I understand, of course, there may be circumstances that render it desirable to change the venue. I recall to mind the action taken in connection with prosecutions arising out of very serious fishery disputes and disturbances on the Fraser River, shortly after I was appointed to the Bench, and not long before the death of my brother the lamented Chief Justice MCCOLL. An application was made to change the venue from Vancouver, because there was great disorder in the Fraser Valley and upon that river, and the Militia had to be called out. The state of public opinion was so strong, being inflamed by various causes, that after the Assizes opened in Vancouver and some cases had been tried an application was made to the presiding judge to change the venue, and it was granted and several cases were transferred to the New Westminster Assizes, and it became my duty to try them. I illustrate that to shew that there are circumstances when it will be necessary to make an order of this kind, because such a state of affairs existed in one particular community—in that case, in Vancouver, because misplaced sympathy with the depredators made justice impossible to be done in that county, and so in such circumstances it was eminently proper to make the order; but on the other hand, and with all respect it would, in my view, be eminently improper to make such an order in the case before us.

MARTIN, J.A.

Therefore, for that reason, the only course open to me is to say that, with the greatest respect to the learned judge below, there was wrongful admission of evidence and failure to recognize the principle of the plaintiff's primary right of selection of the place of trial, and in the circumstances it becomes our duty to say the order was clearly wrongly made from every point of view and so must be set aside.

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GALLIHER, J.A.: I agree. In this case the venue has been laid in Nanaimo; that was the plaintiff's right. Before that right should be taken away, good and sufficient grounds should have been established. Therefore, with all deference to the learned judge, whose views I respect, I do not find, upon examination of the evidence before me, that the circumstances warranted him in changing the venue.

I therefore am of the opinion that the appeal should be allowed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal must succeed. No material such as is called for by the practice was laid before the learned judge in the Court below that would entitle that judge, with great respect, to make the order which was made. The plaintiff here had the right to select the place of trial. The writ issued out of the Nanaimo registry of the Supreme Court and the place of trial was stated to be the City of Nanaimo. The action is one for libel. The only grounds that are permissible to admit of change of venue are, (a) preponderance of convenience, (b) the interests of justice. As to the first ground no attempt was made to establish this. As to the second ground there has been dismal failure. The material upon the second ground is of a nature scant in all its features. The suggestion would seem to be that there is some current of public opinion in the City of Nanaimo which would be antagonistic to the defendant in a libel action in having the defence properly considered. But I see nothing in the material to shew what this suggestion is based upon, and it is absolutely necessary to shew the reason for this supposed opinion, and that being absent, the learned judge was really not capable of exercising a judicial discretion in the matter. He was without essential evidence. Popularity is hinted at.

Now take popularity—surely popularity itself is no crime—nothing ignominious about popularity—it is something that should be acclaimed in a public man; it is an earnest of public duty well performed. Influence—why should not there be influence? A citizen who conducts himself correctly and exercises his duties of citizenship well, would have influence; a Cabinet Minister naturally has influence—why not? That a

man should be engaged in a very large business and an employer of a great deal of labour in a community and advancing the business interests of a community—why not? If he has done that, has he created an atmosphere which would disentitle him having the trial of the action in his home town? I see nothing in the suggested grounds taken, and suggested is as far as the material goes, no proof whatever, and even failure to comply with the rules as to affidavit evidence.

There is a too general tendency, and I have deplored it all my life, to make slanderous and libellous statements in regard to men in public life. It is regrettable that is so. But if slanderous statements are made about public men, and libellous statements, the people who make them ought to be able to rest them on some sound foundation; and in the present case nothing is in evidence as yet; the plaintiff knows of nothing within his own knowledge and has so sworn.

That a Cabinet Minister should represent a constituency is in the order of things, and because a Cabinet Minister represents his constituency does it mean he is using his influence wrongly and improperly? If it be so, then say so, do not merely throw out a suggestion that improper influence might be exercised. Such a suggestion is puerile and inane.

On looking generally over the City of Nanaimo, I cannot see how a minister of the Provincial Cabinet—the plaintiff being minister of mines and provincial secretary—would be able to control or influence the electorate of the City of Nanaimo, or the jurors that might be called upon to hear the case; and as to this there is failure to even allege that it is the intention to do so; any such contention would of course be ridiculous in the extreme, and idle contention.

Injustice may be on both sides. You have to approach the question from both sides; and I was pleased to note that in the *Myers* case, referred to by my Brother MARTIN, the point I took during the argument is dealt with; the change of venue may work injustice to the plaintiff, the change of place of trial may bring in its train the idea to the changed place of trial that the plaintiff would have had some improper advantage in his home town and it was necessary to change the place of trial. The plaintiff has the constitutional right to select the place of trial,

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which he did, and selected his home town; and that has been changed. The change of venue is in the circumstances unfair to the plaintiff. If the plaintiff to this action had been inflaming public opinion in the City of Nanaimo, by newspapers taking up his case and decrying the cause of the defendant, and in that way influencing public opinion, there might be something to be said. But there is nothing of that kind in the material here at all. Therefore, on the material as I look at it, the change of venue did an injustice to the plaintiff. And with regard to the fears of the defendant that a fair trial cannot be had in the City of Nanaimo, I have no hesitation in saying that any such fears are wholly groundless. In my opinion, and there is nothing to the contrary in the material before us, the defendant will have his defence well considered by the jurors in the City of Nanaimo when they have been empanelled. It is rather an idle contention to say that popularity and influence have much effect. If we cast our eyes over the political history of Canada we can glean some pertinent knowledge. The Rt. Hon. Sir John Macdonald was in his day unquestionably the most popular public man in all Canada, yet he was more than once defeated in the City of Kingston. Recently the late Prime Minister (the Rt. Hon. MacKenzie King) of a day or two ago, went to the County of York and was defeated there. It might equally have been said that in the City of Kingston no one could withstand the popularity and influence of Sir John Macdonald, and the same thing in the County of York with reference to Mr. Mackenzie King. But we find that the electorate take different views; and we find in this particular case that the plaintiff is a minority representative: more votes were cast for the other two candidates than for Mr. Sloan—approximately two-thirds of the voters declared for two other candidates, while approximately one-third only declared themselves for the plaintiff. We are asked to accept worthless, or, at best, scant facts, as a reason for allowing this change of venue; this Court has no embarrassment whatever in the present case in deciding, there being an appealable discretion, that there was, with great respect to the learned judge, a want of proper judicial discretion in the Court below; there was an absence of that necessary material before the learned judge to entitle the order being

made. That being so, it is the bounden duty of the Court of Appeal to reverse the order and restore the case for trial to the venue which the plaintiff selected; that is, the plaintiff selected the City of Nanaimo as the place of trial, and that is the place where the trial should be held.

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MACDONALD, J.A.: I am of the same opinion. With deference, I think the judge below deprived the appellant of a legal right, without facts or material that would enable the Court to form its own judgment on the question.

Appeal allowed.

Solicitors for appellant: *Farris, Farris, Stultz & Sloan.*
Solicitor for respondent: *F. D. Pratt.*

KETCHEN v. THE KING.

MURPHY, J.
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KETCHEN v. THE KING

Mineral lands—Situate under sea—Charge on obtaining Crown grant—Land not alienated or leased—B.C. Stats. 1903-4, Cap. 37, Sec. 4; 1910, Cap. 33, Sec. 4.

A suppliant, having paid $10 per acre upon obtaining Crown grants to coal rights in lands under the sea, his petition of right for a refund of $5 per acre was refused as the surface of the lands in question had not been leased or alienated to any person.

PETITION OF RIGHT for a refund of $5 per acre of the amount paid for mineral rights in lands under the sea. Heard by MURPHY, J. at Victoria on the 30th of June, 1926. Under the provisions of the Coal Mines Act the suppliants staked certain lands under the sea and obtained Crown grants for the mineral rights in said lands paying therefor $10 per acre. The Crown held a registered title to the surface of the lands and the suppliants contend this was a form of alienation that entitled them to a Crown grant at $5 per acre under section 4 of the Coal Mines Act Amendment Act, 1903.

Statement

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Stuart Henderson, for petitioner.

Maclean, K.C., for respondent.

1st September, 1926.

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MURPHY, J.: It is clear, I think, that Crown lands of the Province can only be alienated under powers conferred by statute. If authority is needed, the case of *Blackwood* v. *London Chartered Bank of Australia* (1874), L.R. 5 P.C. 92 at p. 112, supplies it.

At the time lots 28G and 29G were staked in 1908, alienation of coal lands was governed by section 4 of Cap. 37, B.C. Stats. 1903-4. These lots are under the sea and it may well be urged there was no statutory authority to alienate such lands until the amending statute of 1910 was passed. This Act fixes the price at $10 per acre for grant of coal and petroleum under the sea. But even if such contention is invalid, said section 5 of Cap. 37, B.C. Stats. 1903-4 fixes the price of coal lands at $10 per acre, or in the event of the land being alienated or held under lease, at $5 per acre.

Judgment

The lands in question have not been alienated nor are they held under lease. The Crown holds a registered title to them. The contention that registration is a form of alienation is, I think, unsound. Registration in the name of the Crown in no way impairs the power of the Crown to deal with said lands within the ambit of the authority granted by statute. It is possible petitioner has a right to a conveyance of the surface, but that is not asked for by the petition, and is not the real point at issue.

The petition is dismissed.

Petition dismissed.

ATTORNEY-GENERAL OF THE PROVINCE OF BRITISH COLUMBIA v. CANADIAN PACIFIC RAILWAY COMPANY AND UNION STEAMSHIP COMPANY OF BRITISH COLUMBIA LIMITED.

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ATTORNEY-GENERAL OF BRITISH COLUMBIA v. CANADIAN PACIFIC RY. CO.

Taxation—Provincial—Fuel-oil Tax Act—Indirect taxation—Ultra vires—R.S.B.C. 1924, Cap. 251—30 & 31 Vict., Cap. 3, Sec. 92, No. 2 (Imperial).

Section 2 of the Fuel-oil Tax Act defines a "purchaser" as "any person who within the Province purchases fuel-oil when sold for the first time after its manufacture in or importation into the Province." Sections 3, 4 and 5 provide, *inter alia*, first, that "Every purchaser shall pay to His Majesty for the raising of a revenue for Provincial purposes a tax equal to one-half cent per gallon of all fuel-oil purchased by him, ... "; secondly, that "Every vendor at the time of the sale of any fuel-oil to a purchaser shall levy and collect the tax imposed by this Act in respect of the fuel-oil, ... "; thirdly, that "Every vendor shall, with each monthly payment, furnish to the collector a return shewing all sales of fuel-oil made by him to purchasers during the preceding month, ..."

The defendant Company buy fuel-oil from the Union Oil Company of Canada and consume all that they buy in and about the Port of Vanconver. The Union Oil Company of Canada purchase its fuel-oil from the Union Oil Company of California. These two companies have the same executive officers. The shares in the Canadian company are owned or controlled by the California company but they are separate legal entities. The California company ships the fuel-oil from California to the Canadian company at Vancouver and the Canadian company pay the California company for the oil at San Pedro, California, on the date of delivery at Vancouver, plus transportation and other charges, the quantity of oil paid for being equal to the quantity discharged into the tanks of the Canadian company at Vancouver. In an action for payment of the taxes alleged to be due and payable under said Act it was held that the first purchaser after importation of the fuel-oil into British Columbia was the Union Oil Company of Canada and that the tax was therefore indirect and *ultra vires* and that even assuming the defendant was the first purchaser the tax sought to be imposed is *ultra vires* of the local Legislature as not being direct taxation within the meaning of section 92, No. 2 of the British North America Act.

Held, on appeal, affirming the decision of MORRISON, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that assuming the respondents were the first purchasers and that those who passed the Act were aware of the facts at the time and intended or desired that the tax should

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be paid by the very person upon whom it was imposed, there must be some line of demarcation between what the Province may tax and what it may not and this line may not be made to depend in all cases on the facts existing at the time the tax is imposed but ought to be made to depend on what may reasonably be expected when conditions shall have become static. The evidence is that fuel-oil has become a commodity of commerce in other countries and reason and experience point to the conclusion that it will be so here. The tax should therefore be construed as an indirect tax and not authorized by section 92, No. 2 of the British North America Act.

Per GALLIHER and MACDONALD, JJ.A.: The inference from the evidence is that the Canadian company are not purchasers but are the marketing agents of the California company and the defendant is therefore the first purchaser in British Columbia.

[Affirmed by the Supreme Court of Canada.]

APPEAL by plaintiff from the decision of MORRISON, J. of the 10th of March, 1926 (reported 36 B.C. 551), in an action for an accounting for moneys due by the defendant to the plaintiff under the Fuel-oil Tax Act in respect of fuel-oil purchased by the defendant after its manufacture or importation into the Province, the defendant being in respect of such fuel-oil, the purchaser, within the meaning of said Act and having failed, neglected or refused to pay to His Majesty the tax of an amount equal to one-half cent per gallon of all such fuel-oil purchased by the said defendants. The facts are sufficiently set out in the judgment of the learned trial judge.

Statement

The appeal was argued at Vancouver on the 30th and 31st of March and 1st of April, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. W. deB. Farris, K.C. (*Sloan*, with him), for appellant: These actions were brought to test the validity of the Fuel-oil Tax Act of 1923. Two points arise, the first is apart from the validity of the Act there being two Union Oil Companies, one in California and one in Canada, and their contention is that the first sale is from the California company to the Canadian company in which case the sale from the Canadian company to the defendant Companies would not be the first sale and that if this is so we should have brought our action against the Union Oil Company of Canada. The second question is whether the Act is constitutional and this primarily involves the question of

Argument

whether the tax is direct or indirect. We say the Canadian company is entirely the creature of the California company, the officials are the same, and the transaction between the two companies carrying out the purchase and sale is not after importation, so that there is no sale here. We contend (1) that the Canadian company was the first vendor and not first purchaser; (2) that the two companies were in effect the same although separate entities; (3) that the contract was made before the goods were imported. On the question of importation under the Customs Act see *Canada Sugar Refining Co.* v. *Reginam* (1898), 67 L.J., P.C. 126; *The Attorney-General of British Columbia* v. *The Attorney-General for Canada* (1922), 64 S.C.R. 377 at p. 388; (1923), 1 D.L.R. 223 at p. 228. Even if wrong on the question of importation the situation is within the meaning of the Act which says "fuel-oil sold for the first time after importation." A direct tax is one demanded from the very person whom the Legislature intended should pay it: see *Cotton* v. *Regem* (1913), 83 L.J., P.C. 105 at p. 114. The ultimate incidence as it appears prospectively to the Legislature when enacting is the test: see *Bank of Toronto* v. *Lambe* (1887), 56 L.J., P.C. 87 at p. 90; *Brewers' and Maltsters' Association of Ontario* v. *Attorney-General of Ontario* (1897), 66 L.J., P.C. 34 at p. 35. *The Security Export Co.* v. *Hetherington* (1923), S.C.R. 539 at pp. 559-60; (1924), 94 L.J., P.C. 1; *Burland* v. *Regem* (1921), 91 L.J., P.C. 81 at p. 84; *In re Validity of Manitoba Act* (1924), S.C.R. 317 at pp. 321-2; (1925), 94 L.J., P.C. 146 at p. 148; *Rex* v. *Caledonian Collieries Ltd.* (1926), 1 W.W.R. 96; *Attorney-General of Quebec* v. *Reed* (1884), 54 L.J., P.C. 12 at p. 13. The term "direct taxation" ought to be liberally construed: see *Severn* v. *The Queen* (1878), 2 S.C.R. 70 at p. 103; *Treasurer of Ontario* v. *Canada Life Assurance Co.* (1915), 33 O.L.R. 433 at p. 439.

Argument

Davis, K.C. (*McMullen*, with him), for Canadian Pacific Railway: First as to whether this is an excise tax, customs duties are taxes on the export and import of commodities and excise duty is a tax on the manufacture, sale or consumption of a commodity. An excise tax works into the cost to the consumer and is an indirect tax. Fuel-oil is a commodity the tax on which the consumer must ultimately pay. It is a tax on the

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consumer of the commodity: see Blackstone's Commentaries, Vol. 1, p. 318 and Stephen's Commentaries on the Laws of England, 17th Ed., Vol. 1, p. 272; *Portland Bank* v. *Apthorp* (1815), 12 Mass. 252 at p. 255; *Patton* v. *Brady, Executrix* (1902), 184 U.S. 608. Customs and excise duties belong exclusively to the Dominion under the British North America Act as to the regulation of trade and commerce. The case of *The Attorney-General of British Columbia* v. *The Attorney-General of the Dominion of Canada* (1922), 21 Ex. C.R. 281 and on appeal 64 S.C.R. 377 at pp. 381 to 387 deals with the question: see also the judgment on appeal to the Privy Council in (1923), 93 L.J., P.C. 129. We submit customs and excise fall within section 91, No. 2 of the British North America Act and is given exclusively to the Dominion: see also, *Grand Trunk Railway of Canada* v. *Attorney-General of Canada* (1907), A.C. 65 at p. 68 and *City of Montreal* v. *Montreal Street Railway* (1912), A.C. 333 at p. 343. As to indirect taxation, he admits the Canadian and American companies are entirely separate on this: see *Macaura* v. *Northern Assurance Co.* (1925), A.C. 619. The oil is delivered to the Canadian company when it is pumped into its tanks at Vancouver and that is when the sale takes place as the amount of oil to be taken in each case is not fixed until it is put into the Vancouver tanks: see *Taylor* v. *Jones* (1875), 1 C.P.D. 87; *Re Hudson Fashion Shoppe Ltd.* (1925), 58 O.L.R. 130. Further as to customs duties being exclusively Dominion see *Toronto Electric Commissioners* v. *Snider* (1925), A.C. 396 at p. 406. If the tax were legal the Province could put on such a tax as to exclude the commodity which would tend to increase the consumption of coal, so that in putting on such a tax they would be regulating trade and commerce.

Macrae, for Union Steamship Co.: The Act in reality is a tax on the vendor and the framing of the Act is merely a subterfuge to make it appear a tax on the purchaser and therefore a direct tax. If it is in fact a tax on the vendor it must be an indirect tax because not only is there the presumption that it would be passed on but there is an express direction in the Act that it is to be collected from the purchaser. There are two observations I desire to make, first, that nowhere in the Act is

there any penalty on the purchaser for not paying, and secondly, nowhere in the Act is any return required to be made or report made by the purchaser. The penalty is on the vendor and the returns have to be made by him and he is ordered to pay the tax.

Farris, in reply: Although this tax may savour of excise if it is a direct tax, which we submit it is, then we have power to impose it: see *Little* v. *Attorney-General for British Columbia* (1922), 31 B.C. 84; *Rex* v. *Western Canada Liquor Co.* (1921), 29 B.C. 499; *Rex* v. *Ferguson* (1922), 31 B.C. 100. The Dominion gets its power to impose customs duties from Nos. 2 and 3 of section 91 and not by section 122. As to whether the tax is direct or indirect it is the intention and expectation of the Legislature when the Act is passed that must govern and in arriving at that expectation you must consider the Act in relation to the known facts.

Argument

Cur. adv. vult.

14th June, 1926.

MACDONALD, C.J.A.: This is an appeal by the Attorney-General of British Columbia from a decision of MORRISON, J., holding that the Fuel-oil Tax Act was *ultra vires* of the Province. The Act was passed in 1923, and is now to be found in the Revised Statutes of British Columbia, Cap. 251. Shortly stated it imposes a tax to be paid by the first purchaser within the Province of fuel-oil imported into or manufactured in the Province.

Assuming that the respondent was such first purchaser and that it was the consumer, and that those who passed the Act were aware of these facts at the time and intended or desired that the tax should be paid by the very person upon whom it was imposed, is it a tax authorized by section 92, No. 2 of the British North America Act, 1867?

MACDONALD, C.J.A.

The respondent's answer to that question may be expressed in the language of the Privy Council in *Bank of Toronto* v. *Lambe* (1887), 56 L.J., P.C. 87 at p. 89:

"The Legislature cannot possibly have meant to give a power of taxation, valid or invalid, according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to, and ascertainable by, the general tendencies of the tax and the common understanding of men as to those tendencies."

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In my opinion no tax can be devised which will not violate the definition of John Stuart Mill referred to in *Lambe's* case, in particular instances. The Privy Council referred to that difficulty and the example of the income tax was given as one which would be denied the character of a direct tax if the definition were strictly applied. Again, the land tax as imposed in this Province, and I think in all other Provinces of Canada, would, in particular instances be an indirect one, whilst a customs duty which is universally regarded as an indirect tax, would be a direct one on the importing consumer.

The evidence is that fuel-oil has become in the neighbouring Republic a commodity of commerce, like coal, and reason and experience point to the conclusion that it will be so here. Indeed it is a question on this appeal as to whether that time has not already arrived. If at the time the Act in question was passed, facts, the stability of which may reasonably be assumed, that is to say, may in all likelihood continue substantially unchanged, are shewn to exist, then as I read *Lambe's* case, the tax ought to be regarded as a direct one notwithstanding that in particular instances it may not answer to that description, but if the Legislature were not justified by the common understanding of men, in making such assumption, but on the contrary, ought to have assumed that those facts were transitory only and would presently be replaced by other facts which must continue to exist, and which, assuming them to exist then, would not support the legislation, it could not legally impose the tax.

MACDONALD, C.J.A.

It appears to me to be impossible to construe, having regard to the objects sought to be attained by the British North America Act, and to the working of it in practice, No. 2 of section 92, in the way contended for by counsel for the Attorney-General. There must be some line of demarcation between what the Province may tax and what it may not, and this line may not be made to depend in all cases on the facts existing at the time the tax is imposed, but ought to be made to depend on what may reasonably be expected when conditions shall have become static. Legislation of this sort cannot, like legislation, for example, affecting immigration, be good until displaced by an Act of the Dominion Parliament. It ought to be founded

upon assumed permanent conditions, otherwise, the subject must become hopelessly involved.

MARTIN, J.A.: This appeal raises the question of the constitutionality of the British Columbia Fuel-oil Tax Act of the 21st of December, 1923, Cap. 71, which imposes, by the 3rd section thereof, a tax of half a cent per gallon upon the purchaser of fuel-oil, "purchaser" being thus defined by the 2nd section:

"'Purchaser' means any person who within the Province purchases fuel-oil when sold for the first time after its manufacture in or importation into the Province."

This Act was subsequently carried into the Revised Statutes of 1924 and is there to be found as Cap. 251, but the time of its original passage is, in my opinion, of prime importance.

It is submitted that this tax is not within class 2 of section 92 of the B.N.A. Act which authorizes the Provincial Legislatures "to make laws" for

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

because it is alleged to be in its nature a form of unauthorized indirect taxation; and it is further submitted that it is an excise tax, which species of taxation is solely reserved for the Federal Parliament under section 122 of the same.

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Since the recent decision of the Privy Council in *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1925), A.C. 561, there is no doubt of the way in which the question of direct taxation must be approached because, at p. 566, it is said:

"As to the test to be applied in answering this question, there is now no room for doubt. By successive decisions of this Board the principle as laid down by Mill and other political economists has been judicially adopted as the test for determining whether a tax is or is not direct within the meaning of s. 92, head 2, of the British North America Act. The principle is that a direct tax is one that is demanded from the very person who it is intended or desired should pay it. An indirect tax is that which is demanded from one person in the expectation and with the intention that he shall indemnify himself at the expense of another. Of such taxes excise and customs are given as examples."

And after considering a number of its own decisions upon the subject, the Privy Council held in that case that a general tax

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upon "persons selling grain for future delivery" was indirect because, pp. 467-8:

"It is obvious that this liability will extend, not only to brokers and mere agents, but to factors, such as elevator companies, to whom the possession of grain has been entrusted for sale. . . . The amount will, in the end, become a charge against the amount of the price which is to come to the seller in the world market, and be paid by some one else than the persons primarily taxed. The class of those taxed obviously includes an indefinite number who would naturally indemnify themselves out of the property of the owners for whom they were acting."

In endeavouring to ascertain what was the "expectation and intention" of the Legislature as to who should pay the tax, it was said in *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575; 56 L.J., P.C. 87, that "the common understanding of man on this subject, is one main clue to the meaning of the Legislature"; and again, the "common understanding likely to have been present to the minds of those who passed the Federation Act" should be kept in view in considering "the probabilities of the case"—pp. 583-4. It has been repeatedly laid down by the Privy Council that it is essential to consider the facts and circumstances, normal or otherwise, under which the impeached legislation was passed in order to determine its validity—*cf., e.g., In re The Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919* (1922), 1 A.C. 191 at pp. 197 and 200, wherein their Lordships said, p. 200:

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"For throughout the provisions of that Act there is apparent the recognition that subjects which would normally belong exclusively to a specifically assigned class of subject may, under different circumstances and in another aspect, assume a further significance. Such an aspect may conceivably become of paramount importance, and of dimensions that give rise to other aspects."

Also in *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* (1923), A.C. 695, their Lordships said, p. 704:

"The overriding powers enumerated in s. 91, as well as the general words at the commencement of the section, may then become applicable to new and special aspects which they cover of subjects assigned otherwise exclusively to the Provinces."

It was decided that the emergency legislation in question could be upheld on the ground that the war situation which it had properly and temporarily been passed to meet (in the exercise of overriding Federal defensive powers) was not wholly at an end in the opinion of the Federal Government, their Lordships saying, pp. 706-7:

"Very clear evidence that the crisis had wholly passed away would be required to justify the judiciary, even when the question raised was one of *ultra vires* which it had to decide, in overruling the decision of the Government that exceptional measures were still requisite. . . . . When, then, in the present instance, can it be said that the necessity altogether ceased for maintaining the exceptional measure of control over the newspaper print industry introduced while the war was at its height? At what date did the disturbed state of Canada which the war had produced so entirely pass away that the legislative measures relied on in the present case became *ultra vires?* It is enough to say that there is no clear and unmistakable evidence that the Government was in error in thinking that the necessity was still in existence at the dates on which the action in question was taken by the Paper Control Tribunal."

In *Toronto Electric Commissioners* v. *Snider* (1925), A.C. 396 at pp. 412-3, the Privy Council finally held (after repeated decisions which are ably reviewed by Mr. W. E. Raney, K.C., ex-Attorney-General of Ontario, in the Canadian Bar Review, Vol. 3, p. 614, Dec. 1925) that its own decision in the much criticized case of *Russell* v. *The Queen* (1882), 7 App. Cas. 829, "can only be supported today, not on the footing of having laid down an interpretation, such as has sometimes been invoked of the general words at the beginning of s. 91, but on the assumption of the Board, apparently made at the time of deciding the case of *Russell* v. *The Queen*, that the evil of intemperance at that time amounted in Canada to one so great and so general that at least for the period it was a menace to the national life of Canada so serious and pressing that the National Parliament was called on to intervene to protect the nation from disaster. An epidemic of pestilence might conceivably have been regarded as analogous."

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The expression "at that time" means that "at least for the period" when the legislation was passed it was the opinion of the Federal Parliament at the time of passing the Act that the evils of intemperance had reached a "disastrous" and "pestilential" stage throughout Canada: the judgment goes on to say, p. 413:

"Their Lordships find it difficult to explain the decision in *Russell* v. *The Queen* as more than a decision of this order upon facts, considered to have been established at its date rather than upon general law."

This can only mean that the legislation was upheld because the Privy Council considered facts to have been established to the satisfaction of Parliament so that it passed legislation "clearly meant to apply a remedy to an evil which is assumed to exist throughout the Dominion," as Lord Hobhouse said, at p. 842, of the *Russell* case, though the statute itself (the Canada Temperance Act, 1878, Cap. 16) only recited in its preamble that

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"it is very desirable to promote temperance in the Dominion, and that there should be uniform legislation in all the Provinces respecting the traffic in intoxicating liquors."

Later the Act was carried into the Revised Statutes of Canada, 1906, as Cap. 152, but without any preamble, where it still stands with amendments made as late as 1922, Cap. 11. The importance of this is that (as aptly pointed out by the Chief Justice of Canada in *The King* v. *Eastern Terminal Elevator Co.* (1925), S.C.R. 434 at 438) the assumption that the national life of Canada was menaced at the time of the passing the Act in 1878, or since, by an epidemic of intemperance, is, in fact, as erroneous as novel, and the following timely observations of his Lordship will commend themselves to all who have a knowledge of Canadian affairs:

"I should indeed be surprised if a body so well informed as their Lordships had countenanced such an aspersion on the fair fame of Canada even though some hard driven advocate had ventured to insinuate it in argument."

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But, nevertheless, despite this grave error of fact in the assumption, the said Act stands as constitutional because the Privy Council assumed that Parliament had acted on it as the cardinal fact in its presumed knowledge and "consideration" of existing conditions, *i.e.*, facts and circumstances, at the time it passed the statute, and though it might subsequently be shewn that those conditions had changed yet that change does not destroy the present constitutionality of the Act, if it were constitutional when it was enacted. If this is not the case, then the Canada Temperance Act has become unconstitutional since the Privy Council declared the contrary, because no one would now be bold enough to deny that the people of Canada as a whole are today appreciably more temperate in their use of intoxicating liquor than they were in 1878, or seriously to suggest that a disastrous state of intemperance now menaces the national life of our country. I find no authority to support the view that once a Provincial Legislature has enacted legislation which is valid as being within its allotted powers then by a change of conditions the legislation becomes *ultra vires*. If I am wrong in this, then it would be possible to bring repeated actions every year, or indeed, month or day, after the legislation had been adjudged valid by the highest tribunal in a repeated effort to

obtain, sooner or later, a contrary adjudication to declare it invalid because of changed conditions since the original judgment upholding it: in this observation I exclude those overriding Federal statutes for national defence and preservation which are in a special class and are self-declaratory of their temporary nature dependent upon war conditions, such as in the *Fort Frances* case, *supra*.

This difficult situation, first created by the B.N.A. Act in respect to direct taxation in its legal sense, is, as pointed out in *Cotton* v. *Regem* (1914), A.C. 176 at p. 190, something entirely new and

"marks an important stage in the history of the fiscal legislation of the British Empire. Until that date the division of taxation into direct and indirect belonged solely to the province of political economy so far as the taxation in Great Britain or Ireland or in any of our colonies is concerned: . . . . . The British North America Act changed this entirely. 'Direct taxation' is employed in that statute as defining the sphere of Provincial legislation, and it became from that moment essential that the Courts should for the purposes of that statute ascertain and define the meaning of the phrase as used in such legislation."

It is only to be expected therefore, when such new situations are created as the distribution of legislative powers in one country between two Legislatures that, corresponding legal and constitutional difficulties will be created and their practical satisfactory solution will tax judicial resources, of which the case at Bar is another striking example, wherein exceptional difficulties are encountered because the Provincial Legislature was also dealing with an exceptional situation.

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The opinion that the intention of the Legislature must be derived from conditions before it at the time receives further confirmation from the opinion of Duff and Brodeur, JJ., in *The Security Export Co.* v. *Hetherington* (1923), S.C.R. 539, 559-60, 575, wherein it is laid down (pp. 559-60):

"For the purpose of applying the definition of Mill in order to decide questions arising under item (2) of section 92, one must assume that the Legislature imposing the tax contemplates the normal effect of such a tax imposed in the existing circumstances, and the question one must ask oneself is whether, in view of the normal effect and tendency of a given tax, it may be affirmed that the tax is demanded from the very persons who are ultimately to bear the burden of it."

On appeal to the Privy Council the decision was reversed but not on this ground (1924), 94 L.J., P.C. 1.

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And in *In re Validity of Manitoba Act* (1924), S.C.R. 317, Duff, J. said, p. 322:

"Again, to take another example, a tax levied on sales by western farmers of grain grown by themselves would be in fact, as well as in intention, a tax to be borne by the very person who is called upon to pay it. I think counsel for Manitoba is right in his contention that the actual, normal operation of the tax, as the Legislature may be assumed to know it, must be considered."

The parties there had agreed upon a statement of the relevant facts necessary to determine the constitutional question, as Mignault, J. points out at p. 324: the decision was affirmed by the Privy Council *sub nom. Attorney-General for Manitoba* v. *Attorney-General for Canada, supra,* in which, p. 568, it was declared that though the intention of the Act was not in all respects invalid and could otherwise be supported as a "legitimate imposition of direct taxation" upon a limited class of persons, yet it was in the complicated circumstances "impracticable for a Court of law to make the exhaustive partition required" seeing that

"if the Act is inoperative as regards brokers, agents and others, it is not possible for any Court to presume that the Legislature intended to pass it in what may prove to be a highly truncated form."

In the very recent case of *Fairbanks* v. *The City of Halifax* (1926), S.C.R. 349, the Supreme Court of Canada held, p. 361:

"Common business experience and knowledge must of course be imputed to the Legislature, and results which follow in the natural and ordinary course of common business transactions must be held to have been contemplated."

It was further held, p. 365, that in supporting the allegation of indirect taxation,

"the burden [was] upon him [the attacking Attorney-General] to make out that it was expected or intended, having regard to the form of the tax and the facts and circumstances of the case, that the tax would be passed on by the tenant."

In *Brewers' and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* (1897), A.C. 231, the Privy Council (*per* Lord Herschell) considered, pp. 236-7, what the Legislature could have "contemplated as the natural result of the legislation in the case of a tax like the present one," and went on to point out that

"It is of course possible that in individual instances the person on whom

the tax is imposed may be able to shift the burden to some other shoulders. But this may happen in the case of every direct tax."

Their Lordships also said in the *Cotton* case, *supra,* p. 195:

"To determine whether such a duty comes within the definition of direct taxation it is not only justifiable but obligatory to test it by examining ordinary cases which must arise under such legislation."

In that case their Lordships, p. 194, in declaring the legislation to be *ultra vires,* fortified their opinion by the supposed fact that the notary would recover the amount of the tax he had advanced from the estate, but subsequently found that this was not the case as they explain and correct in their later judgment in *Burland* v. *The King* (1922), 1 A.C. 215 at p. 224.

And in *Attorney-General for Quebec* v. *Reed* (1884), 10 App. Cas. 141, they had already said, p. 144:

"The question whether it is a direct or an indirect tax cannot depend upon those special events which may vary in particular cases; but the best general rule is to look to the time of payment; and if at the time the ultimate incidence is uncertain, then, as it appears to their Lordships, it cannot, in this view, be called direct taxation."

Turning therefore, in the light of these authorities, to examine the facts and circumstances relating to the imposition of the present tax as they existed and were presumably present to the mind of the Provincial Legislature in December, 1923, it appears that there were two great companies in control of the importation and manufacture of fuel-oil within this Province without any middlemen and that state of affairs continues to exist today. The defendant Railway Company buys, and itself consumes, all its supplies of fuel-oil from the Union Oil Company of Canada at Vancouver, B.C., which latter company, according to my view of the legal effect of the evidence (unnecessary to detail) is the real importer of said oil as the result of the "arrangement," *i.e.*, contract, it has with another and foreign company called the Union Oil Company of California with which it has such close affiliations as to make their arrangements somewhat loose in definition between themselves, but, to my mind, clear in their legal result as regards the plaintiff, and it follows that the defendant is the "purchaser" at a "sale for the first time after importation" within the meaning of the Act, and it is admitted by the defendant that the oil is not bought for resale but for self-consumption only, and the same is true as regards the other defendant Union Steamship Company's pur-

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chases from the same importer and it is important to note that this state of affairs has existed since such importation from California began in 1910, *i.e.*, for sixteen years. The said importer, the Union Oil Company of Canada, in addition to selling to the defendant Railway Company and said Steamship Company also sells direct to its own customers, almost all being consumers on a large scale of business without any middlemen, and wholly supplies the said Railway and Steamship Companies: all these consumers therefore would be purchasers of oil "sold for the first time . . . . after importation" within said section 2. The defendant's own evidence shews that there are even today only 120 buildings in the large city of Vancouver that use fuel-oil because "it is not economical for a small building to use oil."

The only other fuel-oil controlling and vending company in this Province is the Imperial Oil Limited, and the manager thus explains to his own counsel the very unusual situation whereby there are no middlemen in this special business:

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"What is the reason, in your opinion, that there is no middleman? Because there is no margin to offer them. We sell it right down to the bone and there is no middle price where a man can afford to handle it.

"You give no preference? No, ten cents a barrel gross profit is an exceedingly high profit on fuel-oil, and the middleman could not work on it.

"THE COURT: There are no ulterior reasons? None whatever."

A question arose as to whether or no the said Company (*i.e.*, the Imperial Oil Limited) is a company which makes the first sale to consumers within the Province. It operates under a Dominion charter, and some confusion has arisen because there is a company, also operating within the Province under a Dominion charter, called the Imperial Oil Refineries Limited, and the defendant submits that these two companies are distinct legal entities and that the legal effect of the evidence is that the "main" portion of the fuel-oil that the former company sells direct to consumers is obtained from the latter, the Refineries Company, which has its refinery at Ioco, near Vancouver, where it refines imported crude oil and therafter sells its whole product direct to the former company. It is to be observed first, however, that though the strict legal position upon the evidence is, I think, that the former company must technically, *inter se*, be

deemed to be a purchaser from the refining company, and therefore any such transactions between them constitute a legal first sale to it, yet in substance the two companies are so exceptionally closely related as parent and subsidiary, and otherwise, *e.g.*, in directors and shareholders (though these are not wholly identical) that the manager of the former was justified in describing with essential practical accuracy, the refining company as being "the manufacturing department of our Company," which is "purely a marketing department of the organization"; and the fact that in its returns to the Government it treated itself as the first vendor of its supplies to the public direct and collected the tax (by section 4) "under the impression that we were the branch company that was supposed to have paid this tax" is not without significance as evidencing its own view of the real indoor relations between the two companies however separate upon paper their identities might legally be as regards the public. This is important, because in considering the special facts and circumstances before it the Legislature would act, in the advancement of the public interest, not upon the shadow but upon the substance of the situation and base the exercise of its legislative power not upon form but upon reality.

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The second observation is that in any event a substantial portion of the fuel-oil that the former company sells is in fact imported by itself from California and to that appreciable extent it is a first vendor. The extent of this direct importation does not appear, the defendant's witness leaving it in an unsatisfactory way, but it is to be inferred that it is substantial, because he is careful to define the amount it exports as "very small"; the statement that the "main portion" of supply comes from the refinery at Ioco is much too loose and vague, particularly in the circumstances where accuracy is essential to found any estimate upon. But it is important to note that, according to the evidence, this indoor distribution of Provincial operations between the two closely affiliated companies did not occur till after the passing of the Act complained of because the evidence shews that the refining company was not authorized to do business in this Province till after the 28th of January, 1924, when it received a certificate of local registration of that date, and hence, in any event, the Legislature is not open to criticism

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for not considering technical legal conditions which had no existence when the proposed measure was before it, they chiefly being that there were only two local companies importing and operating in fuel-oil, *i.e.*, the Union Company and the Imperial Oil Limited, the latter under Dominion charter and Provincial licence of the 23rd of November, 1899, from which licence authorizing and licensing that company to "carry on business within the Province of British Columbia" it is to be inferred that it began to do so from that date, which would be for 24 years when the Legislature began to deal with the matter in 1923, and thirteen years for the Union Company, which it is said began to operate in 1910, as before noted.

It is obvious that such a situation was in all essential respects an unique and extraordinary one and quite apart from those normal and ordinary conditions of business which have received consideration by the Courts in the many observations hereinbefore cited as tests and guides "in the natural and ordinary course of business transactions" which the Legislature would be assumed to have in contemplation. Here the cardinal fact that the Legislature had before it was in this distinct, great and monopolistic kind of business a local experience of 24 years with one company and thirteen years at least with both of them, had established a course of business without any change in its methods or results, and, with all respect, I am unable to comprehend why the Legislature should be expected to abandon this sound base of actual experience for its laws in favour of a prophetic speculation upon the possibilities of the future. We were invited on the supposed authority of the *Bank of Toronto* case to attempt to look into the future and consider the common understanding of men as to the general tendencies of the tax, but assuming those general expressions have any application to the special circumstances of this case they, in any event, support my view because in unique business circumstances business men of common understanding would certainly not fail to guide themselves by the proved results of long experience with the special conditions which remained unchanged in that special business.

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To avoid the consequences of this obviously common-sense policy, counsel for the defendant at the trial, while admitting

that no appreciable change in conditions had taken place here since the passing of the Act (1923) up to the time of the trial (February, 1926), yet sought to prove that there was "reason to anticipate" that a change in the marketing of this oil would take place here such as, it was alleged, has occurred to a certain extent in another and foreign country, and, subject to objection, evidence was given below for the plaintiff by a witness from California respecting the "development" of the fuel-oil business in the United States, and though the learned judge did not rely at all upon it in his judgment and received it with much doubt, yet he did not actually reject it, as I am of opinion, with respect, he ought to have done, because no proper foundation was or could in the circumstances, have been laid for it, and it was obviously incomplete and unsatisfactory in itself. I am unable to comprehend how our Provincial Legislature could possibly be expected in exercising its judgment upon local conditions in this Province, which does not produce any oil commercially, to take a necessarily inadequately informed, if not misinformed cognizance of the history and condition of the oil industry throughout a vast, immeasurably richer and more populous country, being one of the largest, if not the largest, producers of oil in the world, and under such a different constitution and laws of the various States that in the *Bank of Toronto* case, *supra*, at p. 587, the Privy Council would not even consider the principles of taxation laid down for the United States by no less a jurist than Chief Justice Marshall. But even if the evidence of that witness were to be admitted it goes no more than to say guardedly that "the practice seems to be on the increase" (*i.e.*, of reselling in retail from the large producing companies) though this "practice" of "progressive development" began he says, between 12 and 14 years ago. It is to be observed, however, that during this very period of a "seeming increase" in the United States, there was and is in fact no change or "development" or "progression" in the situation in this Province as hereinbefore pointed out. I am therefore of the opinion that the evidence is not admissible, and, if admissible, is of no assistance to the defendant.

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There is moreover a very good reason why the Legislature should hesitate to alter its sound policy of taxing a great and

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controlling business because though oil has not yet been discovered in commercial quantities in this Province, yet it is common knowledge that drilling operations have been for some time and are now in progress upon petroleum locations under Provincial Acts and if successful the whole local situation would be altered (as has recently occurred in the neighbouring Province of Alberta) and require special consideration because we should no longer be dependent upon foreign importations.

In the largest aspect of this matter the remarks of Mr. Justice Middleton in *Treasurer of Ontario* v. *Canada Life Assurance Co.* (1915), 33 O.L.R. 433, 439, upon taxing powers under the B.N.A. Act, are, I think, most appropriate, *viz.*:

"These considerations seem to indicate that it was not so much the intention to limit the Provincial powers to taxation which would be direct in the strictest sense in which that term is used by political writers, as to prevent the imposition of indirect taxes which would tend to interfere with the general policy of the Confederation. The ultimate incidence of the tax was not so much the concern of the draftsman as the securing of freedom for the Dominion from any interference by the Provinces in matters assigned to it. The term 'direct taxation' ought therefore to be liberally and not narrowly construed, and all taxation which can fairly be regarded as direct should be permitted so long as it is confined 'within the Province.'"

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This view is confirmed by the recent observations of the Supreme Court of Canada in *City of Windsor* v. *McLeod* (1926), S.C.R. 450, 457, wherein it was said, in a case of the same description, that the Court was

"always anxious to uphold impugned legislation by giving to it any construction of which it reasonably admits that will make for its validity."

though in the case before it the contrary implication was felt to be insuperable; and the legislation held to be clearly *ultra vires;* if I may so say, I should have thought that since the *Validity of Manitoba Act* case, *supra*, the matter was barely open to argument.

The result of my careful consideration of the whole matter in all its aspects, after a critical examination of all the authorities cited and many others, is that this tax is *intra vires,* the Legislature having in the exceptional circumstances of the great business it was dealing with demanded the tax from the very person intended and desired to pay it, and I am of opinion that the defendant has failed to satisfy the onus, "either in the form

of the tax as imposed, or in the facts of the particular case," which the Supreme Court has declared in the *Fairbanks* case, *supra*, is imposed upon it. No practical difficulty exists here in giving effect to the Act in an un-truncated form, to use Lord Haldane's apt expression in the *Manitoba Grain Futures* case, *supra*.

Since this is my opinion upon the question of this tax being a direct one in its true nature, the further objection that it is one of excise cannot prevail because those two forms of taxation are based upon independent and irreconcilable powers, the former Provincial, the latter Federal; each of which may, nevertheless, in its due exercise operate upon the same subject-matter simultaneously, the readiest example of which is to be found in the existing taxation, since the war, of incomes by both the Federal and Provincial Legislatures under radically distinctive powers; and the imposition of Federal taxes upon liquor imported by the Province under its recent Government Liquor Control Act is another apt local illustration of the principle to which effect has been given by the decision of this Court in *Little* v. *Attorney-General for British Columbia* (1922), 31 B.C. 84, wherein it was said, p. 86:

"It is not true that the Provincial Legislature cannot do that which is within its legislative powers, because the effect of what it does may indirectly affect those subjects over which the Parliament of Canada has been given jurisdiction." MARTIN, J.A.

And *cf.* our decision in *Rex* v. *Ferguson*, *ib.* 100.

In brief, the fact that the tax before us is direct in its nature and therefore Provincial does not prevent the Federal Parliament from imposing a true excise tax upon the same subject-matter without any conflict arising therefrom between the respective legislative powers.

It cannot, to my mind, be seriously doubted that if this Act had been attacked at the time it was framed, the attack would have failed. Why should it succeed now when the actual local situation remains the same?

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

GALLIHER, J.A.: I agree with my brother MACDONALD that the Canadian Pacific Railway is the first purchaser, notwithstanding that the parent company (the Union Oil Company of GALLIHER, J.A.

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California) and the subsidiary company (the Union Oil Company of Canada) must be regarded as separate entities.

In the first place a certain practice is pursued as between the two companies. It may be termed a working arrangement or system but the parent company is not legally obligated to deliver. It may without incurring liability, divert oil originally started for delivery to the subsidiary company. It has none of the ear-marks of the ordinary business or mercantile transaction.

It is true, Wolff says:

"If it was another company with whom we had no interest or identification at all, the same practice might be pursued until it was terminated by either party."

Of course, it might be pursued but he does not say that it would be or as a matter of fact, that it is, and one might doubt that it would be. I think that under the process adopted here, the subsidiary company is nothing more than the selling agents and its plant and equipment to that extent, the distributing depot for the fuel-oil of the parent company.

But assuming I am right in holding that the Canadian Pacific Railway is the first purchaser of the oil in Canada, and the ultimate consumer thereof, the grave question still remains—Is the tax imposed a direct or an indirect tax? This question has been dealt with by their Lordships of the Privy Council in a number of cases cited to us, and is one not always easy of determination. I have carefully considered these cases and have read the reasons for judgment of the Chief Justice and my brother MACDONALD, and I am in agreement with their conclusions.

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It seems unnecessary to elaborate the matter and it does seem to me that in the common understanding of mankind it would not be presumed that the Legislature were taken to be enacting a law which as Mr. *Davis* very tersely puts it, might be *intra vires* today and *ultra vires* tomorrow, and that dependent on some act of the party affected changing existing conditions.

This oil is not free from taxation. It may be taxed as personal property in the same manner as any other commercial product within the Province.

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MCPHILLIPS, J.A.: This is an appeal from Mr. Justice MORRISON, who held that the Attorney-General of British

Columbia, in suing under the Fuel-oil Tax Act (Cap. 251, R.S.B.C. 1924, Secs. 1, 2, 3, 4—the sections read as follows: [already sufficiently set out in the head-note]) had failed to sue the proper party, *i.e.*, should have sued the Union Oil Company, and further held that the Fuel-oil Tax Act was *ultra vires* of the Legislature of the Province of British Columbia.

As to the holding that the proper party was not sued, and that as respects the respondents in this appeal, there was no sale or purchase within the purview of the Act, I do not propose to deal with this point in any way as the respondents very faintly supported the judgment, and it may be well said that this point was abandoned. I would be disposed to hold that the sales and purchases of oil as set forth in the facts adduced at the trial, did come within the ambit of the Act and the proper parties were sued. The main contest and to which the appeal is wholly directed is, the question of the validity of the Act, it being held in the Court below that the Act is in its nature unconstitutional and without the power of the Legislature. The submission, however, on the part of the appellant is, that the Act is *intra vires* and that the judgment under appeal is wholly wrong.

The oil taxed may, in my opinion, be rightly said to have been imported into the Province and the respective respondents were the purchasers when sold for the first time after importation into the Province (*Canada Sugar Refining Co.* v. *Reginam* (1898), 67 L.J., P.C. 126, and at p. 128; *The Attorney-General of British Columbia* v. *The Attorney-General for Canada* (1922), 64 S.C.R. 377, Anglin, J. (now Chief Justice of Canada), at p. 388). There is no intermediate person here, the tax has been imposed upon the purchasers, being the corporations rightly and statutorily chargeable with the tax and the corporations intended to be taxed. In this connection I would refer to what Lord Moulton, who delivered the judgment of their Lordships of the Privy Council, said in *Cotton* v. *Regem* (1913), 83 L.J., P.C. 105 at p. 114:

"In the year 1897 the same question came before this Board in a very similar case—*Brewers' and Maltsters' Association of Ontario* v. *Att.-Gen. of Ontario*, 66 L.J., P.C. 34; (1897), A.C. 231. The question in that case was as to whether an Act requiring brewers and distillers in the State of Ontario to take out licences was *ultra vires* of the Provincial Legislature. Lord Herschell, in delivering the opinion of the Board, treated the question

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as being settled by the decision in *Bank of Toronto* v. *Lambe* (1887), 56 L.J., P.C. 87; 12 App. Cas. 575, and referring to the decision in that case he says: 'Their Lordships pointed out that the question was not what was direct or indirect taxation according to the classification of political economists, but in what sense the words were employed by the Legislature in the British North America Act. At the same time they took the definition of John Stuart Mill as seeming to them to embody with sufficient accuracy the common understanding of the most obvious indicia of direct and indirect taxation which were likely to have been present to the minds of those who passed the Federation Act. The definition referred to is in the following terms: "A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another such as the excise or customs." In the present case, as in *Lambe's* case, their Lordships think the tax is demanded from the very person whom the Legislature intended or desired should pay it. They do not think there was either an expectation or intention that he should indemnify himself at the expense of some other person.' Their Lordships are of opinion that these decisions have established that the meaning to be attributed to the phrase 'direct taxation' in section 92 of the British North America Act, 1867, is substantially the definition quoted above from the treatise of John Stuart Mill, and that this question is no longer open to discussion."

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(Also see *Burland* v. *Regem* (1921), 91 L.J., P.C. 81; *Bank of Toronto* v. *Lambe* (1887), 56 L.J., P.C. 87 at p. 90, col. 1, par. 3).

The present case is not one where at the time for the required payment of the tax the ultimate incidence of the tax could be said to be uncertain. If it were so, admittedly, the imposition would not be direct but indirect taxation—*Attorney-General of Quebec* v. *Reed* (1884), 54 L.J., P.C. 12, the Lord Chancellor (Earl of Selborne) at p. 13:

"The question whether it is a direct or indirect tax cannot depend upon those special events which may vary in particular cases; but the best general rule is to look to the time of payment; and if at the time the ultimate incidence is uncertain, then, as it appears to their Lordships, it cannot, in this view, be called direct taxation within the meaning of the 2nd subsection of the 92nd clause of the Act in question."

In the present case the respective respondents are the purchasers within the purview of the Fuel-oil Tax Act, and are consumers of the oil, not trading in the oil, and looking at the time of the required payment of the tax, there was no uncertainty as to the ultimate incidence of the tax. It cannot be contended for one moment in the present case, that the tax here is in its nature one demanded from these corporations in the

expectation and intention that they should indemnify themselves at the expense of others. The situation of the respective respondents is clearly this—they are purchasers of the oil for their own consumption and the tax is demanded from the very persons—corporations here—whom the Legislature intended or desired should pay it (*Cotton* v. *Regem, supra,* at p. 114, 2nd col.). In *Re Doe* (1914), 19 B.C. 536, Mr. Justice Clement (a notable writer upon Canadian Constitutional Law, the author of The Law of the Canadian Constitution, 3rd Ed., 1916), when considering the Succession Duty Act of British Columbia (R.S.B.C. 1911, Cap. 217) said, at pp. 537-8:

"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.

"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 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."

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It would occur to me that there is not a question of a doubt that the tax imposed under the Act we have to construe is positively direct in its effect. The corporations here taxed buy the oil, it is their property, it has been imported into the Province, and they are the first purchasers, but above and beyond that it is their property when bought and being within the Province it is property that may be taxed by the Province if there be apt legislation imposing the tax and we have the express legislation imposing the tax, the imposition is directly made upon the owners of the property, *i.e.*, the oil—they are not purchasers for resale, but consume the oil in the carrying on of their transportation business, that is railways and steamships. I fail to see by what line of reasoning a very plain situation can be

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befogged. If the Province is powerless to raise revenue in the present case by the manner set forth in the Act it would seem to me that the Province is shorn of that power and authority which is plainly conferred by section 92, No. 2, of the British North America Act. In this connection I would refer to the latest and the most lucid exposition of what constitutes a direct tax by Lord Haldane, in *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1925), 94 L.J., P.C. 146 at pp. 148-9:

"The question which arises is whether the tax imposed by the statute is, in the light of these facts, direct or indirect. As to the test to be applied in answering this question, there is now no room for doubt. By successive decisions of this Board the principle, as laid down by Mill and other political economists, has been judicially adopted as the test for determining whether a tax is or is not direct within the meaning of section 92, subsection 2 of the British North America Act. The principle is that a direct tax is one which is demanded from the very person who it is intended or desired should pay it. An indirect tax is that which is demanded from one person in the expectation, and with the intention, that he shall indemnify himself at the expense of another. Of such taxes excise and customs are given as examples. It does not exclude the operation of the principle if, as here, by section 5, the taxing Act merely expressly declares that the tax is to be a direct one on the person entering into the contract of sale, whether as principal or as broker or agent. For the question of the nature of the tax is one of substance, and does not turn only on the language used by the local Legislature which imposes it, but on the provisions of the Imperial statute of 1867. In *Cotton* v. *Regem*, followed in *Burland* v. *Regem*, this Board held, in the case of a Provincial succession duty, intended to be collected from a person concerned, it might be, merely with the administration of a testator's estate, who had been obliged by law to make a declaration of the particulars of that estate for taxation to be payable by him personally, and was naturally entitled to recover the amount paid from the persons succeeding to the estate, that the taxation was *ultra vires*. A probate duty—as distinguished from such a succession duty—paid as the price of services to be rendered by the Government and imposed on the person claiming probate, might, it was indicated, on the other hand, well be direct taxation. In *Att.-Gen. for Quebec* v. *Reed* Lord Selborne had laid down an analogous application of the same principle. *Bank of Toronto* v. *Lambe* is another case in which Lord Hobhouse, applying the same principle, found the tax to be direct. In *Brewers' and Maltsters' Association of Ontario* v. *Att.-Gen. for Ontario* Lord Herschell, in delivering the opinion of the Board, followed this case, on the ground that the licence tax in question was demanded from the very person who it was intended or desired should pay it as a tax on his licence, with no expectation or intention that he should indemnify himself at the expense of any other person."

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In considering the language of Lord Haldane above quoted,

the tax called in question in the present case "is demanded from the very person who it is intended or desired should pay it." Further, these cogent words of Lord Haldane are not to be passed over—they are compelling words—"For the question of the nature of the tax is one of substance, and does not turn only on the language used by the local Legislature which imposes it, but on the provisions of the Imperial statute of 1867." Here there is no expectation or intention that the corporations should indemnify themselves at the expense of any other person nor will they in fact do so. Lord Haldane at p. 150, added:

"Turning to the only remaining question, whether the tax is in substance indirect, and bearing in mind that by section 5 the liability is expressed as if it were to be a personal one, it is impossible to doubt that the tax was imposed in a form which contemplated that some one else than the person on whom it was imposed should pay it. The amount will, in the end, become a charge against the amount of the price which is to come to the seller in the world market, and be paid by some one other than the persons primarily taxed. The class of those taxed obviously includes an indefinite number who would naturally indemnify themselves out of the property of the owners for whom they were acting."

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This language of Lord Haldane in no way covers the situation of affairs of the present case as the tax here imposed is not in a form which contemplates that some one else should pay it —it is directly imposed, and will not be paid by other than the persons taxed.

In considering questions of direct and indirect taxation it is not well nor does it make for the permanency of the Dominion that either the Dominion or the Provinces should be held to a too rigid construction of the terms of the Confederation Act (the British North America Act). There should be elasticity of construction, not of course, doing any violence to the language used, but construing that language to fit the changing conditions of the Dominion and Provinces in the course of the development of Canada as a whole. In calling up this consideration, I would refer to the language of an eminent member of the Canadian judiciary, Mr. Justice Middleton, of the Appellate Division (Second Divisional Court) of the Supreme Court of Ontario in *Treasurer of Ontario* v. *Canada Life Assurance Co.* (1915), 33 O.L.R. 433 at p. 439:

"Much has been said concerning the clause in question looking only at

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the words 'direct taxation' torn apart from their context and without regard to their historical setting.

"The framers of the Act sought to mould a stable Dominion out of separate Provinces and to end the jealousy and friction which had resulted from the antagonisms and conflicting interests incident to their separate existence. 'Trade and Commerce' was assigned to the Dominion, and with it had to go the power of imposing customs and excise duties. Manifestly no Province could be permitted to interfere with the general fiscal policy of the Dominion by any such direct tax; but the Province had to be given some source of income; and so direct taxation, and this alone, was permitted.

"These considerations seem to indicate that it was not so much the intention to limit the Provincial powers to taxation which would be direct in the strictest sense in which that term is used by political writers, as to prevent the imposition of indirect taxes which would tend to interfere with the general policy of the Confederation. The ultimate incidence of the tax was not so much the concern of the draftsmen as the securing of freedom for the Dominion from any interference by the Provinces in matters assigned to it. The term 'direct taxation' ought therefore to be liberally and not narrowly construed, and all taxation which can fairly be regarded as direct should be permitted so long as it is confined 'within the Province.'"

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Here we have a tax which is unquestionably confined to the imposition of a tax upon property which has come within the Province and being within the Province is assuredly property which may be subjected to taxation by the Legislature of the Province, once liberated from customs and exise duties which is within the ambit of the Dominion powers. It must be capable of being taxed without regard to the suggestion that in effect it is in its nature an additional customs duty or excise duty under the guise of a Provincial tax, and therefore *ultra vires* of the Provincial Legislature. This contention can be driven too far and would in its ultimate effect amount to this, that where property has paid customs duties or excise duties, it must ever remain untaxable by the Legislature of the Province. It is unthinkable that any such intention is deducible from the language as contained in the British North America Act—a wholly unworkable construction destructive of the autonomy of the Provinces which admittedly is the power of direct taxation as against all property within the Province, no matter how introduced therein. Being within the Province, it must be held to be the subject of Provincial taxation.

It has been argued at this Bar that the tax is really a tax against the vendor of the oil; with deference to the learned

counsel advancing this contention, I cannot see that there is any force in this contention. As I have already pointed out, it is specifically imposed against the purchasers of the oil, the owners thereof, and they are the parties intended to be taxed and who are taxed. The tax is a direct tax and within the *ratio decidendi* of the controlling cases previously referred to. Nor can it be said that the Act trenches upon trade and commerce, essentially a power exercisable by the Parliament of Canada.

I would allow the appeal, being of the opinion that the Act is wholly within the powers of the Provincial Legislature, as defined in the British North America Act, and therefore *intra vires* the Provincial Legislature.

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MACDONALD, J.A.: The main point in issue is the competency of the Provincial Legislature to enact the Fuel-oil Tax Act (R.S.B.C. 1924, Cap. 251), declaring that every purchaser of fuel-oil ("purchaser" being defined as "any person who within the Province purchases fuel-oil when sold for the first time after its manufacture in or importation into the Province") shall pay for Provincial purposes a tax equal to one-half cent per gallon on all fuel-oil purchased. By section 4 the vendor is required to collect the tax for the Government. "Vendor" is defined as "Any person who within the Province sells fuel-oil for the first time after its manufacture in or importation into the Province." Both defendants admit the purchase of fuel-oil within the Province but claim they are not first purchasers and that in any event the Act is *ultra vires*.

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It is necessary to refer to the evidence to ascertain who is the first purchaser in British Columbia. Fuel-oil is imported into the Province by the Union Oil Company of California and after it passes through the hands of the Union Oil Company of Canada, the latter sell to the two defendants. Is there first a sale by the Union Oil Company of California (hereinafter called the California company) to the Union Oil Company of Canada (hereinafter called the Canadian company)? or do they stand to each other in the relationship of principal and agent in the transaction? A further point is this: Assuming that it is not a matter of agency but one of purchase between the California

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company and the Canadian company, was it completed before or after importation? If before importation the first sale in the Province would be from the Canadian company to the defendants within the meaning of the Act.

There are two Union Oil Companies, one with its head office in California, the other in Canada. The defendant, the Canadian Pacific Railway Company, admit direct purchase from the Canadian company for its own use on their locomotives, steamships and in hotels and not for the purpose of re-vending. The defendant Union Steamship Company also purchase for use on their steamships, not for resale. They are the ultimate consumers. The California company and the Canadian company are separate entities jointly controlled. Stock reports shewing the quantity of oil in the tanks of the Canadian company at Vancouver are sent to the California company from time to time. The latter company thus apprised of the requirements at Vancouver, notify the former that it will forward from California and discharge from its own vessels on reaching Vancouver a certain quantity of fuel-oil into the tanks of the Canadian company. There may be delivery of a portion at intermediate ports of call, but this is exceptional, the general rule being that the full cargo is sent to one destination. The Canadian company is simply notified by one of its own officials—the vice-president, who resides in California—of the proposal of the California company to deliver an estimated quantity of oil. It might be more or less than the stock report indicates. Nearly all the officers of the Canadian company reside in California. The vice-president referred to, is also manager of sales and transportation in the California company. Both companies, too, have a common president. For the Canadian customs an invoice for declaration signed by an official of the California company is made out, and forwarded to an agent of the California company in Vancouver in advance of the arrival of the ship. This declaration (Exhibit 1) headed "Invoice of goods shipped on consignment" is consigned to the California company at Vancouver. The duty is paid by the California company. When the ship begins to discharge its cargo of fuel-oil a check of the quantity is made by representatives of both companies, and a Canadian customs official. A form is then made out shewing

that a certain quantity of oil has been delivered by the California company to the Canadian company in the tanks of the latter. The oil is not released, however, to the Canadian company until it is passed by the customs, *i.e.*, after it is put in the tanks—in other words, physical delivery is made before it is cleared through the customs. It cannot be used until it is cleared. The duty may be paid the same day or the day following delivery. The price is arbitrarily fixed by the California company with the assent of officials of the Canadian company, in accordance with the prevailing price of oil on the date of delivery plus transportation and other charges. The price charged the defendants is also fixed under the supervision and control of the California company directly or indirectly.

What are the true inferences from the foregoing facts? The interests of the two companies are identical. The Canadian company is owned and controlled by the California company, and its officials are appointed by direction of the California company. They are, of course, separate entities but their relationship has a bearing on the question as to whether or not it is a contract of sale or of agency in respect to the transactions between them. There is no contract requiring the one to purchase and the other to supply, and the assistant manager of the California company agreed that it was because of the peculiar relationship between them that such a contract was unnecessary. He was also asked this question:

"We will assume that there is a vessel in Vancouver with a cargo of oil ready to discharge. Is there anything in the relationship between the two companies that would prevent the California Company ordering that vessel back to Seattle, for instance, for discharging?"

And the answer was:

"No, sir, there is not.

"THE COURT: Before unloading?

"Mr. *McMullen*: Before unloading, yes, my Lord."

That would not be possible, without breach of contract, if there was a contract of purchase and sale consummated between the two companies before the time of discharging.

If on these facts it is possible to find that there is a sale in British Columbia by the California company to the Canadian company, the latter would be the first purchaser, and apart from the question of the validity of the Act, should have been

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sued. I think, however, the true nature of the relationship is suggested by the following evidence, given by the same witness, *viz.*:

"Who imports that fuel-oil into British Columbia? The Union Oil Company of California.

"How is that oil marketed after it is imported into British Columbia? It is marketed in British Columbia by the Union Oil Company of Canada."

The inference is that the product of the California company is marketed for them by the Canadian company; not sold by the latter independently under complete contract of sale, passing title to the Canadian company. The Canadian company are marketing agents of the California company. The defendants, therefore, are first purchasers in British Columbia. In this view it is unnecessary to deal with the question as to whether or not if the facts disclose a contract between the two companies it was completed outside of British Columbia, or before importation.

There are other facts in evidence which should be noticed before dealing with the validity of the Act. In addition to the two companies referred to, we have Imperial Oil Limited and Imperial Oil Refineries Limited. The Imperial Oil Limited as the marketing branch, obtains its supplies from the Refineries and sells to the public for general use in steamships, railroads, logging companies, apartment-houses, schools, hospitals and private dwellings, etc. It also imports small quantities at times to replenish its stocks when the available supply from the Refineries is short. Sales are made direct to the consumers mentioned without the intervention of middlemen or retailers, because it is alleged the margin of profit is too small to make it practicable.

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On the evidence outlined does the Act impugned impose "direct taxation within the Province in order to raise a revenue for Provincial purposes?" The question has been dealt with by the Privy Council in so many cases and the governing principles laid down—applicable of course to the facts of the particular case—that apart from referring to Mill's definition of a direct and indirect tax which was adopted by their Lordships in *Cotton* v. *Regem* (1914), A.C. 176, it is only necessary to deal with certain considerations which it was urged by counsel for the appellant should be kept in view in construing former

judgments of the Privy Council on this question. The definition referred to reads:

"A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another."

In the case at Bar it was suggested that the Legislature had knowledge of the true situation in respect to the use and marketing of fuel-oil, *viz.*, that these defendants —first purchasers— buying for consumption never intended, at the time the tax was imposed, or at any future time, to be indemnified at the expense of others. That is doubtless true in so far as these defendants are concerned, but it is only one step in the inquiry. The Legislature cannot, by insisting that the condition in the trade is on a certain basis when the Act was passed, ignore the inherent probabilities which in all likelihood will arise. Counsel for appellant must go further and say, as he did say, that this commodity (fuel-oil) does not lend itself to merchandising in the ordinary way, through manufacturers, wholesalers and retailers. It is sold direct to the consumer without the intervention of middlemen, and therefore in taxing the first purchaser they tax "the very person who it is intended or desired should pay it."

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While the evidence shews the absence of middlemen, yet the general tendency of the trade must be considered. Evidence was led to shew that in the United States, middlemen intervene. Will the same methods ultimately prevail in British Columbia with the growth and expansion of business and population; and if so, is it possible that an Act can be regarded as *intra vires* in respect to present conditions only to become *ultra vires* at a future date when the commodity may be marketed like other fuel, such as coal or wood? It is quite true that owing to changing conditions, for example, "sudden danger to social order arising from the outbreak of a great war," giving way at a later period to normal conditions, an Act passed by the Dominion Parliament might be *intra vires,* for a time and become *ultra vires,* if maintained after the menace to national well-being disappeared.

Fort Frances Pulp Co. v. *Manitoba Free Press Co.* (1923), 93 L.J., P.C. 101, at 105.

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Explanatory statements too in a recent judgment of the Privy Council (*Toronto Electric Commissioners* v. *Snider* (1925), A.C. 396), of the grounds of the decision in *Russell* v. *The Queen* (1882), 7 App. Cas. 829, suggest the same conclusion. While, however, that may be true in respect to legislation enacted to meet situations created by a great national menace or an alleged apprehension of danger to the public welfare through the alleged evils of intemperance at a certain stage in the country's development, these considerations do not apply to the situation we are dealing with in the case at Bar pertaining solely to business transactions unconnected with passing phases affecting national safety. That was not intended by the British North America Act, 1867 (30 & 31 Vict., c. 3). In such cases as the present some general principle must be evolved to avoid confusion, in view of the fact that in modern life the *modus operandi* in carrying on business may radically change from time to time. We should regard the general understanding of mankind as to the usual incidence of commercial transactions. For example, the Act could not be *intra vires* in so far as oil from the Union Oil Company of Canada is concerned and *ultra vires* in respect to oil from the Imperial Oil Refineries Limited, where the tax is doubtless passed on to the consumer and is therefore indirect. It cannot be assumed that there is any such expression of intention on the part of the Legislature to deal piecemeal with the subject. It is either wholly valid or wholly invalid. We must look at the tendency of such a tax, gathering the intention of the Legislature from the general knowledge of men in business affairs in respect to the handling of such commodities. If that tendency is to follow the usual course of sale of similar commodities such as wood or coal then it must be regarded as *ultra vires* from the outset—the tax in substance is indirect. Referring to the judgment of Lord Hobhouse in *Bank of Toronto* v. *Lambe* (1887), 12 App. Case. 575 at p. 582, His Lordship says:

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> "The Legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies."

We must look at the ultimate incidence of the tax as it would

appear prospectively to the Legislature when the Act was passed. The Act impugned would appear to presuppose a fixed condition and the absence of the usual processes of sale and resale through several agencies. Yet the frame of the Act with its reference to first purchasers would appear to contemplate the successive handling of the commodity by different parties. In fact, what must have been regarded as likely to happen, did in fact happen. Evidence was adduced, as already pointed out, in respect to the operations of Imperial Oil Limited and Imperial Oil Refineries Limited, shewing that the alleged first purchaser is not the ultimate consumer. The tax therefore may and doubtless would be passed on by the first purchaser to the various consumers mentioned. This condition arose after the Act was passed. Should it not be regarded as one of the probabilities likely to be present in the minds of the Legislature? Fuel-oil will doubtless be used in future in many private dwelling-houses as well as in industrial plants, and middlemen will intervene to assist in marketing it. It is not determinative to say that by reason of small profits no middlemen are now generally engaged in this trade, and that the Act tends to perpetuate that condition by imposing a tax still further reducing the margin of profit. That is an incidental condition only. The trade is susceptible to the intervention of such intermediaries in passing through the hands of various concerns to a variety of consumers who must finally bear the burden of the tax.

I would dismiss the appeal.

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

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

Solicitor for respondent Canadian Pacific Ry. Co.: *J. E. McMullen.*

Solicitors for respondent Union Steamship Co.: *Abbott, Macrae & Co.*

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IN RE TAXATION ACT. SEELEY & CO. v. BROWN

IN RE TAXATION ACT. SEELEY & COMPANY LIMITED v. BROWN.

Taxation—Income tax—Company acting as insurance agents—Bonus on commission contingent upon the profits of parent company—Liability to income tax—R.S.B.C. 1924, Cap. 254, Secs. 42 and 99.

Seeley & Company Limited solicited insurance as agents for several insurance companies. They were paid a commission for the business they did, and it was arranged that at the end of each year a bonus or contingent commission was payable to them only in the event of the parent company making a profit of a certain amount on the year's operations. Seeley & Company were assessed on their income derived from the contingent commissions paid them and an appeal to the Court of Revision on the ground that the parent company had already paid a tax on these profits was dismissed.

Held, on appeal, affirming the decision of D. MCKENZIE, judge of the Court of Revision, that there is no difference between the two means of remuneration. He bargains for both equally when he becomes an agent and the fact that one is contingent and payable out of the net profits while the other is not contingent and is payable out of gross profits does not differentiate them. They are both liable for the income tax.

APPEAL by Seeley & Company Limited from the decision of D. McKenzie, judge of the Court of Revision of the 18th of February, 1926. Seeley & Company are Vancouver agents for a number of companies who are entitled or licensed to do business in British Columbia. The companies pay taxes on their gross income. Seeley & Company are paid by commission on the business they do and at the end of each year if the profits are of a certain amount they receive a bonus or contingent commission. Seeley & Company paid income tax on their ordinary commissions but claimed they should not be taxed on the bonus or contingent commission. The judge ordered that the tax should be paid.

Statement

The appeal was argued at Victoria on the 22nd of June, 1926, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and MACDONALD, J.J.A.

Molson, for appellant: Seeley & Company are agents for several companies and they get a regular commission for all

Argument

business done by them upon which they pay taxes. If the main companies have a profit they then give a bonus or contingent commission on the profits they make. The main companies pay taxes on these profits so that the tax is already paid and should not be again charged with taxes when a portion of these profits are handed over to another.

E. O. C. Martin, for respondent: Possibly the parent company should not have paid the tax when it did not keep the money but that does not affect the position of the appellant. This contingent commission is income derived from commission on profits and is just as much liable to the tax as the regular commission. The company is subject to the provisions of section 99 of the Act.

Argument

Molson, replied.

MACDONALD, C.J.A.: The appellant pays on his gross income. Any deduction for anything paid out is not made from that income.

Now the appellant is an agent of a company. He procures insurance and gets commission on the same. It is not contended that he is entitled to exemption for this, but he gets in addition what is called a contingent commission, that is to say he gets a share of certain profits made during the year in the Province of British Columbia, by way of a further remuneration, and I suppose as an inducement to greater endeavour to make the business of his company a success. He claims he is not liable for income tax on that contingent commission. I cannot see any difference between the two means of remuneration. They are both remuneration, there is no question about that; he bargains for both equally when he becomes an agent for the company, and the mere fact that one is contingent and payable out of net profits, while the other is not contingent and is payable out of gross profits does not appear to me to differentiate them.

MACDONALD, C.J.A.

Therefore I think the appeal should be dismissed and the judgment of the learned judge of the Court of Revision sustained.

GALLIHER, J.A.: I somewhat regret that I cannot give effect to what my own suggestion was with regard to interest created

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under their contractual relation. Upon reflection, it seems to me that this is not a class of interest that the Legislature are dealing with; that it must be a direct interest in the company as being a shareholder in the company, and not an interest as created between employer and employee by contractual relationship. It is an interest in the sense that I have already expressed it, but is not the interest that is referred to in the enactment passed by the Legislature.

MCPHILLIPS, J.A.: I am of the opinion that the appeal cannot succeed. The appellant is the agent for various companies who pay income tax to the Province, as indicated by my brother the Chief Justice, by the way of two per cent. on their gross income. The agents of the companies have an arrangement whereby certain commission is paid, plus a certain contingent commission which is based upon the business done in the Province of British Columbia.

The section of the Act which is invoked is section 42, subsection (*a*) as amended by section 7, Cap. 54 of 1925, which is an exemption provision, and the exemption is of—

"All income derived from interest on bonds or debentures issued by a corporation where income tax has been paid by the corporation in respect of that interest either indirectly or by way of separate return under subsection (1) of section 44; and all income derived from dividends from a corporation or from profits or shares from a partnership where the corporation or partnership is liable to assessment or taxation in respect of income or by way of alternative tax under this Act."

MCPHILLIPS, J.A.

This appellant is not a member of any partnership or any corporation in the light of the facts presented to us in this appeal, and does not come within the terminology of this exemption, not being a partner nor a shareholder in the corporations.

With deference to the learned counsel who made the submission, it is idle to contend that this subsection covers the present case, because the appellant does not come within the terminology of this exemption at all.

What happened is this: the corporations paid two per cent. on their gross income to the Province; then, in carrying on their business, for the purpose of arriving at a contingent commission to their agents, strike an amount which is the net profit on the business done in British Columbia, and on that net profit,

20 per cent. is paid to the agents. The net profit was a sum of money which was lying in the treasuries of the various corporations to be dealt with as the discretion of the directors would determine. Now they had antecedently, of course, agreed to pay some of this money away, and when this money was paid over to the agents it was nothing more or less than an additional remuneration for services rendered, and in fact was an additional amount by way of salary for the services rendered by the agents, and it was money earned individually, it was in no way ear-marked, and when the money was paid over it had not written across it, "This money has already paid income tax, and no income tax must be paid again." If this were done you would paralyze the whole taxation system of this country. The question is this, Is this money primarily income, the individual income of the person sought to be taxed? If so, it is taxable. If the individual can say, I was in a partnership which earned certain profits, and this money that I have received is really money that has already paid income tax, I could appreciate it, or, if he can say, I was a shareholder in the corporations and this money has already paid income tax, I could appreciate that; but that is not this case.

MCPHILLIPS, J.A.

It may be an unprovided case, but I see no injustice in the imposition of the tax; the Court cannot legislate; it is a matter for the Legislature only.

MACDONALD, J.A.: I am of the same opinion.

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Appeal dismissed.

Solicitors for appellant: *Walsh, McKim & Housser.*
Solicitor for respondent: *J. W. Dixie.*

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Husband and wife—Husband's will—Substantially no provision for wife's maintenance—Testator's Family Maintenance Act—Application under —Order giving whole estate of over $8,000 to wife—Appeal—R.S.B.C. 1924, Cap. 256, Secs. 3 and 5.

A husband's estate at the time of his death was valued at slightly over $8,000. By his last will he left his wife $10 and his household furniture valued at about $250. The balance of the estate he left to a nephew. Upon the application of the widow for relief under the Testator's Family Maintenance Act it was held that she was entitled to the whole estate. Ten witnesses gave evidence when the petition was heard, but there being no stenographer present the evidence was not taken down.

Held, on appeal, affirming the decision of MORRISON, J. (MACDONALD, C.J.A. and MACDONALD, J.A. dissenting), that sections 3 and 5 of the Act recite that the Court may in its discretion make such adequate, just and equitable provision for the family of the testator as the Court in the circumstances shall think just and it may consist of a lump sum or periodical payments. The only way that the order can be set aside is to say that the circumstances which were before the Court would not warrant the order. As the evidence is not before this Court it cannot review the decision below and the appeal must be dismissed.

APPEAL by the beneficiary from the decision of MORRISON, J. of the 21st of January, 1926, granting the petition of Lydia Smith for an order under the Testator's Family Maintenance Act for adequate provision for maintenance and support. The petitioner was married to the late Charles Smith in April, 1920, and lived with him until his death in June, 1925. In May, 1920, Charles Smith made a will giving his whole estate to his wife, but in November, 1924, he made a new will giving his wife $10 and the household furniture valued at about $250. The balance of the estate he gave to his nephew W. S. Brighten. Deceased's estate was valued at the time of his death at $8,603.46. It was held by the trial judge that the petitioner was entitled to the whole estate.

Statement

The appeal was argued at Victoria on the 23rd of June, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, J.J.A.

Creagh, for appellant.

Cantelon, for respondent, raised the preliminary objection that although ten witnesses were heard the evidence was not taken down, there being no stenographer present: see *Dockendorff* v. *Johnston* (1924), 34 B.C. 97.

Creagh: The point on which I rely will be found in the petition and affidavit in support. An order was made that it was beyond the jurisdiction contemplated by the Act. The estate is valued at over $8,000 and he has given it all to the wife in absolute disregard of the will: see *In re Livingston, Deceased* (1922), 31 B.C. 468; *Allardice* v. *Allardice* (1911), 29 N.Z.L.R. 969; (1911), A.C. 730; *In re Stigings, Deceased* (1924), 34 B.C. 347. Argument

Cantelon, in reply: The trial judge has used his discretion. The evidence is not here upon which he came to the conclusion that the wife should have the whole estate. In the circumstances this Court will not interfere.

MACDONALD, C.J.A.: Although we have not all the evidence before us, it not having been taken in shorthand, nor the grounds upon which the learned judge proceeded, yet we have certain facts which I think are sufficient to enable us to deal with this appeal. These are the facts contained in the respondent's own petition. The property of the deceased was willed to his nephews and nieces. It is of a value of at least $6,000. The learned judge appealed from, acting under the provisions of the Testator's Family Maintenance Act, awarded the whole of the estate to the widow. The objection to such an order, it seems to me, ought to be apparent. It wholly disregards the testator's intention and disposes of his whole estate contrary to his wishes. The widow may live long, or she may die or remarry within a month or a year; the result of the order is that the beneficiaries are wholly deprived of the benefits of the will in any event. In effect, a new disposition is made of the property in the very teeth of the will. MACDONALD, C.J.A.

While it is true that the statute provides that the judge may grant a lump sum for maintenance to a widow where no sufficient provision has been made for her by the will, I think it never was intended that a fairly substantial estate should be

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given in this manner without reference to the interests of the beneficiaries. What the legislation contemplated was, that if the estate were very small then the whole must be given on the principle that it would not be worth while to make two bites of a cherry, but when an estate was left, as this one was, amounting to upwards of $6,000, it seems to me the Court should regard the interests of the beneficiaries and the intention of the testator, as well as the claims of the applicant, and should make an order which would be just to all parties. The principle involved does not depend on evidence which has been omitted from the appeal book, it is enough for this purpose to accept the respondent's own evidence, the evidence in her petition. With respect, I think the order was made under a misapprehension of the object and scope of the legislation in question: it was made upon a wrong principle. The object of the legislation is maintenance, not gift.

MACDONALD, C.J.A.

MARTIN, J.A.: In this case we are dealing with a matter which is something wholly unknown to our former law, and the whole object of the new statute is to defeat the wishes of the testator. This novel circumstance must be considered by this Court, in relation to the object which is sought to be maintained. We have these two sections which are particularly appropriate here, that is to say 3 and 5, and the first recites in brief that the Court may in its discretion make such "adequate, just and equitable" provision for the family of the testator as the Court in the circumstances thinks fit, and an additional and very exceptional power is conferred upon the Court by said section 5, whereby it is provided that the Court may, if it thinks fit, order that "the provision shall consist of a lump sum or periodical or other payment." The only way in which the statute is said to be ineffective herein is that it does not allow the whole estate to be used immediately for the purposes aforesaid, and that where an entire appropriation appears, such an order defeats itself. But to my mind that would defeat the statute, because it is easy to foresee a situation where it would be in the interest of the education of the family or the support of the statutory beneficiaries that the immediate expenditure for them would depend upon the state to be maintained at the time; and the circum-

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stances would be those which were before the Court upon the evidence before it, and the fund would be applied in the best way for the attainment of the said object either in whole or in part.

In this case the learned judge has thought fit to say, taking advantage of the power conferred upon him by section 5, that the applicant should forthwith receive an amount representing the entire value of the estate—that is, in essentials, an order for a lump sum.

The only way that that order can be set aside—the power obviously reposing in the learned judge that made it—is to say that the circumstances which were before him would not warrant the order. Now how are we to say what the circumstances were before him, when there was no evidence as to what they were? We are in effect to review a discretion while in ignorance of what the materials of that discretion were. That is clearly an invitation to this Court to take a leap in the dark, which is an invitation I have always refused, and I think it is a proper occasion for again refusing it.

MARTIN, J.A.

I am therefore of the opinion that when a matter coming before us is of a nature which we are in entire ignorance of upon the facts thereof, the only proper course for us to take is to refuse to make any order interfering with what has been done below, and so I would dismiss the appeal.

GALLIHER, J.A.: In my view, whilst it is true that a judge under the Act might award the whole as a lump sum where it amounts to say $800 or $1,000, yet if a judge in the exercise of his discretion did not do so properly or reasonably under all the circumstances, then we might be in a position to review that.

I find myself in the difficulty that my brother MARTIN has expressed; there is no evidence before us on which we can pass. It strikes me that if certain evidence was before me in a case of this kind, that I would have no hesitation in saying that the award of $6,000, notwithstanding it may have been the full amount of the estate, would not be more than was necessary, considering the circumstances of the widow, and it may have been so made to appear to the learned judge. In ordering it to be set aside, one would have to say, that under no consideration

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could the whole estate be given, no matter what its value might be. I do not think that was intended, and it resolves itself into a question of reasonableness in each case.

MCPHILLIPS, J.A.: In my opinion the appeal cannot succeed. In the first place we have only got before us the petition and the affidavit verifying it, and apparently the learned judge in the Court below proceeded upon oral evidence, and a very considerable amount of oral evidence. So all that can be said about it is that the litigants suffer through the fact that the proper procedure was not adopted, that is to say to see to it that a stenographer was present. We have repeatedly made that pronouncement in this Court and there is really no excuse for not following this proper procedure.

But still I do not know that that would have been of any avail in this case, even if we had this evidence, because the Court in my opinion has absolute discretion.

I observe in the petition that the lady in question, the widow, is 43 years of age and only possessed of assets that do not come to more than $950. Now the Legislature has undertaken to say, and we cannot question its wisdom—and in this respect I am at one with the Legislature—that a husband or wife should make proper provision for the surviving consort. The Legislature has enacted that there is created by marriage a relationship which calls for a provision being made out of the estate.

MCPHILLIPS, J.A.

This Court had at the last Vancouver sittings to consider the case of a wife dying and leaving a very considerable estate without making any provision for the maintenance of the husband; the attempt was made by the husband to obtain some provision by way of maintenance. He had unfortunately suffered a grave injury in an accident, and had, in my opinion, been wholly incapacitated from earning his living, and the wife died leaving an estate in value some $30,000, and the Chief Justice of the Supreme Court had made an order of $50 a month to the husband. The majority took the view that under the circumstances—we had all the evidence before us there—that that order could not be supported. I dissented and was of the opinion that the order made should be affirmed. I expressed there, as I

express now, my view that the Legislature has enacted that the relationship that exists between husband and wife is such that that relationship has to be recognized, and regarded when there is a testamentary disposition of the estate. If, for instance, the husband or the wife should be in need, that the relationship that exists calls upon the husband or the wife to remember it and make provision, otherwise we should have the husband or the wife, as the case may be, becoming a public charge upon the country. And why should the husband or the wife be a public charge upon the country if there is an estate which primarily ought to pay for the manitenance of that husband or wife? And therefore, in this particular case, when Parliament has said that the judge shall determine the question, and when the judge has determined the question upon the appeal, the question is, has there been any excess of jurisdiction on the part of the learned judge? I must say I cannot see how that can be contended with any chance of success whatsoever. Section 5 of the Act reads in these terms:

"In making an order the Court may, if it thinks fit, order that the provision shall consist of a lump sum or a periodical or other payment."

MCPHILLIPS, J.A

The learned judge in this case has directed that the whole estate, said to be in value $6,000, should be paid to the wife, there being no children of the marriage. This lump sum provision is objected to. Suppose he had directed payment of $50 a month for ten years, that would have exhausted the estate. In view of the circumstances of the widow the husband ought reasonably to have left to his wife the whole estate. And apparently he did not do what the learned judge thought he ought to have done. The learned judge was the one to determine that. He could have directed $50 a month for her life, and might have said, "This will only last ten years, and she is 43 years of age, I think it is a proper case for a lump sum payment, as in that case judicious use thereof may make provision for life as against ten years." The learned judge might reasonably have said as he has in effect said, if the widow gets the $6,000 now, it may be that she can, with business aptitude applied to the matter, provide for herself out of this estate for the remaining years of her life—which might be 40 years—many of our people live longer than 83 years of age. Therefore

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it seems to me that the learned judge—and he had the evidence before him which we have not—formed the opinion that the best thing to do was to give this lady the whole $6,000, to admit of her making such use thereof as would enure to her permanent maintenance, thereby preventing her becoming a charge upon the country.

The Legislature has undertaken to provide against such a happening, the husband or the wife must make proper provision out of the estate disposed of; and the husband here failing to comply with the declared policy of the law, the judge acting in conformity with the statute has made a proper order. This is a common-sense view of the statute. It is a Christian view and it is a moral view of the statute. The learned judge in the Court below having made a proper order in view of all the circumstances, it only remains for this Court to declare its affirmance of the order made below. In my opinion the order should be affirmed and the appeal dismissed.

MCPHILLIPS, J.A.

MACDONALD, J.A.: I base my view on the admitted facts set out by the Chief Justice. On these facts the order complained of is not an order making adequate provision for maintenance; it is really an order transferring the whole estate from the beneficiaries named in the will, to the wife; something which in my view was not contemplated by the Legislature.

I agree with the disposition of the appeal as stated by the Chief Justice.

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

Solicitor for appellant: *J. H. MacGill.*
Solicitor for respondent: *W. A. Cantelon.*

HIGGINS AND CHAN SING v. COMOX LOGGING COMPANY.

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HIGGINS v. COMOX LOGGING CO.

Fire—Spreading of—Logging operations in dry weather—Use of spikes instead of tree-jack—Clearing of brush—Negligence.

The defendant Company, in order to move logs from where they fell to a railway, ran a traveller on a sky-line cable that stretched between two spar trees about 1,120 feet apart. The cable was fixed on No. 1 spar tree and at No. 2 spar tree was held in place by two spikes over which it ran continuing to a stump some distance beyond where it was tied. When extra weight was put on the traveller the cable slipped back and forward on the spikes at spar tree No. 2 causing friction that gradually wore the cable at that point where it eventually broke, the loose end winding around guy ropes that supported spar tree No. 2. This generated sparks that fell in the brush below and started a fire. Owing to the extreme heat and dry weather at the time the fire spread in spite of the efforts of the defendant's employees to put it out, and eventually reached the plaintiff's farm. An action for damages was sustained.

Held, on appeal, reversing the decision of MORRISON, J. (MACDONALD, C.J.A. and MCPHILLIPS, J.A. dissenting), that the fact that they did not use a tree-jack instead of spikes to hold the cable in place on spar tree No. 2 did not render the system one which was not reasonably safe and proper; that the fact that defendant had not cleared away the brush around the spar trees did not amount to negligence and the fact that during a spell of hot weather and high winds the humidity reaching as low as 47 does not render the hauling and handling of logs negligence *per se*, if adequate fire-fighting equipment and men are available.

APPEAL by defendant from the decision of MORRISON, J. of the 30th of March, 1926, in an action for damages for injury to the property of the plaintiffs caused by fire through breach of duty by defendant to plaintiffs and through negligence of defendant's servants. The plaintiff Higgins is the owner of lots 161 and 167, Comox District, known as the Tyee Farm, the plaintiff Chan Sing being the lessee of the property. The defendant carried on logging operations in its camp No. 3 in the Comox District and in its operations a fire started at about 9.30 a.m. on the 8th of August, 1925. The defendant operated a sky-line cable between two trees about 1,120 feet apart. The

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cable went from tree No. 1 (about 120 feet high) to tree No. 2 (about 75 feet high) and from No. 2 tree went to a stump to the ground beyond. On this cable was a traveller that raised the logs and carried them to the railway. Tree No. 2 was supported by two guy ropes (cable) behind, and the traveller was brought back and forward by a donkey-engine beyond tree No. 1. The cable supporting the traveller was held up on tree No. 2 by spikes in the tree and when extra weight was put on the traveller there was friction by reason of the cable going back and forward on these spikes, the result being that the cable became worn and it eventually broke at this point. When it broke the loose end wound itself around one of the guy ropes and the friction caused sparks that fell to the ground and ignited the dry brush below and the fire spread so rapidly that notwithstanding the efforts of all the men employed by the defendant, the fire spread to the plaintiff's farm and burnt over 72½ acres of her land destroying the soil, timber, barns and crops. Judgment was given for the plaintiffs, and a reference was directed to R. M. Palmer of Cowichan Bay to ascertain the amount of damages.

The appeal was argued at Victoria on the 24th to the 28th of June, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

J. W. deB. Farris, K.C., for appellant: The whole question is whether the defendant was negligent, and the learned judge below found that the men did everything possible to stop the fire after it started, but he says there was a breach of duty in operating without a "tree jack" on No. 2 tree, in which case the fraying of the cable would have been avoided. We submit that the system employed was equally safe. In 25 years' operations there was never a fire such as this owing to a cable breaking. All reasonable care was taken: see *Buchanan* v. *Young et al.* (1873), 23 U.C.C.P. 101 at p. 105.

Higgins, K.C., for respondents: This is a common law action and in common law he is liable: see *Musgrove* v. *Pandelis* (1919), 2 K.B. 43. He is not entitled to rely on the fire starting by accident as he did not plead the statute (14 Geo. III., Cap. 78). He was operating a defective system: see *Smith*

v. *London and South Western Railway Co.* (1870), L.R. 6 C.P. 14 at p. 20. The premises were in a negligent condition. The brush should have been cleared away: see *In re Polemis and Furness, Withy & Co.* (1921), 3 K.B. 560.

Farris, replied.

Cur. adv. vult.

5th October, 1926.

MACDONALD, C.J.A.: The defendants were using a "high line" in moving their logs in the woods when a steel cable broke and striking another emitted sparks which set the forest on fire ultimately injuring plaintiffs' lands.

The trial judge put the question for decision in these words: "Did you [the defendant] take due care under the circumstances?" and after reviewing the circumstances he answered the question in the negative. I think he came to the right conclusion.

In reviewing the facts he said that the weather was very dry and hot; that there was a lot of inflammable material lying about; that the conditions were extraordinary and that the operations of the defendant under these conditions were a menace to the countryside; that defendant had had warnings of the danger from the forest officials, and that in these circumstances he thought it would have been the act of ordinary prudence on defendant's part to have stopped its operations until weather conditions had changed for the better. With these conclusions I quite agree. The defendant was bound either to have ceased operations for the time being, or in the exceptional circumstances, to have provided additional safeguards against fire and for the control of it should a fire have originated by reason of its logging operations.

MACDONALD, C.J.A.

The trial judge makes no finding that defendant was operating there under a defective system but it is to be noted that he was very favourably impressed by the evidence of the witness Brady, and that Brady was very positive that the system was defective by reason of defendant's failure to use a "tree-jack" instead of the method employed of wrapping the cable about the tail spar tree. Speaking of this Brady said:

"It would not be very long before it would break."

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Armstrong, another witness, and perhaps the best qualified on either side to speak of this defect, said:

"The wrap on the tail spar tree is not good practice, it will jerk, and a jerk will break a line quicker than a more evenly distributed strain."

The witness Baker also condemned the system. This system is known as the "Lidgerwood" or "high line" system. Originally the wrap about the tail spar tree was used, but being found unsafe it was generally discarded and the tree-jack was substituted therefor as being much better and safer for taking the cable. The reason for this must be obvious when the superiority of the tree-jack over the wrap is considered in the light of the evidence. In my opinion, the system was defective and that defect was calculated to break the cable and start the fire.

There is also ample evidence that there was considerable inflammable material around about the tail spar tree. Apart from the oral evidence of this the fact that the fire started within a few feet of this tree and spread with such rapidity that the hose attached to a locomotive which arrived there within, defendant says, five minutes of the beginning of the fire, failed to control it. It was argued that these fire fighting appliances were a sufficient precaution against the escape of fire, but the fact is that they proved utterly worthless under the conditions which existed at that time. Moreover, in proof of the inflammable condition of the terrain, a large number of men who were near by failed to control the fire which was immediately discovered and although there was little wind. As one of defendant's witnesses put it, the fire "ran like everything."

MACDONALD, C.J.A.

It was also contended that defendant was negligent in not providing barrels filled with water, placed along or adjacent to this high line, for use in case of emergency. While it appears to me that such a means of protection would have appealed to a reasonably careful man as being both inexpensive and efficacious in controlling a fire in its inception, yet as Armstrong a witness of great experience would not say that defendant could be charged with negligence in not providing such, I am not disposed to found my conclusion upon their absence. I rely first upon the circumstances mentioned by the learned trial judge and upon which he founded his conclusion, and secondly, upon the absence of the tree-jack which, I think, would have prevented the break-

ing of the cable. The other circumstances tend to support and strengthen this conclusion. The defective system in itself would be a sufficient answer to this appeal, but taken together with the other circumstances to which I have referred, and to which the learned judge has referred, I have no doubt that this appeal cannot succeed.

I would allow the cross-appeal. The arbitrator or referee, Mr. Palmer, who assessed the damages took a view of the injured property behind the backs of the parties and their counsel. True, he had taken a view first with counsel present but after reserving his decision he had another view unknown to counsel. Mr. *Higgins* swears that Mr. Palmer told him of this when handing him the award and remarked that it was "a good thing that he had done so." That second view must, I think, have materially affected his award. This Court has held on several occasions that such a view taken by a judge is ground for a new trial, and I cannot think that an arbitrator is in a different category.

MACDONALD, C.J.A.

The order of reference, the award and the final judgment entered thereon should be set aside.

MARTIN, J.A.: I do not think I can add anything useful to the judgment of my brother GALLIHER, with which I agree.

MARTIN, J.A.

GALLIHER, J.A.: The learned trial judge has found, and I think found only, that the defendant was negligent in operating at all at that season of the year owing to atmospheric conditions and the possibility of fire occurring from any cause whatsoever. Of course, if the plaintiffs can maintain their judgment on any other grounds of negligence alleged, it is our duty to give effect to it.

GALLIHER, J.A.

Feeling myself untrammelled by any finding of the learned judge on this aspect of the case I have carefully read the appeal book from cover to cover. Plaintiffs' particulars of negligence which are set out in the statement of claim do not specifically cover the clearing of underbrush or the placing of water-barrels, but they argued before us that defendants were negligent in three respects: (a) defective system of operation; (b) in not clearing or underbrushing for some 75 or 100 feet around the

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spar tree before operation; (c) in not having water-barrels with buckets placed in the immediate vicinity of the operations. As to (a): Apart from statutory provisions the law does not require or impose upon the operator that he shall use the latest and most up-to-date machinery or system. If such were the case and operators had to junk their outfit every time what was considered an improved method was brought forth, operations could only be carried on at very considerable, not to say prohibitive, expense. What the law requires is that a reasonably safe and proper system shall be used and adopted. The system used here is what is known as the Lidgerwood system, and there is no dispute that the system is a good one, but plaintiffs submit that defendant should have used what is called a "tree-jack" which would be attached to one of the spars and through which the sky or main line would pass thus causing less friction and danger of breaking the line or emitting sparks which might cause fires, than the method adopted by the defendant of wrapping it around the spar. Absolutely conflicting evidence was given *pro* and *con*, as to the merits and demerits of the two methods, but on the whole there is nothing to convince me that the method employed here was not a reasonably safe and proper one—in fact, I think the preponderance of the evidence is that the method employed was at least equally safe.

As to (b): There would be two objects in clearing around the spar tree—to prevent the lines when suspended, from fouling, and greater safety from fire spreading quickly if it started. It is in respect of the latter that plaintiffs urge negligence. Two things should be considered in connection with this: the likelihood of fire occurring from the cause which gave rise to this conflagration and the practicability of clearing to the extent claimed where the logging apparatus is being constantly changed from place to place, as only a limited area can be logged from one setting. The defendant says that in its many years of operation it has never had fires from such a cause and had never heard of same. If we were to apply the principle that it was negligence in the circumstances here in not clearing for the space contended for then we would, I think, upon the evidence, have to go further and say that all around each operation where the engine was used, where logs were being

hoisted, and between the engine and the tree spars the ground should be underbrushed and this the evidence satisfies me would be impracticable. Unless such an accident as did occur here occurred there would seem little likelihood of fire breaking out at the point it did, and I do not think that we should say that the defendant should reasonably have anticipated such a cause. I am applying the term "reasonably anticipate" in accordance with the following principles:

"What the defendants might reasonably anticipate is, as my brother Channell has said, only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence":

Blackburn, J., in *Smith* v. *London and Southwestern Railway Co.* (1870), L.R. 6 C.P. 14 at p. 21. See also, Channell, B., to the same effect, referred to by Bankes, L.J., in *In re Polemis and Furness, Withy & Co.* (1921), 3 K.B. 560 at p. 569.

As regards (c): I think we must hold that the fire protection apparatus was all that could reasonably be called for. It might have been of assistance if barrels had been there as well, but see the evidence of Armstrong:

"You don't find the barrels around where the cables are? No, I have never seen it. But it would be quite feasible to do it on the logged off side of the strip in this case. It is not practised that I have seen."

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Considering what would appear to me to be the fact that all reasonable appliances were at hand for fighting fire and that every effort was made by the men to subdue it I cannot find negligence in this respect.

This leaves for discussion the ground upon which the learned trial judge based his judgment, *i.e.*, that it was negligence *per se* to operate at the time and under the conditions prevailing. Lumbering is one of the chief industries of British Columbia, and the felling and logging of timber is one of the elements of that industry. This operation is necessarily of a more or less dangerous character and that danger is accentuated at certain seasons of the year by conditions of humidity, in various stages, such as partly prevailed at the time in question here.

In my view this fire should be regarded as one of accidental origin and since I have concluded that proper appliances were available and used in fighting the spread of it and that every effort was made by the men to quench or prevent its spread, and

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that no negligence in operation has been shewn, we are down to the one bald question—Does operating at all under the weather conditions then prevailing constitute negligence which renders the defendant liable? The evidence is that the fire started about 9.30 in the morning, and that the humidity was then 47. Cowan, the Provincial Government forester, says: "Operations should cease if the humidity falls to 35." The warning pamphlet sent out by the Government put in as Exhibit 5, says:

"When temperature is above 70 and humidity is below 50, fires start—below 40 fires spread."

Hence, with humidity at 47, though fires might start it would hardly be considered too dangerous to operate with adequate fire-fighting equipment and men at hand available.

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It appears that telegrams are sent out by the forestry department to logging companies warning them as to an approaching heat wave and it is admitted some were received prior to this fire. As none are produced or put in as exhibits, I cannot tell their nature (other than from what little reference is made to them in the evidence) from which I would deduce that they were intended as warnings to be careful in operation but not to cease operation.

From all the circumstances attending this fire and its cause, I do not think it was negligence *per se* to operate and Mr. *Higgins* frankly stated in his argument that he was not trying to maintain that position.

It follows, in my opinion, this appeal should be allowed.

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MCPHILLIPS, J.A.: In my opinion, the appeal should be dismissed and the cross-appeal allowed.

The appeal raises a very important question and one that affects the logging industry which is of great magnitude in this Province. It will always be a matter of difficulty in the carrying on of this industry, especially in the heated months of summer, to make adequate provision for the prevention of fires so liable to occur under conditions that arise from time to time. The weather, at the time, was extremely hot and tense, all the down timber, branches and debris generally surrounding the operations was in a very dry state and liable to blaze up and the fire get beyond control.

There was a large body of evidence led which, in my opinion, established beyond question that it was extremely negligent under the climatic conditions existent to continue operations, especially in view of the system of operation and the absence of tree-jacks to prevent the crossing of wires and ignition from the wires forming a part of the rigging which handled the logs. The actual operation which preceded the breaking out of the fire, for which damages have been allowed the respondent, the plaintiffs in the action, by the trial judge, was, in its nature, the hauling and handling of logs by a system of steel cables and engines. The humidity was extremely low, at the time of the breaking out of the fire, which fact was known to the appellant, the defendant in the action, and, at the time, there was a strong wind blowing in the area where the operations were being carried on which would render it next to impossible to check any fire that might arise. Further, I think there can be no question, upon the evidence, that negligence was well established upon all the alleged grounds, namely, that operations should have been discontinued owing to the extremely low humidity at the time and there was negligence in the system, and the absence of tree-jacks, which latter would have obviated the crossing of wires and friction upon the wires which set off sparks which, upon falling upon the dry branches, tinder and debris immediately about the scene of the operations caused a fire to break out. It was contended, upon evidence led by the appellant, that all proper precautions against fire were present. With this evidence, I cannot agree, especially when coupled with the extremely low humidity existent at the moment and the absence of the tree-jacks, a contrivance well known to all operators in the industry and which, in my opinion, should have been in use. Their absence constituted a defective system and was the proximate cause of the starting of the fire, giving rise to the cause of action sued upon. That is, from this alone, it can well be said, there was actionable negligence, but I do not confine my view solely to this. The specific defaults upon the part of the appellant in the operations may be said to have been recklessness in operation with the extremely low humidity then existent, the failure to clear away the accumulation of dry branches and tinder surrounding the machinery in operation

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and the absence of the tree-jacks, a contrivance which would have prevented the happening, that is to say, prevented the sparks being driven off the wires consequent upon friction in the operations which falling upon the inflammable material below immediately set up the fire which the appellant allowed to get out of control and which ravaged the lands of the respondents. The humidity existing at the time was 47 and the evidence adduced as applicable to logging operations in this Province, and particularly in the area where the operations were being carried on, is that fires will start up and become unmanageable below 50. The Government of the Province of British Columbia has caused careful attention to be given to this question of humidity and in the forest service of the Government psychrometric tables have been prepared available to all operators in the woods and loggers generally, which tables contain warnings to those engaged in the industry, and it was established that at the time the fire broke out the relative humidity per cent.—Fahrenheit temperatures—was 47 and the warning is that below 50 fires start. That condition existing, it is clear to demonstration, that the appellant undertook a risk that it should not have undertaken in continuing operations in the manner in which it did and having done so was guilty of actionable negligence.

This question of liability for damages caused by fire has received at various times the most careful attention of the Courts and we have the opportunity of turning to elaborate judgments of eminent jurists of long ago as well as eminent jurists of our time, and I doubt if it could be said that the subject-matter ever received more careful consideration than in the case of *Port Coquitlam* v. *Wilson*, a decision of the Supreme Court of Canada on appeal from this Court (1923), S.C.R. 235. There the verdict of the jury granting damages to the plaintiffs in the action was sustained after the most careful consideration of the law by all the judges of the Supreme Court, there being unanimity of opinion upon the law generally. Mr. Justice Mignault, though, took the view that there was material misdirection of the learned trial judge in instructing the jury that the municipal corporation was liable for the action of the officer of the corporation in changing the stove or stove-pipe and upon that ground, in his opinion, the verdict could not stand and, in

his opinion, there should be a new trial. The trial judge in that case directed the jury that the fact that the fire first broke out in the appellant's premises was *prima facie* evidence of negligence and that the onus was on the appellant to acquit itself of liability by shewing that the fire began accidentally. The Court held that the corporation was liable and did not disagree with the direction of the learned trial judge to the jury and held that the verdict should not be disturbed. It was specifically held by the Supreme Court of Canada that owing to the judge's finding, as to the cause of the fire, in view of the existence of its own by-law and of the fact that the fire would not have occurred if the by-law had been complied with, the appellant was *prima facie* liable for not having taken reasonable means to prevent harm to its neighbours by the escape of the fire it had authorized and that the charge of the trial judge, if technically open to criticism, was, in substance, unassailable. In the present case, we have the learned trial judge, Mr. Justice MORRISON, holding that the appellant is liable for the fire in question and answerable in damages to the respondents in this appeal owing to the appellant failing to take due care under the circumstances. The learned judge has specifically found that "the logging was operated with the danger of fire always imminent." It is true the learned judge did not find that the absence of tree-jacks constituted negligence alone which could be said to be the proximate cause of the bringing about of the fire, but it is observable that he formed a favourable view of Brady's evidence and the learned judge did really hold that there was defect in the system of operation. I would refer to what the learned judge said, *viz.*:

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"The plaintiff suggests the system was wrong, and it was so used constantly, and that that is what caused it; and inasmuch as it was dangerous in that way, most of the concerns gave up using it. Well, that is not very satisfactory. But it seems to me that Mr. Brady's evidence, which really impresses me—and I know nothing about Mr. Brady, I don't know what opinion other loggers have of him, I am just taking him as I saw him in the witness box in the ordinary way—and Mr. Brady's evidence does impress me entirely; he seemed to be a very intelligent man, and he says he is an experienced logger—and he says that that must have been caused by fraying against those spikes, and the spikes were put there in that method for them to use them to keep the sky-line in place, and the oscillation of the tree

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spars, one can readily see they must necessarily oscillate and move about—and that that frayed the cable; and it would be no negligence, probably—it might not probably really be negligence on the part of the defendant in not observing that for awhile, you see, because they had not had it very long in use—but that is how it broke. If that is so, then that would clearly be a defect in their system, in their method of logging, which Mr. Brady says was absent in the other method, the tree jack—he said that it would not break that way with the tree-jack—and besides that, if it did break it would not coil around an adjoining cable causing friction which happened in this case. But, anyway, the point which particularly impresses me is that I think the negligence arose out of their operating at all at that particular time under the circumstances, having these warnings. So that I say that this duty, the breach of which gives rise to a cause of action of negligence, is to take due care under the circumstances, and that in this case there was a breach of that duty by operating at that time of the year with an appliance of that sort."

Mr. Justice Duff, in the *Wilson* case dealt particularly with the Fires Prevention (Metropolis) Act (1774) and with his judgment Mr. Justice Anglin—now Chief Justice of Canada—agreed, and at pp. 243-4, said:

"The law was changed by the statute of Anne and again by the statute of 14 Geo. III., c. 78, sec. 86, which no doubt is in force in British Columbia, and by which it was provided:

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"'No action, suit or process whatever, shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall . . . accidentally begin.'

"There are points still unsettled as to the effect of this statute. It was held in *Filliter* v. *Phippard* (1847), 11 Q.B. 347, that a fire is not accidental within the statute if it begins through negligence and it may be taken to be the law that fires intentionally lighted and fires arising through negligence are outside the statute and that responsibility in respect of them is governed by the common law. On principle, since the statute creates an exception to the general rule, the onus ought to be upon the defendant alleging that the statute applies to shew that the fire did accidentally begin; but the point is no doubt an arguable one with the weight of *dicta* probably in favour of an answer in the opposite sense—the view accepted by MACDONALD, C.J., in this case. It is not necessary I think to pass upon the point for the purposes of this appeal. Again the judgments of the Lords Justices in the recent case of *Musgrave* v. *Pandelis* (1919), 2 K.B. 43, suggest some interesting questions; whether, for example, a fire which originated in a coal or cinder escaping from a domestic stove is, for the purpose of applying the statute, to be treated as beginning with the lighting of the fire in the stove or with the fire kindled through the agency of the escaping fragment. The effect of the statute as construed by *Filliter* v. *Phippard* is to impose upon the occupier of premises in which a fire is lighted at the very lowest the duty to take all reasonable precautions to prevent the fire getting beyond his own premises and doing injury to others; and an obligation to take reasonable precautions in dealing with such a dangerous element as fire is an obligation to take

special care, *Ellerman* v. *Grayson* (1919), 2 K.B. 514. The *dictum* of Atkin, L.J. was expressly approved in the House of Lords by the Lord Chancellor as well as by Lords Finlay and Parmoor."

I cannot persuade myself that the learned trial judge can in any way be disagreed with in imposing liability upon the appellant for the fire and the consequent damages resulting therefrom. The findings of fact have been reasonably arrived at by the trial judge, and the authorities will not admit in this case of the learned judge's conclusion being differed with. I would refer in particular to *Coghlan* v. *Cumberland* (1898), 67 L.J., Ch. 42, Lindley, M.R., at p. 402; *Carpenter* v. *Mayor, &c., of Wandsworth* (1917), 117 L.T. 183. In arriving at a final conclusion upon this appeal it is well to bear in mind what Lord Loreburn said in *Lodge Holes Colliery Company, Limited* v. *Wednesbury Corporation* (1908), A.C. 323 at p. 326 (77 L.J., K.B. 847 at p. 849):

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

What Lord Esher, M.R. said in *Colonial Securities Trust Company* v. *Massey* (1895), 65 L.J., Q.B. 100 at p. 101; (1896), 1 Q.B. 38 at pp. 39-40: MCPHILLIPS, J.A.

"'Where a case tried by a judge without a jury comes to the Court of Appeal, the presumption is that the decision of the Court below on the facts was right, and that presumption must be displaced by the appellant.'"

What Lord Gorell said in *Bryce* v. *C.P.R.* (1909), 15 B.C. 510 at p. 513 (and this was a case in which the Judicial Committee restored the judgment of my brother MARTIN, then one of the justices of the Supreme Court of British Columbia):

"Their Lordships consider that the facts appear to have been very fully and carefully investigated by MARTIN, J., with the assistance of assessors, and that no adequate ground has been shewn for an appellate Court to take a different view of the facts from that taken by the learned judge. He had the great advantage of seeing and hearing the witnesses, and unless it could be shewn that he had taken a mistaken or erroneous view of the facts, or acted under some misapprehension, or clearly came to an unreasonable decision about the facts, he should not, in accordance with well-recognized principles, be overruled on matters of fact which depended mainly upon the credibility of the witnesses."

And what Sir Arthur Channell said in *Toronto Power Company, Limited* v. *Paskwan* (1915), A.C. 734 at p. 739; 84 L.J., P.C. 148, is very much in point in this case:

"It is unnecessary to go so far as Middleton, J. did in the Court below

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and say that the jury have come to the right conclusion. It is enough that they have come to a conclusion which on the evidence is not unreasonable."

In the present case we have the learned trial judge sitting without a jury making findings of fact upon oral evidence. Presumptively the findings are right, and they have not been displaced. In my opinion therefore the conclusion at which the learned judge arrived was not unreasonable. I think he was amply justified by the evidence adduced at the trial in arriving at that conclusion and that the appeal fails.

There remains to be considered the cross-appeal stated in the following terms:

"1. That after the close of the said inquiry and reference and before delivering his findings, the said R. M. Palmer, in the absence of the parties to the action and their respective counsel, took a view of the property in question in the action, and took further evidence."

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I would think the objection is well taken and that the assessment of damages cannot be supported and that there should be a reassessment of damages, and that there should be a new trial confined though to the assessment of damages only. In the result, in my opinion, the judgment of the learned trial judge should be affirmed and the appeal dismissed, but the cross-appeal should succeed and that there be a reassessment of damages by the Court or some other referee appointed by the Court.

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MACDONALD, J.A.: I concur with my brother GALLIHER.

Appeal allowed, Macdonald, C.J.A. and McPhillips, J.A. dissenting.

Solicitor for appellant: *P. P. Harrison.*
Solicitor for respondents: *Frank Higgins.*

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CAPTAIN J. A. CATES TUG AND WHARFAGE COMPANY LIMITED v. THE FRANKLIN FIRE INSURANCE COMPANY OF PHILADELPHIA, PENNSYLVANIA.

Insurance, marine—Tug-boat—Constructive total loss—Abandonment—Assent to by insurers—Evidence of.

The test as to constructive total loss of a ship is whether a shipowner of ordinary prudence and uninsured would not have gone to the expense of raising and repairing the vessel but would have left her at the bottom of the sea because her market value when raised and repaired would probably be less than the cost of restoration and repair.

Acceptance of abandonment should be found if underwriters by their acts adopted a course consistent only with acceptance of abandonment or if they acted in such a way as to alter the right of the owner. The owner on the other hand, cannot arbitrarily compel assent to an improper abandonment by refusing to join in acts of reclamation or salvage; nor are the insurers compelled to refrain from salvage operations in the hope of minimizing the loss on pain of being held to have assented to abandonment. To amount to assent the acts of the insurers must be of such a character as could only be justified on the assumption that the wreck was treated as their own property.

APPEAL by defendant from the decision of MURPHY, J. of the 12th of March, 1926 (reported *ante*, p. 235), in an action to recover a loss under two policies of marine insurance on the motor-vessel "Radius," this vessel having been sunk in the First Narrows of Vancouver Harbour on the 26th of August, 1925, after being in collision with the steamship "Anyox" owned by the Coastwise Steamship & Barge Co., Ltd. One was a time policy for $24,000 and the other a disbursement or earning policy for $6,000. The vessel sank in about 12 fathoms of water and the owners decided to abandon it as a constructive total loss, notice of which was given the defendant Company on the following day. The defendant Company immediately sent one Captain Cullington, a marine surveyor, to make an examination and the Vancouver Dredging & Salvage Company, Ltd. was employed to salvage the vessel and she was raised, there being a salvage award of $6,500 to the Salvage Company. Judgment was given in this action on the 12th of March, 1926,

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and on the 12th of April following the defendant in subrogation of the plaintiff's rights brought action against the Coastwise Steamship & Barge Co., Ltd. for the loss of the "Radius." Notice of appeal was given in this action on the 12th of May, 1926. The plaintiff's preliminary objection on the hearing of the appeal that by commencing an action against the Coastwise Company for the damages sustained, the defendant had adopted the judgment below, and precluded itself from the right of appeal was overruled. The facts are set out fully in the reasons for judgment of the trial judge, *ante,* p. 235.

Statement

The appeal was argued at Victoria on the 15th to the 18th of June, 1926, before MACDONALD, C.J.A., MCPHILLIPS and MACDONALD, JJ.A.

Argument

Griffin, for appellant: We submit that acceptance of abandonment was not made. The defendant raised the vessel as salvors only: see *Shepherd* v. *Henderson* (1881), 7 App. Cas. 49 at p. 63. There was no act by the defendant upon which it could be found that it had accepted abandonment: see *Provincial Insurance Company of Canada* v. *Leduc* (1874), L.R. 6 P.C. 224; *McLeod* v. *The Insurance Co. of North America et al.* (1898), 30 N.S.R. 480; 29 S.C.R. 449; (1901), 34 N.S.R. 88; Arnould on Marine Insurance, 10th Ed., Vol. II., p. 1535, Sec. 1200. Captain Cullington, the underwriter's surveyor who made an examination of the wreck and had it raised, died before the trial and the submission is that his examination on discovery should be accepted as evidence on the trial: see section 20 of the Evidence Act; Taylor on Evidence, 11th Ed., Vol. I., p. 344, Secs. 464-5.

J. A. MacInnes, for respondent: We say, first, that there was assent to abandonment as the vessel was put up for sale: see *Parker* v. *Palmer* (1821), 4 B. & Ald. 387; *The Blairmore* (1898), 67 L.J., P.C. 96. If we can shew there was a constructive total loss it makes no difference whether the appellant assents or not. As to what is constructive total loss see Arnould on Marine Insurance, 10th Ed., Vol. II., pp. 1354 (Sec. 1048) and 1670; *Marten* v. *Steamship Owners' Underwriting Association* (1902), 7 Com. Cas. 195. On the question of evidence of constructive total loss see *Crabbe* v. *Shields* (1925), 36 B.C.

89; Phillips on Insurance, 5th Ed., Vol. 2, p. 248, Sec. 1524; *M'Iver* v. *Henderson* (1816), 4 M. & S. 576 at p. 584; *Kaltenbach* v. *Mackenzie* (1878), 3 C.P.D. 467; *Macbeth & Co., Limited* v. *Maritime Insurance Company, Limited* (1908), A.C. 144; *North Atlantic Steamship Co.* v. *Burr* (1904), 9 Com. Cas. 164. The keel of the boat was split. They were going to repair the keel by putting a splice in. This cannot be done efficiently; there must be a new keel. In making up the estimate of loss the margin in the *Blairmore* case, *supra,* is practically the same as in this one.

Griffin, in reply: The respondent endeavours to shew an actual loss of over $24,000, but according to the list I have made out it is a little less than $16,000. Supervision amongst other costs in his estimate is not required: see *Ship "Blairmore" Co., Limited* v. *Macredie* (1897), 24 R. 893 at p. 897. The onus is on the plaintiff: see *McLeod* v. *The Insurance Co. of North America et al.* (1901), 34 N.S.R. 88 at p. 126; *Hall* v. *Hayman* (1912), 2 K.B. 5 at p. 12; *Kemp* v. *Halliday* (1865), 34 L.J., Q.B. 233 at p. 245; *Montreal Light, Heat and Power Company* v. *Sedgwick* (1910), A.C. 598 at p. 604; *Klein* v. *Globe & Rutgers Fire Ins. Co.* (1924), 2 F. (2d) 137.

Argument

Cur. adv. vult.

5th October, 1926.

MACDONALD, C.J.A.: The judgment cannot, in my opinion, be sustained. It is based on the finding of fact that the plaintiff's notice of abandonment of the wreck was accepted by the defendant. The inference to be drawn from the whole of the evidence is, to my mind, clearly opposed to this finding. The defendant proceeded promptly to salve the vessel, and the result was that a very substantial salvage was effected.

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The defendant paid into Court $11,500, which it says is a sufficient sum to cover the plaintiff's loss. While there is conflicting evidence on this branch of the case, I am convinced that that sum is quite sufficient to answer plaintiff's demand.

The action should be dismissed.

MCPHILLIPS, J.A.: At the threshold in this appeal, upon the facts, it would appear to be clear to me that the respondent

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did not abandon the ship and in any case it was not such a loss as would admit of abandonment. Further, upon the facts, it in sequence follows there was no acceptance of any contended for abandonment and in the present case acceptance was necessary.

Upon careful consideration of the facts, it is made fully apparent that the case was not one of a constructive total loss. It is true the ship went down but not in deep or difficult water making it impossible or at all difficult to raise the ship as the facts establish. She was raised and her value, when raised, was such that there is a very appreciable excess in value over and above the cost of repairing the damage, that is, it is futile for the respondent to contend for abandonment as being a constructive total loss within the meaning of section 60 of the Marine Insurance Act, 1906. It has been proved that any such contention of abandonment could not be acceded to in any case nor would abandonment be reasonable because it has been preserved from actual total loss without an expenditure exceeding its value. It is clear, in my opinion, upon the facts that the loss can only be treated as a partial loss (sections 60 to 62 inclusive of the Marine Insurance Act, 1906). In my opinion the facts amply disclose that notice of abandonment could not have been properly given in the present case and it is impossible for the respondent to contend that even in default of acceptance abandonment must be held to have taken place (section 62, subsection (4); *Marmaud* v. *Melledge* (1877), 123 Mass. 173).

Upon the basis of a partial loss, which I consider the case was, we have the respondent claiming $30,000. The appellant contended that $18,000 was sufficient to defray the partial loss and offered $18,000, *i.e.*, $11,500 in cash the amount paid into Court, and the ship. That, in my opinion, was generous treatment to the assured, the respondent, and, in passing, it may be said that the respondent only established damage to the extent of $8,039, so that everything considered the $11,500 is ample to cover any possible loss (see section 56, subsection (4), Marine Insurance Act, 1906). In *Sailing Ship "Blairmore" Company* v. *Macredie* (1898), A.C. 593, the second paragraph of the headnote succinctly sets forth the law:

"The test whether a ship has become a constructive total loss is the

same in English as in Scottish law, although these laws may differ in regard to the date at which the test ought to be applied. In considering whether a constructive total loss has occurred, the question is whether a shipowner of ordinary prudence and uninsured would have gone to the expense of raising a sunken ship and repairing her."

The facts in the present case make it manifest that the respondent acting in ordinary prudence would have raised the ship and repaired her. Here the underwriters raised the ship and it is clear that the case is one not of constructive total loss but partial loss only, and for partial loss only can the shipowner, the respondent, recover. Lord Watson puts the test in these words at p. 603:

"The test, as I understand it, is simply this: that in order to instruct a total constructive loss, at the date to which the inquiry relates, it must be shewn that a shipowner of ordinary prudence and uninsured would not have gone to the expense of raising and repairing the vessel, but would have left her at the bottom of the sea, because her market value when raised and repaired would probably be less than the cost of restoration and repair. That, in my opinion, was the test as explained by the consulted judges and accepted by this House in *Irving* v. *Manning* [(1847)], 1 H.L. Cas. 287."

A close study of the *Blairmore* case shews that the House of Lords really did not decide that where a ship goes to the bottom that there cannot be a partial loss only. Lord Halsbury and Lord Herschell expressed themselves in these terms, but Lord Herschell at p. 610 also said:

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"I take it, then, that the general rule applicable is, according to the law of this country, that if in the interval between the notice of abandonment and the time when legal proceedings are commenced there has been a change of circumstances reducing the loss from a total to a partial one, or, in other words, if at the time of action brought the circumstances are such that a notice of abandonment would not be justifiable, the assured can only recover for a partial loss."

And the present case is within the above language.

Lord Shand expressed himself upon the point in terms similar to Lord Watson. He said (p. 614):

"If by natural causes or by the actings of third parties the ship had been in April, 1896, restored to the appellants without cost to them, though in a disabled condition, but requiring only repairs of less cost than the value of the ship when repaired, the authorities seem to shew that the owners would not have been entitled to prevail in a claim against the underwriters as for a total loss."

In *Kemp* v. *Halliday* (1865), 34 L.J., Q.B. 233 at pp. 244-5, Blackburn, J., said:

"It is now finally settled in England by the decision of the House of

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Lords in *Irving* v. *Manning* [(1847)], 1 H.L. Cas. 287, 306, 'that the question of loss, whether total or not, is to be determined just as if there were no policy at all.' If the subject-matter is by the underwriters' perils put in such a situation that, supposing there was no policy, it would be totally lost to its owner, then as between the assured and the underwriter there is a total loss, not otherwise. And the question whether the thing is lost to the owner is to be treated in a practical business-like spirit; and if the owners cannot by any means which they or their representative the captain can reasonably use be saved, then it is totally lost; but if by any reasonable means which were reasonably within their reach they might redeem the subject-matter, and do not do so, the total loss is not attributable to the perils which cast the subject-matter of insurance into that position, but to the neglect of the owners to take those reasonable means. If they do not take those reasonable means 'they cannot make the loss total by their own neglect'—*Thornely* v. *Hebson* [(1819)], 2 B. & Ald. 513, as explained by Lord Tenterden in *Parry* v. *Aberdein* [(1829)], 9 B. & C. 411, 417. 'The duty of the master in case of damage to the ship is to do all that can be done towards bringing the adventure to a successful termination, to repair the ship, if there be a reasonable prospect of doing so at an expense not ruinous, and to bring home the cargo and earn the freight if possible'—*Benson* v. *Chapman* [(1849)], 2 H.L. Cas. 720. The underwriters do not by their contract engage to indemnify against the consequences of his neglect to perform that duty. The question, however, whether it is possible, must be understood in the sense in which it is explained by Maule, J. in *Moss* v. *Smith* [(1850)], 9 C.B. at p. 103; s.c. 19, L.J., C.P. at p. 228: 'In matters of business a thing is said to be impossible when it is not practicable, and a thing is impracticable when it can only be done at an excessive or unreasonable cost. A man may be said to have lost a shilling when he has dropped it into deep water, though it may be possible by some very expensive contrivance to recover it.' I may add, to complete the illustration, that a diamond of great value would not be totally lost if dropped into water from whence it would cost £10 to recover it, though a shilling in the same position would be totally lost."

(Also see Arnould on Marine Insurance, 10th Ed., Vol. II., Sec. 1120).

The case of the *Montreal Light, Heat, and Power Company* v. *Sedgwick* (1910), A.C. 598, was a case of loss of cargo not loss of a ship. Lord Atkinson used language of this kind pertinent to the present case where the loss is in respect of the ship (p. 604):

"Of this the loss was absolute, [dealing as he was with the cargo] not constructive at all. Whether the barge, as she lay submerged, was so valuable or was so slightly damaged that a prudent owner would, with a reasonable regard to his own interest, most probably cause her to be raised and repaired, or was of such small value, or so seriously damaged that he would most probably not think she was worth being raised and repaired, but would abandon her—vital issues if the action was one for the loss of

the barge—were matters which in no way affected the loss the plaintiffs, in fact, sustained."

In *Macbeth & Co., Limited* v. *Maritime Insurance Company, Limited* (1908), A.C. 144, Lord Loreburn said, at pp. 147-8:

"This question admits of ready answer as soon as it is ascertained what is the true test by which a Court is to be guided. Really the choice lies between two. One is that a ship has become a constructive total loss if the cost of repairing her would exceed her value when repaired. The other is that she has become so when a prudent uninsured owner would not repair her having regard to all the circumstances. If the former test be adopted, then this appeal must be dismissed, because the cost of repairs here is £11,000 and the repaired value is £12,000. If the latter test be adopted, then the appeal must be allowed; for no sensible man would have repaired this ship if he could have made a better thing of it by selling her as a wreck, and it is found that he could have done so. If this were an open question, there seems to me ground for arguing that the former is the sound view. But I think this is not really an open question, notwithstanding the recent decision in *Angel's Case* (1903), 1 K.B. 811. I will not enter upon a criticism of the authorities. I have had the advantage of seeing in print the opinion of Lord Collins, who fully discusses them, and I agree in his conclusion. When once the test of what a prudent uninsured owner would do, whether he would sell the ship where she lies or repair her, is admitted, it follows that the value of the ship where she lies must enter into the calculation. And this test has been laid down repeatedly by many high authorities over a long period of time. I think it was too late to disturb it in 1903. I will merely add that in my opinion the rule can only apply where there has been a wreck or something equivalent to a wreck. If an owner tried to treat as a constructive total loss such a case as was put in argument, of a vessel worth £5,000 as she lay damaged in harbour after a storm, but which would cost £6,000 to make her fit to take the sea, and would then be worth only £10,000 as repaired, he would fail. Among other reasons, the loss would not be by perils of the sea."

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The facts of the present case establish beyond question that the loss must be treated as a partial loss only, not as a constructive total loss. I would, therefore, allow the appeal.

MACDONALD, J.A.: If the appellant by its acts assented expressly or by implication to the abandonment of the vessel as found by the learned trial judge, the whole question is settled favourably to the respondent. To decide this point the evidence must be considered.

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The day after respondent's tug "Radius" was sunk in collision with the S.S. "Anyox," *viz.*, August 27th, 1925, Captain Cates, the owner (after first notifying appellant by letter of the loss on the day of the accident) forwarded by mail to appellant's

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agents, Messrs. Macaulay, Nicholls and Maitland, formal notice of abandonment. On September 2nd, 1925, appellant's agents replied by letter stating that "at this stage" it was impossible to accept abandonment on the ground that in their view the vessel was not a constructive total loss. The learned trial judge finds that between these dates, appellant's agents took immediate steps by employing one Captain Cullington, professedly on behalf of the owner (but without consulting him) as well as the insurers, to locate the sunken tug. This action was taken on the 26th of August before the notice of abandonment was received. After a diver located the sunken tug Cullington was directed by Macaulay to obtain figures from a salvage company of the cost of raising it to the surface. Shortly after he advised Macaulay that it could be done for $6,500. Macaulay then gave instructions to Cullington to act in conjunction with the owner for the benefit of all concerned in raising the vessel without prejudice, as he put it, as to whether it was a constructive total loss or not. Captain Cates attended a conference to discuss the situation, but as the learned trial judge found, although not making his position clear to Cullington, his attitude was not inconsistent with his previous determination to abandon the vessel. That view is, I think, warranted by the evidence. It is true, that appellant's agents wrote to the respondent on the 27th of August in reply to the letter from Captain Cates of the 26th, in which they state that they understood that Cullington was "on the job" in conjunction with the respondent. This statement would not necessarily bind the respondent to joint action even though the letter was not answered, but it did convey to Captain Cates an intimation that they were not acting on the assumption that the underwriters had taken over the wreck. Macaulay testified that at two subsequent interviews with Captain Cates the latter agreed to have an examination of the engine made by the firm of Ferrier & Lucas, the tug having been raised in the meantime, carrying out to some extent at least the suggestion of joint action at this stage. However, throughout these proceedings the learned trial judge finds that Macaulay and Cullington clearly understood that Captain Cates was persisting in his abandonment of the vessel and I am not disposed to question that finding, nor do I think it precludes the conclu-

sion I have arrived at. The appellant, on the other hand, was equally insistent in refusing to assent thereto. With that attitude assumed by both parties one Cribb, the manager of the Vancouver Dredging & Salvage Co. Ltd. (the firm that raised the vessel) hearing rumours that it was for sale asked Cullington in such event to give his firm an opportunity to purchase. Cullington replied that he did not think it was for sale, but if it should be an opportunity to tender would be given to Cribb's company. The outcome was that Cribb, on behalf of his firm made a verbal offer of $12,500 for the wreck, this sum to include $6,500 due to his company for salving it. This offer, or its receipt, was not communicated to Captain Cates. Macaulay was advised of the offer by Cullington and he instructed the latter to have Cribb put it in writing. This request was complied with. Several weeks afterwards, however, and before acceptance, the offer was withdrawn. The explanation that this offer was obtained solely for valuation purposes is disposed of by the learned trial judge by stating that the Salvage Company did not so understand it and that a valuation if required, would not likely be obtained in this way. His finding, therefore, is that the Salvage Company was requested to make a *bona fide* offer of purchase, which it would have been bound to carry out if accepted before withdrawal. I am satisfied, particularly where in some respects the evidence is conflicting, to accept these findings, even although in other respects they may be regarded as inferences from undisputed facts. Captain Cates testified that he was never at any time after the accident consulted in regard to selling the wreck. That evidence, if accepted, as we should assume it was accepted, shews that the proceedings to sell were conducted solely by the appellants.

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The foregoing statement places the evidence in the strongest possible light for the respondent. It does not necessarily follow, however, that the insurers were acting in the capacity of owners of the wreck; that should only be assumed under all the circumstances if the offer had been accepted, and appellant acted upon it. I am satisfied from the evidence and the attitude assumed throughout by the parties concerned that if the offer had not been withdrawn the appellant would not effectuate a sale without consulting Captain Cates. It was simply intended

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as a basis for arriving at some adjustment of the dispute between them and would not have been consummated until, if possible, the whole dispute was settled. The insurers had an interest in procuring an offer. The incident therefore cannot be said to be exclusively referable to an act of ownership by the insurers. The utmost that can be said is that the insurers took possession of the ship, raised it, asked that Cribb should make a written offer of purchase, called for tenders to repair it, while at the same time refusing to assent to abandonment, and if not in so many words, still virtually informing the assured as to the character in which they were acting. That is not acceptance. *Provincial Insurance Company of Canada* v. *Leduc* (1874), L.R. 6 P.C. 224.

I am unable, therefore, to find an assent by the appellant to abandonment. It is a mixed question of law and fact. Primarily it is a question of fact, but as pointed out by Lord Penzance in *Shepherd* v. *Henderson* (1881), 7 App. Cas. 49 at p. 64, a jury might be instructed as a matter of law that if the underwriters by their acts adopted a course consistent only with acceptance of abandonment they ought to find such acceptance or assent: also that if they acted in such a way as to alter the rights of the owner, the same result would follow. The owner, on the other hand, however, cannot arbitrarily compel assent to an improper abandonment by refusing to join in acts of reclamation or salvage: nor are the insurers compelled to refrain from salvage operations in the hope of minimizing the loss on pain of being held to have assented to abandonment. To amount to assent the acts of the insurers must be of such a character as could only be justified on the assumption that the wreck was treated as their own property. The insurers were entitled to suspend decision until by salvage operations it was demonstrated, if possible, that the vessel had a reasonable margin of value after payment of the cost of raising and repairing it.

MACDONALD, J.A.

Counsel for respondent submitted that in any event it must be regarded as a total constructive loss, relying on Lord Watson's judgment in *The Blairmore* (1898), 67 L.J., P.C. 96, where his Lordship states at p. 100:

"The test, as I understand it, is simply this, that in order to instruct a total constructive loss, at the date to which the enquiry relates, it must be

shewn that a shipowner of ordinary prudence and uninsured would not have gone to the expense of raising and repairing the vessel, but would have left her at the bottom of the sea, because her market value when raised and repaired would probably be less than the cost of restoration."

I cannot believe, on the evidence that if the vessel in the case at Bar was uninsured the owner would not attempt to salvage it. It sunk within a harbour, and as events proved could be raised and repaired for less than its insured value. The offer of $12,500 made for it as already referred to is proof of that fact. Respondent's counsel on another branch, *i.e.*, to shew that exclusive authority over it was exercised by the appellant, was obliged to admit that this was a *bona fide* offer and the learned trial judge so found. Is it likely, therefore, that an uninsured owner with knowledge perhaps greater and more expert than the insurers would leave the vessel submerged? I think not. There was a motive on the owner's part in taking the position of absolute abandonment inasmuch as one of the policies, a disbursement and earnings policy of $6,000 was only operative in the event of a total loss. Assuming the owner was honest in his judgment, it was not that of a reasonable man. It is only where there is a reasonable probability that the cost of salvage and repairs will equal or exceed the value that the assured may abandon. I cannot find that there was any such probability in this case. True, it is stated that it might be found in deeper water than where it actually grounded, but the prudent shipowner would at least investigate by diving operations to find out if it was within the reach of salvors. It is not under these conditions that submerged wrecks are regarded as a total loss. To use an illustration given by Lord Blackburn in *Shepherd* v. *Henderson, supra*:

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"A sixpence dropped into the water, which you can see lying at the bottom at a depth of twenty feet in clear water, is totally lost because it would cost much more than the sixpence to get it up, it would cost more than it was worth."

That would be a constructive total loss. It is quite different where a sunken vessel can be raised at a cost less than its value. True, if the margin was comparatively small a different result might follow. That is not this case. The insurers might take possession of the wreck for the purpose of restoring it and proceed to make full repairs and if at a cost of less than the

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value tender it in this condition to the owner and unless he can object to the sufficiency of the repairs, he cannot contend that it is a constructive total loss or regard the action of the insurers as an acceptance of abandonment: see *Marmaud* v. *Melledge* (1877), 123 Mass. 173, the principle of which is applicable.

The only remaining question is—did the appellant tender and pay into Court a sufficient sum to answer the respondent's claim? I agree with the Chief Justice on this point and would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Griffin, Montgomery & Smith.*
Solicitors for respondent: *MacInnes & Arnold.*

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IN RE PACIFIC COAST COAL MINES AND HODGES

IN RE PACIFIC COAST COAL MINES LIMITED, AND HODGES, ASSIGNEE.

Company law — Bankruptcy—Assignment — Directors—Whether properly constituted—Powers as to assignment—Indoor management—Interference by Court.

A properly constituted board of directors has power to make an assignment in bankruptcy without having received authority to do so from the shareholders.

Hovey v. *Whiting* (1887), 14 S.C.R. 515 followed.

Although the board making the assignment in bankruptcy had been appointed at a meeting of shareholders representing a majority of shares only and of which notice was not given to the other shareholders it was held that the assignment was not void. In such circumstances the Court will only interfere when the act complained of is *ultra vires* of the company; when it is tainted with fraud or when there has been oppression of the minority.

Burland v. *Earle* (1902), A.C. 83 applied.

Statement

APPEAL by the Pacific Coast Coal Mines Limited from the order of MACDONALD, J. of the 19th of May, 1926, dismissing

an application to set aside an assignment from the Company to W. E. Hodges dated the 29th of October, 1921, as being unauthorized and for a declaration that the assignment was void and of no effect. The Company was incorporated in 1908 with a capital of $3,000,000 and Arbuthnot and associates held 7,458 shares of $100 each. A group known as J. H. Outland *et al.* held 78 shares, and various persons in the United States held 12,086 shares which were later acquired by the Pacific Coast Collieries Limited of Montreal and said Company transferred these shares subsequently to the Prudential Trust Company Limited of Montreal. Arbuthnot claimed that he and his group of shareholders did not receive any notice of meetings of shareholders from 1912 to 1921. In 1919 in the action of the *Pacific Coast Coal Mines Limited* v. *Arbuthnot,* Arbuthnot recovered judgment against the Company for $175,953.88. At a meeting of the directors on the 29th of October, 1921, it was resolved that the Company assign to W. E. Hodges, of Vancouver, as an authorized trustee under the Bankruptcy Act. The Company claimed the directors were improperly constituted and that the action in making an assignment was *ultra vires* of the directors. The Company claimed Arbuthnot *et al.* were entitled to notice and that the resolution could not be made by the directors without authorization by the shareholders at a meeting properly called.

Statement

The appeal was argued at Victoria on the 29th and 30th of June, 1926, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

D. S. Tait, for appellant: An order was made in 1921 appointing Hodges assignee. We say (1) no notice was given to Arbuthnot and his associates of shareholders' meeting; (2) there was no meeting in 1919-20 as it lacked a quorum; (3) they were not held on proper dates; (4) eleven directors are required and only 7 were elected; (5) only a general meeting can authorize an assignment; (6) no notice sent to the directors of directors' meeting; (7) no quorum at directors' meeting. The question is whether these defects were nullities. That a notice to shareholders is required see *The King* v. *Langhorn* (1836), 4 A. & E. 538; *Canada Furniture Co.* v. *Banning*

Argument

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(1918), 1 W.W.R. 31; *Milot* v. *Perreault et al.* (1886), 12 Q.L.R. 193; *Young* v. *Ladies' Imperial Club* (1920), 2 K.B. 523; *Alexander* v. *Simpson* (1889), 43 Ch. D. 139; *Garden Gully United Quartz Mining Company* v. *McLister* (1875), 1 App. Cas. 39. They purported to hold meetings but there was no quorum. Proxies were not filed in time: see *Harben* v. *Phillips* (1883), 23 Ch. D. 14; *McLaren* v. *Thomson* (1917), 2 Ch. 41. As to notice being given see *In re Portuguese Consolidated Copper Mines, Limited* (1889), 42 Ch. D. 160; *Farmers Bank* v. *Sunstrum* (1909), 14 O.W.R. 288. As to the position of the trustee in bankruptcy to the company see *In re Adolphe Perusse, Etc.* (1925), 7 C.B.R. 166. As to estoppel, if the resolution is void estoppel does not apply. *In re A Bankruptcy Notice* (1924), 2 Ch. 76 is the case relied on below but see *Toronto Railway* v. *Toronto Corporation* (1906), A.C. 117. It is *ultra vires* of the directors to make an assignment without a resolution of the company: see *Wilson* v. *Miers* (1861), 10 C.B. (N.S.) 348; *Donly* v. *Holmwood* (1880), 4 A.R. 555; *Hovey* v. *Whiting* (1887), 14 S.C.R. 515 at p. 529. As to defects that go beyond irregularities see *Channel Collieries Trust, Limited* v. *Dover, St. Margaret's and Martin Mill Light Railway* (1914), 2 Ch. 506; *Mahony* v. *East Holyford Mining Co.* (1875), L.R. 7 H.L. 869; *British Asbestos Company, Limited* v. *Boyd* (1903), 2 Ch. 439; *The Briton Medical, General, and Life Association* v. *Jones (2)* (1889), 61 L.T. 384; *Tyne Mutual Steamship Insurance Association* v. *Peter Brown & others* (1896), 74 L.T. 283; *Dawson* v. *African Consolidated Land and Trading Company* (1898), 1 Ch. 6 at p. 15; Buckley on the Companies Acts, 10th Ed., pp. 174-6; Palmer's Company Law, 12th Ed., pp. 201-3.

A. H. MacNeill, K.C., for respondent: The former litigation with reference to this company was disposed of in *Pacific Coast Coal Mines, Limited* v. *Arbuthnot* (1917), A.C. 607 at p. 616. The learned judge below found there was good faith in the actions of the directors. As to the validity of the proxies see *Browne* v. *La Trinidad* (1887), 37 Ch. D. 1 at pp. 10-17. On the question of ratification see *British Asbestos Company, Limited* v. *Boyd* (1903), 2 Ch. 439; *Montreal and St. Lawrence Light and Power Company* v. *Robert* (1906), A.C. 196 at pp.

202-3; Halsbury's Laws of England, Vol. 5, p. 210, par. 346; *Royal British Bank* v. *Turquand* (1856), 6 El. & Bl. 327; *Owen and Ashworth's Claim. Whitworth's Claim* (1901), 1 Ch. 115. As to invalidity of appointment of directors see Halsbury's Laws of England, Vol. 5, p. 238; *Jackson* v. *Cannon* (1903), 10 B.C. 73.

Tait, in reply, referred to *In re Provincial Hotels Company, Limited* (1922), 3 C.B.R. 296 and *In re Patricia Appliance Shops, Limited* (1922), 2 C.B.R. 466. In a proxy the name of an alternative is as important as that of the original appointee.

Argument

Cur. adv. vult.

5th October, 1926.

MACDONALD, C.J.A.: A motion was made returnable on the 9th of April, 1926, purporting to be on behalf of the appellant, the Coal Company, for an order setting aside an authorized assignment in bankruptcy of the Company, dated the 29th of October, 1921, to the respondent Hodges. The order appealed from dismissed the motion.

I at first had some doubt about the authority of the solicitor to make the motion, but since there is some evidence that a new board had been elected in 1926, which might have authorized the proceedings, and in view of the fact that his authority has not been disputed, it is unnecessary to say more than that the solicitor's authority was not an issue in the appeal.

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Counsel for the appellant submitted that the assignment was null and void; they argued that the board of directors had not been legally appointed; that in any case, a board of directors had no power to make an assignment; and that the shareholders did not authorize it.

It will be useful to refer briefly to the past litigation in which the appellant was engaged.

In 1911, two opposing groups of shareholders and the company came to an agreement among themselves by which the Victoria group agreed to surrender to the Company their holdings aggregating 7,459 shares, and to accept in lieu thereof debentures of the Company of equivalent value. The agreement dealt with several matters which were *ultra vires* of the Company, and

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therefore it was found necessary to obtain from the Legislature a private Act ratifying the agreement. The Legislature, however, made the ratification contingent on the consent of the shareholders in general meeting. Special resolutions were then passed in professed compliance with this condition, whereupon the said agreement was carried into effect. The remaining shareholders the New York group took charge and managed the business for several years, when they tired of their bargain and brought an action in the Company's name to set aside the agreement on the ground that the meetings of shareholders which had confirmed it had not been regularly convened and this contention was upheld by the Privy Council, who set aside the agreement on the ground that the condition imposed by the Legislature to its coming into effect had not been duly performed. The effect of this was to relegate the Company and its members to their original rights. This judgment was pronounced on the 3rd of August, 1917. During the period between the date of the agreement and the date of the judgment no notice of the meetings of the Company had been given to the shareholders who had surrendered their shares, and who were assumed to have ceased to be members. On the pronouncement of the judgment, however, their true position emerged, namely, that they had never ceased to be shareholders. Their names therefore were restored to the share register at or before the 9th of March, 1919, and still remain there. Notwithstanding this they received no notices of subsequent meetings and have taken no part therein. Directors appear to have been appointed annually by the votes of the Prudential Trust Company, Limited, which holds 12,086 shares out of a total of 19,622 allotted. In addition to this shareholder there were several others, exclusive of those who had surrendered, owning in the aggregate 75 shares, some of whom were represented at the said meetings. It was the board of directors so appointed holding office in 1921 who authorized the assignment in question.

In my opinion, the assignment is not void. The Court will interfere with transactions of a company in these circumstances, namely: when the act complained of is *ultra vires* of the company; when it is tainted with fraud; and when there has been oppression of the minority. In other cases the proper forum to

deal with the complaint is the company itself. *Burland* v. *Earle* (1902), A.C. 83 In the case at Bar all that is necessary may be accomplished by the calling of a meeting of the members and by submitting the question to them. No one disputes that the members of the company may authorize an assignment in bankruptcy. Indeed, a properly constituted board of directors may themselves do that. *Hovey* v. *Whiting* (1887), 14 S.C.R. 515. It is not suggested that there was fraud in the making of the assignment.

This case is not governed by *Pacific Coast Coal Mines, Lim.* v. *Arbuthnot* (1917), 86 L.J., P.C. 172, the judgment above referred to. Here the Company have the power to deal with the subject of this appeal; there, the agreement was *ultra vires* of the Company and could only have been given validity by the performance of a condition which the Privy Council held had not been performed.

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There was an interlocutory appeal which arose out of the calling of meetings of shareholders and creditors under an order of the learned judge. These meetings resulted in nothing affecting the case. I would therefore dismiss both appeals, with costs, except costs of and incidental to the calling of the said meetings.

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

This case, as I view it, narrows down to two questions: (1) Can a board of directors make an assignment in bankruptcy without first having received the sanction of the shareholders? If the board is duly and properly constituted then the decision of the Supreme Court of Canada in *Hovey* v. *Whiting* (1887), 14 S.C.R. 515, answers that question in the affirmative. But it is objected here that the board was not so constituted, and a number of instances of irregularity were argued before us and I will assume in favour of the applicant, that these have been shewn.

GALLIHER, J.A.

The second question then arises—to what extent if any, will the Courts interfere in matters of indoor management and which can be cured by resolution of the Company in general meeting, and in what circumstances would the Courts interfere? They would interfere in case of fraud, or oppression of the minority shareholders, but these grounds are not taken in the

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notice of appeal, and though mentioned in argument, have not been demonstrated. They would also interfere in respect of some act *ultra vires* of the Company, but it is not suggested that the Company would have no power to make such an assignment. *Burland* v. *Earle* (1902), A.C. 83, is in point, and I think conclusive of this question.

Though all the shareholders should have been notified of the meetings held, the same majority of shares which directed the appointment of officers and the management of the business, could confirm all the acts done.

I would allow the appeal and agree in the disposition of costs made by the Chief Justice.

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MCPHILLIPS, J.A.: The contention here made is that the assignment in bankruptcy was invalid and should be declared of no effect upon many grounds, all of which, after careful consideration would seem to be unquestionably matters of "indoor management" (*Royal British Bank* v. *Turquand* (1856), 6 El. & Bl. 327; *Montreal and St. Lawrence Light and Power Co.* v. *Robert* (1906), A.C. 196 at p. 208). Now what was done here was ostensibly the act of the directors who, in my opinion, had the power to bring about the assignment in bankruptcy notwithstanding the irregularities existent in failure to notify a number of shareholders of the Company of meetings to be held and at which they were not represented. Those dealing with a company are entitled to assume that all is being done regularly and here the directors under the memorandum of association have the powers of the Company (*Mahony* v. *East Holyford Mining Co.* (1875), L.R. 7 H.L. 869; *Bargate* v. *Shortridge* (1855), L.R. 5 H.L. 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; *Duck* v. *Tower Galvanizing Company* (1901), 2 K.B. 314; *Dey* v. *Pullinger Engineering Co.* (1921), 1 K.B. 77). The length to which the rule has been extended would apparently seem somewhat extreme but for the attainment of certainty and convenience of business it is a rule which is absolutely necessary in the carrying on of business with a company. The singular situation presented in this case is this: the directors *de jure*

carried out the assignment in bankruptcy and proceedings have gone on following this action but now we see the Company attacking the validity of the assignment. This is not possible when there will be prejudice to creditors as there will be undoubtedly here but in any case it is not possible for the Company to now complain. Why were the irregularities allowed to take place? This Court can only assume, when the name of the Company is being used in these proceedings, that it is the majority voice of the Company that authorized these proceedings. If so, why is not the Company taking steps to readjust matters? This is possible. It is a matter of indoor management. A simple method would be to pay the debts of the Company if it is that the Company is not insolvent. If it is insolvent it is in the interests of justice that the creditors have the protection of the assignment in bankruptcy brought about by the directors who were carrying on the business of the Company, *i.e.*, directors *de jure* (*Hovey* v. *Whiting* (1887), 14 S.C.R. 515).

These proceedings are not based on fraud but even if they were the rule in *Foss* v. *Harbottle* (1843), 2 Hare 461 would stand in the way. In that case two members of the company took action against the directors for losses sustained by reason of fraudulent acts of the directors but the Court held the majority could confirm the acts and the Court would not interfere. What are the majority doing in the present case? So far as can be seen it would appear that the majority confirm the action of the directors (*Mozley* v. *Alston* (1847), 1 Ph. 790; *MacDougall* v. *Gardiner* (1875), 1 Ch. D. 13). It cannot be gainsaid that a very important body of shareholders in the present case were disregarded, not even advised of the proceedings of the Company and the directors palpably proceeded irregularly, but why this inaction on the part of these shareholders? Surely they would reasonably know that the Company was transacting business and they should have bestirred themselves, not remained inactive all this time. *MacDougall* v. *Gardiner, supra,* was the case of a single shareholder complaining. Mellish, L.J., said:

MCPHILLIPS, J.A.

"In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been

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done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which a majority of the company are entitled to do legally, there can be no use in having litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes." (*Harben* v. *Phillips* (1883), 23 Ch. D. 14; *Duckett* v. *Goover* (1877), 6 Ch. D. 82; *Exeter & Crediton Ry. Co.* v. *Buller* (1847), 5 Railw. Cas. 211; 16 L.J., Ch. 449; *Normandy* v. *Ind, Coope & Co., Limited* (1908), 1 Ch. 84; *Ving* v. *Robertson & Woodcock (Lim.)* (1912), 56 Sol. Jo. 412). This demonstrates the futility of the present proceedings even if it were to be admitted that what is complained of were illegal acts, yet the Company could have done them legally and that being the case it is idle to have litigation in the matter—the curative power is with the majority of the Company. It is true that no majority of shareholders can sanction that which is established to be *ultra vires* of the Company (*Burland* v. *Earle* (1902), A.C. 83), but that is not the present case. It is impossible to say that what has been done is in any way *ultra vires* of the Company. Unquestionably if this was an action brought alleging that a fraud has been committed by the majority on the minority that could be enquired into by the Court but that is not the nature of the present proceedings (*Menier* v. *Hooper's Telegraph Works* (1874), 9 Chy. App. 350; *Burland* v. *Earle, supra; Cook* v. *Deeks* (1916), 1 A.C. 554). It has also been held that a minority can prevent the Company from acting on a special resolution obtained by a trick (*Baillie* v. *Oriental Telephone and Electric Company, Limited* (1915), 1 Ch. 503). Further this is not the case of an ordinary resolution inconsistent with the articles. If it were it would not be effectual (*Quin & Axtens, Limited* v. *Salmon* (1909), A.C. 442), but the challenged action here is the making of the assignment in bankruptcy which could be done legally and even if it were done illegally, it can be confirmed or disagreed with by the majority of the Company and in the language of Mellish, L.J., above quoted, "there can be no use in having litigation about it."

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I do not question at all the right of the minority to commence proceedings in the name of the Company where the act challenged is (a) *ultra vires* of the company; (b) fraud on the minority; (c) resolution obtained by trick; (d) resolution

inconsistent with articles, but the present proceedings are not of that nature. Here the name of the Company has been used although there is some evidence, if not conclusive evidence, that the proceedings are at the instance of a minority. If that be really the case, these proceedings could have been stayed and the name of the Company struck out. Further, the solicitor might be ordered to pay the costs personally (*Marshall's Valve Gear Co., Limited* v. *Manning, Wardle & Co., Limited* (1909), 1 Ch. 267; *West End Hotels Syndicate (Limited)* v. *Bayer* (1912), 29 T.L.R. 92). The whole history of litigation in connection with the Company would appear to have been a chapter of unfortunate happenings and throughout all this time that which was proved by the original holders of the property to be valuable coal fields has been allowed to remain unworked and to deteriorate in value, and one cannot but express sympathy for the position of the minority, being the original holders who had retired from the active management and given up control and parted with their shares and in good faith, taking securities for their investment charged upon the properties only to have it declared that the securities were invalid being *ultra vires* of the Company. In the result, the original owners were relegated to their original position but were consistently disregarded as shareholders for a long period of time and the affairs of the Company carried on without reference to this minority. It can be said—why this inaction upon the part of this minority, the active parties in these proceedings? The failure of parties to insist upon their legal rights in shareholders' meetings cannot be wholly excused by saying we got no notice of meetings—steps could have been taken which would have ensured their obtaining advice of shareholders' meetings. It is true even attending and being in the minority would be profitless if their wishes were not the wishes of the majority. This is a position that the minority in a company would often appear to be unacquainted with. Save in the enumerated cases above set forth the minority is powerless in the face of the majority.

MCPHILLIPS, J.A.

It is manifest that the appeal cannot succeed. Nothing has been done which is in its nature *ultra vires* and the proceedings are not of the character which entitle a minority to seek relief in Court using the name of the Company or otherwise, as we

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have seen by the authorities above referred to. It is with regret that I have come to the conclusion that the appeal must be dismissed, believing, as I do, that in the interests of justice the minority should have some form of relief, but, so far as the present proceedings are concerned, they are absolutely futile and nothing can be done to afford any relief.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *John R. Green.*

Solicitors for respondent: *Abbott & Macrae.*

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada:

HOME BANK OF CANADA, THE v. SULLIVAN (p. 401).—Affirmed by Supreme Court of Canada, 15th December, 1927. See (1927), 1 D.L.R. 1097.

REX v. BAKER (p. 1).—Affirmed by Supreme Court of Canada, 18th December, 1925. See (1926), S.C.R. 92; (1926), 1 D.L.R. 115.

REX v. JUNGO LEE (p. 318).—An appeal to the Supreme Court of Canada was quashed, 4th November, 1926. See (1926), S.C.R. 652; (1927), 1 D.L.R. 721.

REX v. SOWASH (p. 1).—Affirmed by Supreme Court of Canada, 18th December, 1925. See (1926), S.C.R. 92; (1926), 1 D.L.R. 115.

Cases reported in 36 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:

MAKINS PRODUCE COMPANY INCORPORATED v. CANADIAN AUSTRALASIAN ROYAL MAIL LINE (p. 462).—Affirmed by the Judicial Committee of the Privy Council, 15th November, 1926. See (1927), 1 W.W.R. 206; (1927), 1 D.L.R. 97, *sub nom. Makins Produce Company, Incorporated* v. *Union Steamship Company of New Zealand, Limited.*

MORTON v. BRIGHOUSE AND MOXON (p. 231).—Reversed by Supreme Court of Canada, 4th January, 1927. See (1927), 1 D.L.R. 1009.

THOMAS v. GALE *et al.* (p. 512).—Reversed by Supreme Court of Canada, 4th January, 1927. See (1927), 1 D.L.R. 593.

Case reported in 34 B.C., and since the issue of that volume appealed to the Supreme Court of Canada:

DONOVAN STEAMSHIP CO., THE WM. v. THE S.S. HELLEN (p. 461).—Decision of the Exchequer Court of Canada reversing the decision of MARTIN, Lo. J.A. reversed by Supreme Court of Canada, 11th October, 1926. See (1926), S.C.R. 627; (1926), 4 D.L.R. 497.

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2.——*Deceased domiciled outside the Province — Intestate — Real and personal property within Province—No relatives in Province—Remuneration to administrator—Appointment of official administrator—R.S.B.C. 1924, Cap. 262, Sec. 80.*] Under section 80 of the Trustee Act the power to grant remuneration to an administrator is limited to 5 per cent. of the gross value of the estate. In the absence of special circumstances the estate of one who dies intestate, being at the time of his death a resident outside of the Province, and having no relatives within the Province, should be administered by the official administrator. *In re F. H. Bates, Deceased* (1919), 27 B.C. 1 followed. *In re* ESTATE OF HERMAN BECKMAN, DECEASED. - - - - - - **41**

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2.——*Exchequer Court in Admiralty—Jurisdiction—Tort on high seas—Submarine cable—Damaged by ship's anchor—Arrest of ship in Canadian waters.*] The Exchequer Court of Canada in Admiralty has jurisdiction to entertain an action against a ship arrested in Canadian waters for a tort committed on the high seas. *The Ship "D. C. Whitney" v. St. Clair Navigation Co.* (1907), 38 S.C.R. 303 distinguished. The plaintiff being the licensee or bailee of a submarine cable and in sole control thereof is entitled to damages for injury done to the cable by the defendant ship's wrongful use of it for deep sea anchorage. COMMERCIAL PACIFIC CABLE COMPANY v. THE PRINCE ALBERT. - - - - - - - - - - **434**

3.——*Master of gas-boat—Action for wages—Master's certificate—Necessity for—Acquiescence—R.S.C. 1906, Cap. 113, Secs. 72(c), 96 and 100—Can. Stats. 1912, Cap. 51, Sec. 1.*] In an action for wages as master of a gas-boat the evidence disclosed that the plaintiff did not "possess a valid certificate" under section 96 of the Canada Shipping Act. *Held*, that the interpretation of section 72(c) of said Act is wide enough to cover vessels of this class, said vessel not being within the exceptions mentioned in section 100 of said Act and amendments thereto, but as the managing owner of the boat, after he knew that the plaintiff was not certificated, continued to employ him, he elected to waive the disqualification and

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4.——*Practice—Interrogatories—Custom alleged—Inquiry as to instances of its occurrence.*] In an action arising out of damage to a cargo the defendant in paragraph 7 of his defence pleaded "that it is the custom for vessels engaged in trading between ports on Puget Sound and Europe to touch at various ports on the west coast of the United States for the purpose of loading cargo and to touch at various ports in Europe for the purpose of discharging cargo and that the plaintiff was aware of said custom at the time of the shipment and consented and agreed that the said vessel should, if those in charge of her so desired, call at such places for such purposes." The plaintiff's application to administer interrogatories included the question: "What instances of the custom alleged in paragraph 7 of the defence have occurred and when?" Objection was taken on the ground that to allow it would compel the defendant to disclose evidence of its defence. *Held*, that the rule applying is whether the answers to the interrogatories would disclose anything material to enable the plaintiff either to maintain his own case or to destroy the case of his adversary. Applying this principle here the information sought by the plaintiff is both material and calculated to destroy the defensive case set up and once that position is reached, the objection that the defendant's evidence is necessarily in part disclosed, vanishes. HEIDNER & CO. v. THE "HANNA NIELSEN." - - - - **207**

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7.——*Practice—Application to admit further evidence—Crown lands—Application for lease of waterfront lot—Objection taken by owner of adjoining lots—Lease granted without notice to adjoining owner—Mandamus—Order absolute—Appeal—R.S.B.C. 1924, Cap. 131, Sec. 139.*] On appeal from an order that a writ of *mandamus* do issue directed to the Minister of Lands commanding him to determine the rights of an applicant for a lease of a certain lot and of an objection thereto and to proceed in accordance with section 139 of the Land Act, an application to put in an affidavit of the minister to shew what actually took place before him was refused (MCPHILLIPS, J.A. dissenting). *Marino* v. *Sproat* (1902), 9 B.C. 335 followed. Section 139 of the Land

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Act provides that "In any application under the provisions of this Act regarding which any adverse claim or protest has been lodged or objection taken, the Minister, ... shall have power to hear, settle, and determine the rights of the adverse claimants, and to make such order in the premises as he may deem just." . . . . . A lumber company applied for a lease of a waterfront lot in the Comox district for booming purposes. S. who owned six lots across a road but fronting on the lot in question, wrote the department of lands, objecting to the granting of the lease and received a reply that his complaint would be considered. The lot was leased to the applicant without notice to S. who applied for and obtained an order for a writ of *mandamus* to determine the rights of the parties in accordance with section 139 of the Land Act. *Held*, on appeal, reversing the decision of GREGORY, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the section is confined to cases in which the objector claims a right to or in the subject-matter itself. S.'s objection to the granting of the lease is not founded on an interest either legal or equitable in the subject-matter and his application should have been refused. THE KING v. THE MINISTER OF LANDS. - - - - - **106**

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BANKS AND BANKING—*Deposit of cheques—Closing doors of bank—Stopping payment of cheque—Claim as set-off—Holder in due course.*] The Home Bank of Canada closed its doors at head office in Toronto at 2.55 p.m. on the 17th of August, 1923, which by Standard Time would be 10.55 a.m. in Vancouver. Shortly after 10.55 in Vancouver defendant gave H. & Co. certain bonds and securities for which he received H. & Co.'s cheque for $17,373.71 drawn on The Home Bank of Canada. At about 2.20 p.m. on the same day H. & Co. sold the defendant certain bonds and received a cheque from him drawn on the Standard Bank of Canada for $10,657.70. The defendant then went to the Standard Bank of Canada to deposit his day's receipts when he was told that the cheque on The Home Bank of Canada could not be accepted as the bank had closed its doors. The defendant then stopped payment on the cheque for $10,657.70. The Home Bank of Canada as holders in due course recovered judgment for the amount of the cheque. *Held*, on appeal, affirming the decision of GREGORY, J. that the contract between H. & Co. and the defendant

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remained good notwithstanding that the cheque given by the defendant was countermanded in consequence of the discovery of insolvency of The Home Bank of Canada. By deposit of the cheque The Home Bank of Canada became the holder in due course and was entitled to enforce payment. THE HOME BANK OF CANADA v. SULLIVAN. **401**

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CHURCH UNION—*Election on question of union—Voters' lists—Drawn up and ratified by session of congregation—Right of appeal—Jurisdiction of church tribunals—Can. Stats. 1924, Cap. 100—B.C. Stats. 1924, Cap. 50.*] A voters' list to be used at the January, 1925, election as to whether the congregation should enter The United Church of Canada was drawn up by the Session of St. Andrew's Presbyterian Church of Nanaimo which excluded most of the persons on the communion roll opposite whose names were pencil annotations on said roll. The result of the voting was a majority of ten against union. An appeal was forwarded to the Presbytery by eight members of the Session raising the question of disqualification of voters and a further appeal signed by 134 persons claiming to be members of St. Andrew's Church was later filed raising the same question. The Presbytery gave no decision but stated it would place no obstacle in the way of action in the civil Courts. On appeal to the Synod from the Presbytery's decision the Synod decided that every person whose name was on the communion roll on the 19th of July, 1924, was entitled to vote and on appeal this decision was upheld by the General Assembly of the church. In an action by the plaintiffs on

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behalf of themselves and all other members and adherents who desired to enter the Union against the defendants represented by those who did not desire to enter the Union, the trustees and the Session of the church, for a declaration that the vote taken was not in accordance with the provisions of The United Church of Canada Acts (Dominion and Provincial), that the congregation had gone into the Union, and for an injunction restraining the trustees from holding the church's property:—*Held*, that at least all those persons whose names appear on the communion roll and whose names were not put on the voters' list because pencil annotations appear opposite their names on the communion roll, which pencil annotations were made at the alleged purgings of the roll in 1921, 1923 and 1924 were legally entitled to vote under the provisions of said Acts and should have had their names on the voters' list. As the anti-union majority at the election was ten and the names of a far greater number than ten persons entitled to vote were not put on the list because of said pencil annotations on the communion roll, the outcome of the election might have been different had the names of said persons been on the voters' list. There was therefore no valid election such as is called for by both the Dominion and Provincial Acts. Although there is some difference in the phraseology of the relevant sections of the two Acts as to the qualification of voters, as the ownership of property is affected by the election the provisions of the Provincial Act would govern. *Held*, further, that the church tribunals are the proper tribunals to decide whether the persons whose names were on the communion roll on the 19th of July, 1924, were entitled to vote on the question of Church Union. STOVER *et al.* v. DRYSDALE *et al.* - - - - - **28**

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2.——*Bonus.* - - - - - **514**
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COMPANY—*Contract—Made by president and general manager—Authority—Renunciation before breach—Adoption of by other party—Right to damages.*] The plaintiff entered into a verbal agreement with E. (the president and general manager of the defendant Company) in the summer of 1923 whereby he agreed to remove the marketable poles from the company's limits, the company to haul the poles to salt water on its logging-trains, and the company was to receive 20 per cent. of the price received by the plaintiff for the poles. The agreement was reduced to writing and signed by E. and the plaintiff on the 1st of November, 1923. Some poles were cut before that date but none were removed until after the 10th of May, 1924, upon which date the Company wrote the plaintiff renouncing the contract on the ground that E. had no authority to make it. Up to this time the plaintiff had cleared roads and cut a quantity of logs near them. He did not abandon his rights under the agreement with E. but in order to cut losses entered into a new agreement with the Company whereby he should cut the poles near his constructed roads and the Company should haul the poles and he should pay $1 per pole for those removed. *Held*, that E. had authority to make the contract and that the plaintiff's action in entering into a new contract as to the cutting and removal of the poles did not preclude him from an action for damages for breach of the first contract. GARRISON v. THOMSEN & CLARKE TIMBER COMPANY, LIMITED. **224**

COMPANY LAW — *Bankruptcy — Assignment—Directors—Whether properly constituted—Powers as to assignment—Indoor management—Interference by Court.*] A properly constituted board of directors has power to make an assignment in bankruptcy without having received authority to do so from the shareholders. *Hovey* v. *Whiting* (1887), 14 S.C.R. 515 followed. Although the board making the assignment in bankruptcy had been appointed at a meeting of shareholders representing a majority of shares only and of which notice was not given to the other shareholders it was held that the assignment was not void. In such circumstances the Court will only interfere when the act complained of is *ultra vires* of the company; when it is tainted with fraud or when there has been oppression of the minority. *Burland* v. *Earle* (1902), A.C. 83 applied. *In re* PACIFIC COAST COAL MINES LIMITED, AND HODGES, ASSIGNEE. - - - - - - - - - - **550**

CONSTRUCTIVE TOTAL LOSS. - - - - - - - **235, 539**
See INSURANCE, MARINE.

CONTRACT—*Advance of money—Shares in company received for—Shares to be repurchased in two years—Terms of agreement reduced to writing—Woman who advances money dies—Action by executrix to recover*

CONTRACT—*Continued.*

—*Evidence—Inference from.*] After incorporating for the purpose of manufacturing lumber the defendant Company, requiring money, secured the sum of $5,000 from S. for which she received shares in the Company, the money being advanced on the understanding that the company would repurchase the shares within two years. P. a chartered accountant who was S.'s agent being apprehensive of his principal's interest being safeguarded endeavoured to bring about the repurchase of the shares. To this the defendant agreed and wrote a letter to P. from which standing alone it cannot be accurately determined what had really transpired between them but P.'s letter in reply on the following day set out clearly the terms of the agreement arrived at to repurchase the shares. The details of the agreement were worked out later and the defendant's solicitor wrote a letter that could only be written on the footing that the alleged agreement existed. Before the agreement was carried out S. died and the defendant then claimed that a different arrangement would have to be made. In an action by S.'s executrix to recover the $5,000:—*Held*, that on the facts of this case there appear all "the phenomena of agreement" and the defendant should not be heard to say that it has not agreed to anything. As appears by the evidence the conduct of the defendant is quite inconsistent with any other reason than that they intended and agreed to repurchase the shares. CLARKE V. LANGS & RODDIS LTD. - - - - - - - - - - **77**

2.——*Bogus.* - - - - - **453**
See INFANT.

3.——Made by president and general manager of company—Authority—Renunciation before breach. **224**
See COMPANY.

4.——*Marriage — Breach of promise—Correspondence between parties before seeing one another—Money sent plaintiff by defendant—Plaintiff goes to defendant's locality—After seeing him for two days leaves him and commences action.*] The plaintiff, who lived in England, commenced correspondence with the defendant, who was a miner in the Portland Canal District, through the medium of a mutual friend who at the time was in England. Shortly after the plaintiff came to Canada and stayed for about one year in Hamilton, Ontario, where the correspondence continued with a view to matrimony. Photographs were exchanged and the defendant sent her money. She then went to Hyder, Alaska, where she met the defendant. They stayed together there for one day and then went to Stewart. The defendant had a house in the course of construction and he wanted to defer marriage until the house was finished. On the day following their arrival in Stewart he went to his mines and on his return the next day he found the plaintiff had gone to Vancouver. Shortly after she brought this action. *Held*, on the evidence, that there was a promise to marry which was accepted but it was one from which either party could withdraw, and the action in its present form as claiming breach of promise cannot succeed. *Held*, further, on the alternative plea for expenses in coming to the defendant on the chance of their suiting each other and the pecuniary loss thus occasioned, the plaintiff may be entitled to such sums as are shewn to have thus arisen, and subject to counsel's submission, an application will be heard for amendment of the pleadings to respond to the evidence in this regard. MUNN V. HAAHTI. - **71**

5.——*Supply of electricity to municipality.* - - - - - - **252**
See MUNICIPAL LAW.

6.——*To do work.* - - - - **418**
See WOODMAN'S LIEN.

CONTRIBUTORY NEGLIGENCE. - **119**
See NEGLIGENCE. 2.

CONTROLLER. - - - - - **227**
See IMMIGRATION. 2.

CONVICTION. - - - **305, 248**
See CRIMINAL LAW. 4, 12.

2.——*Appeal.* **275, 423, 329, 344**
See CRIMINAL LAW. 3, 10, 15, 16.

CORROBORATION. - - **86, 1**
See CASE STATED.
CRIMINAL LAW. 14.

COSTS. - - - - - **280, 412**
See CRIMINAL LAW. 1.
PRACTICE. 5.

2.——*Crown Costs Act.* - - **313**
See SUCCESSION DUTY ACT.

3.——*No bill furnished.* - - **161**
See SOLICITOR AND CLIENT.

4.——*Security for—Application for additional security — Promptness required—Security for past costs not allowed—Mar-*

COSTS—*Continued.*

ginal rule 981.] The plaintiff who resided abroad commenced action in November, 1923, and on demand paid into Court $150 as security for costs. On the defendant applying for additional security in March, 1926, it appeared that up to February, 1925, his costs were allowed to accumulate to $350 in excess of the security and that since that date and prior to this application by reason of commissions abroad and examinations for discovery a further sum of $500 in costs had been incurred. It was also estimated that a further sum of $500 would be required for future costs. An order was made to cover the future costs and $350 of the unsecured past costs. *Held*, on appeal, varying the judgment of MORRISON, J. that the additional security should be reduced to the sum of $500. *Per* MACDONALD, C.J.A.: The defendant should apply for security promptly whether for a first or for a subsequent order, and while it is in the discretion of the Court to grant it even where there has been some delay, it will never be granted in respect of past costs where there has been substantial accumulations thereof. WALL v. WELLS. - - - - - **445**

COUNTY COURT. - - **340**
See PROHIBITION.

2.——*Appeal to—Sittings nearest place where complaint arose—Mode of measuring distance.* - - - - - - **264**
See CRIMINAL LAW. 2.

COURT OF APPEAL—Revision of sentence by. - - - - - **277**
See CRIMINAL LAW. 8.

CRIMINAL LAW—*Charge by police officer dismissed — Appeal by harbour master—"Any person aggrieved"—Right of appeal—Costs—Criminal Code, Sec. 749.*] A harbour board policeman laid a charge against the master of a steamer for infringement of a by-law made by the harbour commissioners prohibiting the unloading or discharging of refuse or rubbish within the limits of the harbour. On the charge being dismissed an appeal was taken by the harbour master of Vancouver to the County Court. *Held*, on appeal, that the harbour master not being an "aggrieved party" nor the "prosecutor or complainant" had no right of appeal under section 749 of the Criminal Code. *Semble*, only the complainant or informant (including in the meaning of the word "complainant" the King and bodies corporate) and the defendant has a right of appeal under said section. REX v. HICKS. - - - - - - - - - - **280**

CRIMINAL LAW—*Continued.*

2.——*Charge dismissed — Appeal to County Court—Sittings nearest place where complaint arose—Mode of measuring distance—R.S.B.C. 1924, Cap. 93, Sec. 114; Cap. 245, Sec. 77.*] Under section 77 of the Summary Convictions Act an appeal from a conviction or order of a justice shall be heard at the sittings of the County Court which is nearest in a straight line to the place where the cause of the information or complaint arose. The question of which is nearest by practical mode of access does not apply. *Rex* v. *Holt* (1925), 36 B.C. 391 followed. REX v. CANADIAN ROBERT DOLLAR COMPANY, LIMITED. - - - - **264**

3.——*Charge of contributing to juvenile delinquency—Conviction—Appeal to County Court dismissed—Habeas corpus—Jurisdiction—Estoppel—Proclamation—Can. Stats. 1908, Cap. 40, Secs. 29, 34 and 35.*] On an application for a writ of *habeas corpus* by an accused who was convicted by the judge of the Juvenile Court for contributing to juvenile delinquency under section 29 of The Juvenile Delinquents Act:—*Held*, that The Juvenile Delinquents Act (Dominion) was not in force because it was not proclaimed as required by section 34 thereof after the passing of the Provincial Act, the proclamation produced (made under section 35) being futile because it could only be made if no Provincial Act had been passed. The application was therefore allowed. REX v. SLINN. - - - - - - - - **275**

4.——*Conviction—Evidence—Material in previous civil proceeding allowed in—Privilege.*] A. gave N. a power of attorney to collect certain debts and sell a certain property in Vancouver. N. collected the debts and sold the property but retained the moneys claiming that the amount collected was due him for wages for previous services rendered to A. A. then brought action to recover the sums collected and recovered judgment for $734.65 and N. was then examined as a judgment debtor. A criminal proceeding was then taken against N. on a charge of applying and converting to his own use the moneys he had so collected. The only evidence submitted against him was the pleadings, proceedings and evidence taken on the previous civil trial and his examination as a judgment debtor. He was convicted and sentenced to four months' imprisonment. *Held*, on appeal, reversing the decision of the magistrate (MARTIN and GALLIHER, JJ.A. dissenting), that it was only after examination of accused as a judgment debtor and failure to execute the

CRIMINAL LAW—*Continued.*

judgment that these proceedings were taken. There is no evidence to support the prosecution except that of the appellant himself. His story is a reasonable one and in face of this and the fact that the person alleged to have been injured was not called the conviction should be set aside. REX v. NOZAKI. - - - - - - - - - - **305**

5. —— *Customs — Smuggling — Liquor found in captain's room on steamship—R.S.C. 1906, Cap. 48, Secs. 20, 116, 190 and 206—Can. Stats. 1925, Cap. 39, Sec. 1.*] To constitute the offence of "smuggling or clandestinely introducing into Canada any goods subject to duty under the value of two hundred dollars" under section 206 of the Customs Act, it is not enough that the party charged had such goods in his cabin on board a boat docked in Vancouver Harbour, it must be shewn that the accused intended to defraud the revenue and had actually landed or made an attempt to land the goods for that purpose. Two days after the Empress of Canada (a steamship coming from Japan) docked in Vancouver harbour, revenue officers found a small quantity of Scotch whisky and gin in the drawers of the Captain's cabin. A charge preferred against the captain with unlawfully smuggling said goods into Canada contrary to section 206 of the Customs Act was dismissed. *Held*, on appeal, affirming the decision of the magistrate that the Act is manifestly intended to apply to goods which are going to be landed and distributed throughout the country and has no application to goods intended for exclusive use on board the vessel. REX v. MAYALL. - **211**

6.——*Disorderly house — Gaming—Warrant—Sufficiency of material for—Evidence—Gain—Criminal Code, Secs. 226, 228, 641 and 986.*] *Prima facie* evidence of guilt under section 986 of the Criminal Code where a premises is found to be "provided with any means or contrivance for playing any game of chance," etc., is established by evidence of the finding on the premises in question of card tables at which players are sitting with cards and poker chips on the table. *Rex* v. *Cessarsky* (1902), 15 Alta. L.R. 201 followed. REX v. PIDGEON. **309**

7.——*Evidence—Identification—Shewing photographs of suspected person to identifying witnesses—Admissibility—Charge—Adequacy.*] The accused who was suspected with others of participation in a bank robbery in Nanaimo was arrested on suspicion by the police authorities in Seattle, Washington. Some of the eye-witnesses of the robbery were taken to Seattle to identify him but before leaving Nanaimo they were shewn a number of photographs of those suspected including several of the accused. Several persons including the accused were lined up and some of the witnesses identified him. This resulted in his being brought to British Columbia, where, after a trial in which said persons appeared as Crown witnesses, some of them identifying him as one of the robbers, he was convicted. Accused appealed on the ground of improper use of the photographs with relation to the witnesses, that the trial judge failed to properly direct the jury with relation thereto and that the photographs were improperly handed to the jury for inspection. *Held*, affirming the decision of MURPHY, J. (MACDONALD, C.J.A. and MCPHILLIPS, J.A. dissenting), that police officers may, before sending prospective witnesses into a foreign state to identify persons therein detained on strong suspicion, take the precaution of shewing them sets of photographs in a fair and cautious way. *Rex* v. *Fannon* (1922), 22 S.R. N.S.W. 427 adopted. *Held*, further (MACDONALD, C.J.A. and MCPHILLIPS, J.A. dissenting), on the submission of non-direction as to the use of photographs that it is impossible to say, on the charge as a whole, that the accused suffered any prejudice therefrom. *Rex* v. *Vassileva* (1911), 6 Cr. App. R. 228 applied. REX v. BAGLEY. - - - - - **353**

8.——*False pretences — Sentence — Revision by Court of Appeal—Criminal Code, Secs. 1013(2) and 1022—Prisoner's health—Grounds for reduction of sentence—Comments on value of English criminal decisions.*] On appeal by a prisoner from his sentence on a charge of false pretences the ground that the state of his health had become worse since his conviction should more properly be the subject of consideration on an application for the clemency of the Crown, which is in a much better position than the Court of Appeal to receive and entertain current reports of proper officials who have had the convict under observation since imprisonment and can speak authoritatively upon his condition. REX v. ZIMMERMAN. - - - - **277**

9.——*Habeas corpus—Application for—Grounds must be set out.*] The grounds upon which an application for a writ of *habeas corpus* is founded must be stated in definite terms either in the notice or in the affidavit in support. REX v. LEE. - **397**

CRIMINAL LAW—*Continued.*

10.——*Interdicted person—Liquor in her possession — Conviction — Appeal — Order made without evidence of excessive drinking —Nullity—R.S.B.C. 1924, Cap. 146, Sec. 66, Subsecs. (1) and (2).*] A chief of police having previously made an interdiction order against the accused laid an information against her for having liquor in her dwelling-house being an interdicted person. Upon conviction an appeal was taken to the County Court judge who found that the interdiction order was made without any evidence of excessive drinking but as the order was made it had to stand and he was forced to dismiss the appeal. *Held,* on appeal, reversing the decision of THOMPSON, Co. J. (MARTIN and MACDONALD, JJ.A. dissenting), that the requirements of section 66 of the Government Liquor Act are obligatory and as the chief of police admitted there was no evidence of excessive drinking by the accused the interdiction order was made without jurisdiction. The Court was not bound by the order and the conviction should be set aside. REX v. GRANT. **423**

11.——*Intoxicating liquor — Sale of— Charge dismissed — Appeal — Evidence — Accused entitled to benefit of reasonable doubt—R.S.B.C. 1924, Cap. 146, Sec. 91.*] Section 91 of the Government Liquor Act casts on the accused, on a prosecution for the unlawful sale of liquor, the onus of proving his innocence where there is evidence of possession, but the rule laid down in *Rex v. Schama* (1914), 84 L.J., K.B. 396 nevertheless applies and he is entitled to the benefit of any reasonable doubt as to his guilt. REX v. PERRI. - - - **289**

12.——*Keeping common gaming-house— User of store for betting—Betting on races in Mexico—Evidence—Conviction—Appeal— Criminal Code, Secs. 227(d), 228, 235(2) and 986.*] On appeal from the conviction of an accused as keeper of a common betting-house, the question for the Court is whether in its opinion there was evidence before the magistrate which would justify him in drawing the inferences of fact that he has drawn, and if there is such evidence the conviction should be upheld (MCPHILLIPS, J.A. dissenting, being of opinion that conviction unreasonable upon the evidence adduced). REX v. SMITH. - - **248**

13.——*Murder—Blood on carpet and hatchet—Bloodhounds—Used to trail murderer—Evidence of their actions—Admissibility—New trial.*] On a trial for murder, evidence was allowed to be submitted that two bloodhounds, trained to follow the tracks of human beings, were on the day following the homicide put on what appeared to be the tracks of the guilty party and followed them to the house of the accused's brother where the accused was shewn to have been on the previous evening. *Held,* on appeal (MARTIN and GALLIHER, JJ.A. dissenting), that evidence of the action of bloodhounds was inadmissible and the accused was entitled to a new trial. *Per* MACDONALD, C.J.A.: The use of such dogs may be of assistance to the police to give them the cue to the identity of the offender, which, if obtained may be followed up by conventional proof of guilt, but evidence of the actions of the dogs themselves should find no place in a Court of law. REX v. WHITE. - - - - - - - **43**

14.——*Criminal law — Murder—Conviction—Application for traverse of trial— Material witness not available—Credibility of evidence of accused—Evidence in rebuttal in contradiction allowed in—Corroboration —Accomplices—Joint trial—Criminal Code, Secs. 263, 858 and 901.*] Baker and Sowash were convicted of the murder of the captain of the boat Beryl G. containing a cargo of liquor for illegal transportation into the United States. They, with two accomplices, left Victoria for Sidney Island on a boat called the Denman II. for the purpose of taking from the Beryl G. her stock of liquor. According to the story of Sowash and one accomplice (one Strompkins) after seizure of the Beryl G. she was towed by the Denman II. to deep water where the bodies of the captain and his son were fastened together by a pair of handcuffs and attached to the bow anchor of the Beryl G. and thrown overboard. The evidence disclosed that Baker had bought a yachtman's cap with white top and surrounded with gold braid to give himself the appearance of a revenue officer, and this cap with two revolvers, handcuffs, and a flashlight he brought on board the Denman II. The case for the Crown as disclosed by the evidence was that in concert with the others, Baker attacked the crew of the Beryl G. under the pretence that they were revenue officers, he being disguised as aforesaid, and the party being equipped with and displaying arms and such articles as officers might be expected to use in dealing with those in possession of contraband liquor. In giving evidence on his own behalf Baker swore he had not used a revolver for a number of years, that he had never owned handcuffs and that he had never used a flashlight.

CRIMINAL LAW—*Continued.*

Evidence was adduced by the Crown in rebuttal that Baker on one occasion recently and on another about three years previously, had employed similar equipment and the same ruse for the purpose of deceiving and disarming the opposition of rumrunners while he took possession of their stock of liquors. *Held*, on appeal, affirming the decision of MORRISON, J. (MCPHILLIPS, J.A. dissenting), that the evidence was properly admitted as shewing the falsity of the appellant's statements on the direct issue, moreover the trial judge put it to the jury merely as evidence affecting the credibility of the appellant. On the trial counsel for accused moved for a postponement of the trial on the ground that Morris (one of the four accomplices) was a necessary and material witness on their behalf, that Morris was under order for extradition to this country from the State of Washington, but had appealed from said order and the appeal was then pending. The motion was denied. *Held*, on appeal (MCPHILLIPS, J.A. dissenting), that a postponement would involve a delay of the trial and in view of the general circumstances it could not be said that there was lack of material to support the denial of the motion. *Mulvihill* v. *The King* (1914), 49 S.C.R. 587 followed. A motion by counsel for Sowash for a separate trial was refused. *Held*, on appeal (MCPHILLIPS, J.A. dissenting), that there was no warrant for saying that the learned judge below did not exercise a proper discretion on the material before him. Moreover accused was in no way prejudiced by a joint trial. REX v. BAKER. REX v. SOWASH. - - - - **1**

15.—*Plea of guilty—Conviction—Appeal—Ground that accusel did not understand nature of charge—Evidence of, refused—Appeal—R.S.B.C. 1924, Cap. 146, Sec. 53; Cap. 245, Secs. 35 and 77.*] An accused having been convicted on a charge of selling beer under section 53 of the Government Liquor Act to which she pleaded guilty, appealed to the County Court on the ground that she did not understand the nature of the charge to which she pleaded guilty and was induced to plead guilty in ignorance. The County Court judge refused to allow the accused to submit evidence to displace the plea of guilty and dismissed the appeal. *Held*, on appeal, GALLIHER, J.A. dissenting, that as the appeal to the County Court was brought under the statute expressly "to retry the case" *de novo* and the only way to "hear and determine" the question of jurisdiction was "to take all the facts and circumstances into account" the evidence

CRIMINAL LAW—*Continued.*

should not have been excluded and there should be an order remitting the case to the County Court for trial. REX v. OLNEY. - - - - - - - - - - **329**

16.——*Sale of a share in a company—Misrepresentation charged as to profits and liabilities—Investigation by purchaser on his own account—Jury—Conviction—Appeal—Misdirection as to obligations of company—Acquittal.*] H. owned all the shares in a freighting company that operated four trucks. Two of the trucks (a Maple Leaf and a Ruggles) were not fully paid for there being a balance owing by the company and the other two (Federals) first purchased by H. and partially paid for, there being a balance of about $2,000 owing for which he gave his personal lien note, were handed over by him to the company. H. advertised for a purchaser of half the shares in the company and M. entered into negotiations with him, and later purchased the shares. After carrying on the business for a short time M. brought action for rescission of the sale of shares in the company on the ground of misrepresentation by H. and recovered judgment. Later at the instance of M. a charge of false pretences was laid against H. on the grounds that he had induced M. to purchase by saying that the profits of the business averaged $800 per month and that the company's liabilities did not exceed $1,500. He was found guilty by a jury and convicted. *Held*, on appeal, reversing the decision of MCDONALD, J. (MARTIN, J.A. dissenting), that the evidence disclosed that M. made a complete investigation on his own account and was more concerned in future profits than what they had been. He knew before the sale that the liability on the Federal trucks was H.'s own personal liability and not the company's whose actual debts did not exceed $1,500. The charge to the jury did not touch upon facts favourable to H. on the question of the company's profits, nor was the jury informed that M. had found out from the manager of the Federal Motor Company Limited, before the sale of shares was completed that the debt on the Federal Motor Company Limited was a personal debt of H.'s and not one of the company's. The prosecution has the ear-marks of an attempt to use the criminal Courts for the collection of debts or punishment of a defaulting debtor and it should never have been commenced. The conviction should be set aside. REX v. THORNTON. - **344**

17.——*Unlawful possession of opium—Summary conviction—Habeas corpus—Cer-*

CRIMINAL LAW—*Continued.*

tiorari—Warrant of commitment—Omission of word "forfeit"—Sufficiency of evidence—Can. Stats. 1923, Cap. 22—Criminal Code, Sec. 1124.] An accused, having been convicted for being in unlawful possession of opium, applied for his discharge on *habeas corpus* on the ground that the word "forfeit" was omitted from the warrant of commitment. The Crown obtained *certiorari* and the conviction and depositions were brought in. *Held*, that as the word appeared in the conviction itself there was substantial compliance with the provisions of the Code. The omission of the word from the warrant should be regarded as a technicality as the word "pay" when used in a conviction necessarily connotes the idea of forfeiture of money and the evidence disclosed that the magistrate had come to a proper conclusion. REX v. HING HOP. - - - - **158**

CROWN LANDS. - - **106**
See APPEAL. 7.

CUSTOMS—Smuggling. - - **211**
See CRIMINAL LAW. 5.

DAMAGES—Action for. - - **241**
See PRACTICE. 1.

2.——*Assessment of.* - - **81**
See JUDGMENT. 2.

3.——*Negligence—Passenger on railway—Run down in railway yard—Jury's findings—Whether invitee or trespasser.*] The plaintiff who was a passenger on a train of the defendant Company intended to change cars for Nelson at the Yahk station. His train did not go to the station at Yahk but stopped in the yard. He was deaf and, misconstruing instructions, was late in getting off the train and missed his Nelson connection. When he got off he walked through the yard to the station where he was told that he should proceed back of the station to reach a hotel, but instead of going as directed he again proceeded through the railway yard towards the spot where he got off the train and on the way was struck by a car from behind. The jury found the defendant negligent and that the negligence consisted in failure of proper transfer at R.R. Station, Yahk, and after finding there was no contributory negligence gave an affirmative answer to the question "If the plaintiff was guilty of contributory negligence could the defendant by the exercise of reasonable care immediately before the accident have avoided the accident?" Judgment was given for the plaintiff on the jury's findings. *Held*, on appeal, reversing the decision of MACDONALD, J. (MACDONALD, C.J.A. concluding that he would dismiss the action) that the jury's answers to questions failed to make their meaning clear and there should be a new trial. MCFETRIDGE v. CANADIAN PACIFIC RAILWAY COMPANY AND SPOKANE INTERNATIONAL RAILWAY COMPANY. - - - - - - - **387**

4.——*Resulting from fire.* - **194**
See TRESPASS.

5.——*Right to.* - - - **224**
See COMPANY.

DEBT—*Partnership—Release to one co-debtor—Delivery of release accompanied by letter reciting conditions—Effect on release.*] An action was brought against M. and F. carrying on business under the firm name of The Fisherman's Poolroom for $424.17 for goods sold and delivered. M. then approached the plaintiff with a view to settling the claim as against him and the plaintiff in consideration of M. paying $185 on account of the debt executed an unconditional release to M. under seal. The plaintiff's solicitor, then enclosed the release with a letter to M.'s solicitor, reciting that "The understanding of course is that we discontinue our action against M. and amend our plaint for the balance still owing on this account and carry on against F." The plaintiff recovered judgment for the balance against F. *Held*, on appeal, affirming the decision of RUGGLES, Co. J., that the solicitor knowing what was in the plaintiff's mind with regard to the release drew up the letter accompanying it in accordance therewith, which should be construed as making the release conditional to the holding of F. liable for the balance of the debt. R. N. JOHNSTON & COMPANY LIMITED v. FINKLEMAN. - - - - - - - **95**

DEBTOR AND CREDITOR — *Accounts—Guarantee—Appropriation of payments.*] The defendant's son, being in the lumber business and requiring supplies, his father wrote the plaintiffs in April, 1922, directing them to supply his son with groceries to the extent of $500 for which amount he guaranteed payment by the 1st of July, 1922. On the 30th of June, when the son owed $572 the plaintiffs wrote the defendant saying that any further extension of credit would have to be arranged for. The son continued to get supplies and made certain payments on account until December 20th following, when the plaintiffs advised the defendant

DEBTOR AND CREDITOR—*Continued.*

by letter that they were still holding his guarantee for $500, and that they would be obliged for payment. The payments made on account by the son covered the cost of all supplies up to the 1st of July and when action was commenced there was due on the account $630.11. The action was dismissed. *Held*, on appeal, reversing the decision of LAMPMAN, Co. J. (MCPHILLIPS, J.A. dissenting), that the rule in *Clayton's Case* (1816), 1 Mer. 572, that where debits and credits are entered in a continuous account and neither party has made an express appropriation the payments made should be appropriated to the older debts, does not apply as the plaintiffs' letter of the 20th of December was in itself an express appropriation made at a time when it was open to the plaintiffs to do so, and they were entitled to recover on the guarantee. SCOTT & PEDEN v. ELLIOTT. - - - - **143**

DECEIT. - - - - - - - **453**
See INFANT.

DECREE—Registration. - - - **324**
See LAND TITLES.

DEPORTATION—Order for. - **227**
See IMMIGRATION. 2.

2.——*Warrant.* - - - **318**
See IMMIGRATION. 3.

DIRECTORS—Whether properly constituted. - - - - - **550**
See COMPANY LAW.

DISBURSEMENTS AND EARNING POLICY. - - - - - - - **235, 539**
See INSURANCE, MARINE.

DISCLOSURE—Lapse of time. **188**
See VENDOR AND PURCHASER.

DISORDERLY HOUSE. - - **309**
See CRIMINAL LAW. 6.

ELECTION—Voters' lists. - - **28**
See CHURCH UNION.

ENGLISH CRIMINAL DECISIONS—Comments on value of. - - **277**
See CRIMINAL LAW. 8.

ESTOPPEL. - - - - - **275**
See CRIMINAL LAW. 3.

EVIDENCE. 289, 248, 329, 235, 539
See CRIMINAL LAW. 11, 12, 15.
INSURANCE, MARINE.

EVIDENCE—*Continued.*

2.——*Action of bloodhounds—Admissibility—New trial.* - - - - - **43**
See CRIMINAL LAW. 13.

3.——*Application to admit further.* **106**
See APPEAL. 7.

4.——*Corroboration.* - - - **86**
See CASE STATED.

5.——*Credibility of.* - - - **1**
See CRIMINAL LAW. 14.

6.——*Gain.* - - - - - **309**
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7.——*Identification.* - - **353**
See CRIMINAL LAW. 7.

8.——*Material in previous civil proceeding allowed in.* - - - - - **305**
See CRIMINAL LAW. 4.

9.——*Of re-insurance.* - - **202**
See INSURANCE, FIRE.

10.——*Sufficiency of.* - - **158**
See CRIMINAL LAW. 17.

EXCHEQUER COURT IN ADMIRALTY—Jurisdiction. - **439, 434**
See ADMIRALTY LAW. 1, 2.

FIRE. - - - - - - - **202**
See INSURANCE, FIRE.

2.——*Allowed to spread.* - - **194**
See TRESPASS.

3.——*Spreading of—Logging operations in dry weather—Use of spikes instead of tree-jack—Clearing of brush—Negligence.*] The defendant Company, in order to move logs from where they fell to a railway, ran a traveller on a sky-line cable that stretched between two spar trees about 1,120 feet apart. The cable was fixed on No. 1 spar tree and at No. 2 spar tree was held in place by two spikes over which it ran continuing to a stump some distance beyond where it was tied. When extra weight was put on the traveller the cable slipped back and forward on the spikes at spar tree No. 2 causing friction that gradually wore the cable at that point where it eventually broke, the loose end winding around guy ropes that supported spar tree No. 2. This generated sparks that fell in the brush below and started a fire. Owing to the extreme heat and dry weather at the time the fire spread in spite of the efforts of the defendant's employees to put it out, and eventually reached the plaintiff's farm. An action for damages was sustained. *Held*, on

FIRE—*Continued.*

appeal, reversing the decision of MORRISON, J. (MACDONALD, C.J.A. and MCPHILLIPS, J.A. dissenting), that the fact that they did not use a tree-jack instead of spikes to hold the cable in place on spar tree No. 2 did not render the system one which was not reasonably safe and proper; that the fact that defendant had not cleared away the brush around the spar trees did not amount to negligence and the fact that during a spell of hot weather and high winds the humidity reaching as low as 47 does not render the hauling and handling of logs negligence *per se*, if adequate fire-fighting equipment and men are available. [Affirmed by Supreme Court of Canada.] HIGGINS AND CHAN SING v. COMOX LOGGING COMPANY. - - - - - - - - **525**

FIRE INSURANCE. - - - - -
See under INSURANCE, FIRE.

FIRE-TRUCK—Collision with automobile—Inevitable accident. - **266**
See NEGLIGENCE. 3.

FORECLOSURE. - - - - - **287**
See MORTGAGE.

FOREIGN EXECUTORS. - - **240**
See ADMINISTRATION. 1.

GAMING. - - - - - - **309**
See CRIMINAL LAW. 6.

GAMING HOUSE. - - - **248**
See CRIMINAL LAW. 12.

GUARANTEE. - - - - - - **143**
See DEBTOR AND CREDITOR.

HABEAS CORPUS. - **158, 227, 318**
See CRIMINAL LAW.
IMMIGRATION. 2, 3.

2.——*Jurisdiction.* - - - **275**
See CRIMINAL LAW. 3.

3.——*Application for—Grounds must be set out.* - - - - - - - - **397**
See CRIMINAL LAW. 9.

HUSBAND AND WIFE—*Husband's will—Substantially no provision for wife's maintenance—Testator's Family Maintenance Act—Application under—Order giving whole estate of over $8,000 to wife—Appeal—R.S.B.C. 1924, Cap. 256, Secs. 3 and 5.*] A husband's estate at the time of his death was valued at slightly over $8,000. By his last will he left his wife $10 and his household furniture valued at about $250. The balance of the estate he left to a nephew. Upon the application of the widow for relief under the Testator's Family Maintenance Act it was held that she was entitled to the whole estate. Ten witnesses gave evidence when the petition was heard, but there being no stenographer present the evidence was not taken down. *Held*, on appeal, affirming the decision of MORRISON, J. (MACDONALD, C.J.A. and MACDONALD, J.A. dissenting), that sections 3 and 5 of the Act recite that the Court may in its discretion make such adequate, just and equitable provision for the family of the testator as the Court in the circumstances shall think just and it may consist of a lump sum or periodical payments. The only way that the order can be set aside is to say that the circumstances which were before the Court would not warrant the order. As the evidence is not before this Court it cannot review the decision below and the appeal must be dismissed. BRIGHTEN v. SMITH. - - - - - - **518**

IDENTIFICATION—Evidence. - **353**
See CRIMINAL LAW. 7.

IMMIGRATION—*Chinaman unlawfully in Canada—Order for deportation by controller—Certiorari—Can. Stats. 1923, Cap. 38, Secs. 10(2), 26 and 38.*] An order for the deportation of the respondent was made by the controller of Chinese immigration under section 26 of The Chinese Immigration Act, 1923. On *certiorari*, the respondent claiming he was born in Canada, the order for deportation was set aside. *Held*, on appeal, reversing the order of GREGORY, J., that the order for deportation be restored as it had been made with jurisdiction and none of the essentials of justice had been violated. *Held*, further, that *certiorari* in general lies with respect to an order for deportation made under section 26, and section 38 is no bar to its application when such orders are made without or in excess of jurisdiction or in violation of the essentials of justice. Section 10(2) of The Chinese Immigration Act, 1923, has no application to deportation proceedings under section 26. *In re* LOW HONG HING. - - - - - - **295**

2.——*Chinese woman seeking entry into Canada—Controller—Inquiry—Jurisdiction—Order for deportation—Appeal—Habeas corpus.*] Where a person of Chinese origin applies for entry into Canada the authority of the official dealing with the question of immigration is absolute, subject to appeal under the Acts controlling immigration.

IMMIGRATION—*Continued.*

The Court has no right to interfere with the acts of immigration officials refusing admission to Chinese who have not yet acquired a domicil in Canada. *In re* CHINESE IMMIGRATION ACT AND YOUNG SUE HING. **227**

3.——*Deportation—Warrant — Omission of date of Act—Validity—Habeas corpus—Can. Stats. 1923, Cap. 22.*] An application on the return of an order *nisi* for *habeas corpus* to release accused on the ground that in the recital in the original warrant of deportation the figures "1923" were omitted from the citation of "The Opium and Narcotic Drug Act, 1923," was refused. *Held*, on appeal, affirming the order of MORRISON, J. that the omission does not invalidate the warrant. *Rex* v. *Gan* (1925), 36 B.C. 125 approved. REX v. JUNGO LEE. - **318**

IMPERIAL LEGISLATON—Effect of. **439**
See ADMIRALTY LAW. 1.

INCOME. - - - - - - **130**
See TAXATION. 1.

INCOME TAX. - - - - **514**
See TAXATION. 2.

INDEMNITY. - - - - - - **99**
See PRACTICE. 8.

INEVITABLE ACCIDENT. - - **266**
See NEGLIGENCE. 3.

INFANT — *Tort—Liability—Deceit—Bogus contract for purchase of motor-car—Assignment of contract to plaintiff.*] Infants are liable to be sued for torts of all kinds and, except where the action is founded upon malice or want of care, the tenderness of the infant's age is immaterial. The defendant, a minor, was induced by one M. to sign an agreement and accompanying promissory note for the purchase of a motor-car from M. who told the defendant that he needed the agreement in order to obtain the release of the car from the company selling it to him. Instead of so using the documents he discounted them with the plaintiff Company. After default in payment under the agreement the plaintiff seized the car but later surrendered it to a *bona fide* purchaser who had possession of it under a later agreement. An action for damages against the defendant alleging deceit and fraudulent conspiracy was dismissed. *Held*, on appeal, reversing the decision of MURPHY, J. (MACDONALD, C.J.A. and MACDONALD, J.A. dissenting), that the defendant on his own admissions knew he was entering upon a

INFANT—*Continued.*

bogus transaction and notwithstanding his being a minor was liable in damages for the amount paid by the plaintiff to M. for the assignment of the spurious documents. CONTINENTAL GUARANTY CORPORATION OF CANADA LIMITED v. MARK. - **453**

INSURANCE AGENTS—Company acting as. - - - - - - - **514**
See TAXATION. 2.

INSURANCE, BURGLARY—*Policy covering burglary from safe or vault—Safe inside vault — Vault burglarized — Money taken inside vault but not in safe—Right to recover.*] The plaintiff held two policies of insurance against burglary in the defendant Company. It had a safe inside a vault on its premises. The vault was burglarized but the moneys taken although inside the vault were not in the safe as the safe would not hold all the moneys on hand at that time. The insuring clause in the policies contained the words "from the interior of any safe or vault described in the schedule." *Held*, that the doctrine *verba chartarum fortius accipiuntur contra proferentem* should be applied and there should be judgment for the plaintiff. WOODWARD'S LIMITED v. UNITED STATES FIDELITY AND GUARANTY COMPANY. - - - - **450**

INSURANCE, FIRE—*Limits of insurance—Amount insured over limit—Contract with other company for re-insurance—Evidence of reinsurance—Liability.*] The plaintiff Company insured the National Canners Limited for $67,500, but having limited its insurance on each risk at $37,500, under contracts of reinsurance $25,000 of the additional amount was reinsured on the 14th of July, 1925, with the California Insurance Company and $5,000 with the Pacific Coast Fire Insurance Company. On the 17th of July following, correspondence commenced between the plaintiff Company and defendant Company as to the defendant accepting reinsurance of the plaintiff on the National Canners Limited and on the 23rd of July it was agreed that the defendant would accept a line of $15,000 of reinsurance on said risk of which the plaintiff would forward commitments in the course of a week or so. On the evening of the 31st of July, the accountant of The National Canners Limited telephoned the plaintiff's agent in Vancouver to place an additional $20,000 on the stock-in-trade of the Company. It being after hours the agent made a note of the arrangement leaving it until the following day to issue the policy. That night the

INSURANCE, FIRE—*Continued.*

National Canners Limited was destroyed by fire. It appeared that in the face of the correspondence between the plaintiff Company and defendant Company that terminated on the 23rd of July the manager of the plaintiff Company's main agents in Victoria instructed his clerk that in case of further insurance for the National Canners Limited, the first $15,000 should be reinsured in the British Traders Insurance Company, and the next $5,000 in the Pacific Coast Fire Insurance Company, and the main agents were empowered to issue policies on behalf of the British Traders Company. Th policies were duly issued by the agents in the names of the British Traders Insurance Company and on the Pacific Coast Company. In an action to recover $12,812.87 from the British Traders Company on its policy so issued:—*Held*, on the facts, that the defendant Company was liable. QUEEN INSURANCE COMPANY OF AMERICA V. BRITISH TRADERS INSURANCE COMPANY, LIMITED. - - - - **202**

INSURANCE, MARINE — *Tug-boat — Time policy, and disbursements and earning policy —Constructive total loss—Notice of abandonment—Acceptance of by underwriters—Evidence.*] In marine insurance, underwriters, although insisting that they will not accept a preferred abandonment, will nevertheless be held to have accepted (a) if they do any act that alters the rights, the conditions and the interests of the owner; and (b) if they do any act which can only be justified under a right derived from abandonment. [Reversed on appeal.] CAPTAIN J. A. CATES TUG AND WHARFAGE CO. LTD. V. THE FRANKLIN FIRE INSURANCE COMPANY. - - - - - - **235, 539**

INTERDICTION. - - - **423**
See CRIMINAL LAW. 10.

INTEREST—Agreement to pay increased rate in consideration of forbearance to sue. - - - - - **287**
See MORTGAGE.

INTERLOCUTORY JUDGMENT. **241**
See PRACTICE. 1.

INTERROGATORIES. - - **207**
See ADMIRALTY LAW. 4.

2.——*Delivery of.* - - - **398**
See PRACTICE. 7.

INTESTATE—Real and personal property within Province. - - **41**
See ADMINISTRATION. 2.

JOINT TRIAL. - - - - **1**
See CRIMINAL LAW. 14.

JUDGE—In Chambers. - - **313**
See SUCCESSION DUTY ACT.

JUDGMENT—Court of Appeal. - **99**
See PRACTICE. 8.

2.——*Judicial Committee of Privy Council—Assessment of damages—Order referring back to jury to reassess—Construction of order as to composition of jury—R.S.B.C. 1924, Cap. 123.*] In an action for malicious prosecution the plaintiff claimed $490 special damages and $5,000 general damages. The jury brought in a verdict for $490 special damages and $10,000 general damages. The Court of Appeal ordered a new trial. The Supreme Court of Canada ordered that the new trial be limited to the assessment of general damages. On appeal to the Judicial Committee of the Privy Council it was ordered that the judgment of the Supreme Court be varied, in that the case be "referred back to the jury in the Supreme Court of British Columbia to reassess the damages generally." An application for an order that the jury to be summoned for the purpose of reassessing the damages pursuant to the order of the Judicial Committee of the Privy Council, do consist of the same individuals as constituted the jury on the trial of the action, was dismissed. *Held*, on appeal, affirming the order of MCDONALD, J. (MCPHILLIPS, J.A. dissenting), that the decision of the Judicial Committee of the Privy Council should not be construed as meaning that the jury which first tried the case and was discharged should be recalled to reassess the damages, such a construction being inconsistent with our jurisprudence and repugnant to the Jury Act. LEW V. WING LEE. - - - - - - **81**

JUDICIAL COMMITTEE OF PRIVY COUNCIL. - - - - - **81**
See JUDGMENT. 2.

JURY—Composition of. - - **81**
See JUDGMENT. 2.

2.——*Conviction.* - - - **344**
See CRIMINAL LAW. 16.

3.——*Findings of.* - - - **387**
See DAMAGES. 3.

JUVENILE DELINQUENCY—Contributing to—Conviction. - - **275**
See CRIMINAL LAW. 3.

LAND—Sale of. - - - - - **188**
See VENDOR AND PURCHASER.

LAND TITLES—*Agreement for sale—Previous delivery of certificate of title by vendor to another—Non-registration by either party—Payment of full purchase price—Action for specific performance—Decree—Registration refused without certificate of title—Appeal under section 230 of Land Registry Act—R.S.B.C. 1924, Cap. 127.*] M. & P. purchased lands under agreement for sale in 1921, went into possession, and paid taxes. In August, 1925, they learned for the first time that two weeks before the date of their agreement for sale the vendor deposited the certificate of title of said lands with T. as security for a loan of $350 and delivered him a conveyance of the lands. Up to this time neither party had registered their respective interests in the lands. On the 4th of November, 1925, M. & P. lodged a *caveat* in the Land Registry office and on the 29th of December following having paid for the property in full they brought action for specific performance against the vendor and a *lis pendens*. Certificate of *lis pendens* was then filed in the Registry office and upon a decree for specific performance being granted they applied to register the decree but it was refused by the reigstrar of titles on account of the non-production of the certificate of title. M. & P. then appealed to a judge in Chambers under section 230 of the Land Registry Act. *Held*, that M. & P. are entitled to registration of the decree notwithstanding the non-production of the certificate of title. *In re* LAND REGISTRY ACT. MORRISON & POLLARD v. TAYLOR. - - - - - - **324**

LETTERS OF ADMINISTRATION. **240**
See ADMINISTRATION. 1.

LIBEL—Action for. - - - **464**
See TRIAL.

LICENCE. - - - - - - **407**
See REAL ESTATE.

LIEN—Assignment—Proof of. - **418**
See WOODMAN'S LIEN.

LIEN FOR WAGES. - - **24**
See ADMIRALTY LAW. 5.

LIQUIDATOR. - - - **373**
See WINDING-UP.

LIQUOR—Found in ship's cabin. - **211**
See CRIMINAL LAW. 5.

2.——*Intoxicating—Sale of.* - **289**
See CRIMINAL LAW. 11.

MANDAMUS—Order absolute. - **106**
See APPEAL. 7.

MARINE INSURANCE. - - -
See under INSURANCE, MARINE.

MARRIAGE—Breach of promise. **71**
See CONTRACT. 4.

MINERAL LANDS—*Situate under sea—Charge on obtaining Crown grant—Land not alienated or leased—B.C. Stats. 1903-4, Cap. 37, Sec. 4; 1910, Cap. 33, Sec. 4.*] A suppliant, having paid $10 per acre upon obtaining Crown grants to coal rights in lands under the sea, his petition of right for a refund of $5 per acre was refused as the surface of the lands in question had not been leased or alienated to any person. KETCHEN v. THE KING. - - - **479**

MISREPRESENTATION. - - **344**
See CRIMINAL LAW. 16.

MORTGAGE—*Interest—Agreement to pay increased rate in consideration of forbearance to sue—Foreclosure—Interest paid to certain date under oral arrangement—Interest for balance of period only asked for at rate originally fixed—Validity of verbal arrangement.*] A mortgage provided for payment of interest at 6 per cent. per annum, subsequently the parties entered into a verbal agreement that after maturity the rate should be 8 per cent. until 1918 and 7 per cent. after that in consideration for which the mortgagee agreed that the principal moneys should not be called in. Interest was paid on this basis until the 31st of October, 1924. The mortgagee seeks foreclosure and asks that the account be taken on the basis that interest was paid up to the 31st of October, 1924, and that the account be taken for the subsequent period at 6 per cent. The defendant contends the whole account should be gone into and that the verbal agreement for a higher rate of interest than that specified in the mortgage is void under section 4 of the Statute of Frauds. *Held*, that it is not sought here to charge the lands with the higher rate of interest but that the charge should be enforced on the basis that the rate of interest chargeable is 6 per cent., so that in taking accounts the interest should be treated as paid up to the 31st of October, 1924. *Standard Trusts Co.* v. *Hurst* (1914), 24 Man. L.R. 185 applied. ROBERT PORTER & SONS LIMITED v. MACKENZIE. - **287**

MORTGAGOR AND MORTGAGEE. **99**
See PRACTICE. 8.

MOTOR-CAR—*Sale on instalment plan—Return of car after part payment to local manager of vendors—Sale by local manager—Agency.*] The local manager of a branch garage of the defendant Company sold a car to H. on the instalment plan. When $384 was still due, H. left the car with said local manager to be disposed of at best possible price. Shortly after and when one of H.'s instalments was overdue, the local manager sold the car to R. for $550 and absconded with this money. The defendant Company then seized the car to cover the balance due from H. R. obtained judgment for the return of the car and damages. *Held*, on appeal, affirming the decision of BARKER, Co. J. (MARTIN, J.A. dissenting), that the evidence supported the view of the trial judge that the local manager was acting for his employers in selling the car to R. and the appeal should be dismissed. ROGERS v. NANAIMO MOTORS LIMITED. - - **326**

MUNICIPAL LAW—*Contract—Construction—Supply of electricity to municipality—Erection of poles and right of way through municipality—By-law—Submission to electors.*] The defendant Company entered into a contract with the plaintiff Municipality for the supply of electricity and in pursuance thereof a by-law was passed by the Municipality conferring upon the Company the right to sell electricity within the Municipality; the right to erect steel towers along Dewdney Road and to string wires thereon for transmitting electricity through and beyond the Municipality; and the right to erect poles and string wires within the Municipality for the purpose of providing electricity within the Municipality. The Company proposed to erect a line of poles in duplication of the steel towers along Dewdney Road for transmission of electricity through and beyond the Municipality and the Board of Works of the Municipality charged with the duty of approval and supervision approved of the location of the new line and the Company proceeded with the erection of the poles pending the submission of a new by-law to the electors granting leave to erect the new line, but the by-law failed to pass. The Company then refused to make certain electrical connections between inhabitants of the Municipality and its main lines. The Municipality obtained judgment in an action for removal of the new poles on Dewdney Road and for a declaration that the Company is bound to make the necessary connections between the power lines and the inhabitants. *Held*, on appeal, affirming the decision of MACDONALD, J., that the contract properly construed did not permit the erection of the duplicate line

MUNICIPAL LAW—*Continued.*

of poles on Dewdney Road and the second by-law having been rejected by the electors the poles should be removed. A clause of the contract required that the Company should make the necessary connection between the customer's installation and the Company's power line provided such installation were located within half a mile of the power line. *Held*, that the distance is to be measured in a straight line and not along the highways. CORPORATION OF THE DISTRICT OF MAPLE RIDGE v. WESTERN POWER COMPANY OF CANADA, LIMITED. - - - - - - - - - - **252**

MURDER. - - - - - - - **43**
See CRIMINAL LAW. 13.

2.——*Conviction.* - - - - **1**
See CRIMINAL LAW. 14.

NEGLIGENCE. - - - - - **387**
See DAMAGES. 3.

2.——*Automobile—Injury to pedestrian—Negligence of driver—Failure to look—Excessive speed—Agony of collision—Contributory negligence.*] The plaintiff in crossing a street at a corner and when about two-thirds of the way across looked to her right and saw the defendant's automobile almost upon her. Her evidence was that she hesitated as to which way she should go and then the car was upon her. The defendant admitted that when he first saw her he swerved to the left to try to avoid her and put on his brakes but they did not take effect until after he struck her; but he claimed that she hesitated and suddenly took two steps back that brought her in front of his car. The defendant's car skidded 63 feet and the plaintiff was carried from 45 to 50 feet after she was struck. The trial judge found the defendant guilty of negligence and that the plaintiff was guilty of contributory negligence in getting in the way and dismissed the action. *Held*, on appeal, reversing the decision of MURPHY, J. that there was the finding of the trial judge that the defendant was guilty of negligence and the evidence amply sustained this, but the plaintiff's evidence which was uncontradicted on the point was that she did not see the defendant's car until it was practically upon her, and, being then in the "agony of collision," she could not be guilty of contributory negligence and was entitled to recover for the damages sustained. ZELLINSKY AND ZELLINSKY v. RANT. - - - - - - - - - - **119**

3.——*City fire-truck — Collision with automobile—Inevitable accident.*] At eight

NEGLIGENCE—*Continued.*

o'clock on the morning of the 26th of June, 1925, the plaintiff's auto-truck was proceeding northerly along Kingsway. He was sitting on the right of the front seat and the driver on the left, his son sitting behind them. As they approached 11th Avenue they were just to the right of a tram-car going the same way. The tram-car slowed down as it approached the crossing but did not stop on reaching the intersection but proceeded on and then suddenly stopped when about one-third of the way across the intersection. The plaintiff's auto-truck, which was then about half way between the tram-car's gates, proceeded on and when it had cleared the front of the street-car and was about half way across the intersection it was struck violently by a city fire-truck. The plaintiff was seriously injured and his son was killed. The fire-truck proceeding easterly along 11th Avenue to a fire slowed down to a stop on nearing Kingsway and blew its siren. When the street-car stopped the fire-truck proceeded to cross in front ran into the plaintiff's truck. In an action for damages the jury brought in a verdict of inevitable accident and the action was of it near the middle of the intersection and dismissed. *Held*, on appeal, affirming the decision of MACDONALD, J. (MACDONALD, C.J.A. dissenting), that there was evidence upon which the verdict of inevitable accident could be supported and the appeal should be dismissed. COUSINEAU v. THE CITY OF VANCOUVER. - - - - - - **266**

4.——*Spreading of fire.* - - **525**
See FIRE. 3.

NEW TRIAL. - - - - - - **43**
See CRIMINAL LAW. 13.

OFFICIAL ADMINISTRATOR — Appointment of. - - - - - **41**
See ADMINISTRATION. 2.

OPIUM—Unlawful possession of. **158**
See CRIMINAL LAW. 17.

ORIGINATING SUMMONS. - **161**
See SOLICITOR AND CLIENT.

PARTNERSHIP. - - - - - **95**
See DEBT.

2.——*Accounting.* - - - **216**
See PRACTICE. 9.

3.——*Action to dissolve.* - **128**
See PRACTICE. 2.

"PARTY"—Word in tariff—To be read collectively. - - - - **412**
See PRACTICE. 5.

PEDESTRIAN—Injury to. - - **119**
See NEGLIGENCE. 2.

PERSONA DESIGNATA. - - **313**
See SUCCESSION DUTY ACT.

PHOTOGRAPHS—Of suspected persons—Admissibility. - - **353**
See CRIMINAL LAW. 7.

PICKETING. - - - - - **284**
See TRADE UNION.

PLEADING—Essential words. - **231**
See SLANDER.

PLEADINGS—Statement of claim. **216**
See PRACTICE. 9.

PRACTICE—*Action for damages—Interlocutory judgment by default—Order setting aside—Affidavit in support—Non-disclosure of defence—Appeal—County Court Rules, Order IX., r. 9.*] In an action in the County Court for damages resulting from a collision between automobiles the plaintiff entered interlocutory judgment in default of a dispute note being filed. The defendant then applied for and obtained an order setting aside the judgment, the defendant to be at liberty to enter a dispute note. The affidavit of defendant's solicitor in support of the application recited "that after going into the facts of this case fully with my client, the defendant, I verily believe and have so advised in my capacity as a solicitor, that he has a good defence to this action upon the merits." *Held*, on appeal, reversing the order of GRANT, Co. J. that Order IX., r. 9 of the County Court Rules requires that the affidavit must disclose a defence on the merits; there must be something more than a mere statement that the party has a good defence on the merits. In this case there is simply the opinion of the solicitor that his client has a good defence on the merits which is not sufficient and the interlocutory judgment should be restored. SCOVIL v. LEWIS. - - - - **241**

2.——*Action to dissolve partnership—Consent order for accounting—Information obtained on cross-examination of defendant—Application to amend statement of claim alleging misrepresentation.*] The plaintiff and defendant were in partnership in a logging operation the defendant being in full charge of the work. On the defendant refusing to complete the work the plaintiff

brought action claiming damages, for an accounting and for dissolution. Subsequently an order was made with the consent of the parties directing the defendant to give an account of the real and personal property of the partnership, and of all moneys received and expended by him on behalf of the partnership. On cross-examination of the defendant on his affidavit supporting his accounts the plaintiff claims to have first ascertained that there was material misrepresentation at the inception of the partnership contract regarding the purchase price of the partnership property made by the defendant. The plaintiff then applied for leave to amend his statement of claim alleging misrepresentation and claiming rescission and alternatively claiming dissolution and an accounting. *Held*, that the cases cited to the effect that another action must be started to set aside the order on the ground of fraud are not in point as the alleged misrepresentation, if there was such, goes to the contract itself, and the rights and liabilities of the parties would be wholly different if the Court found that the right of rescission was established. *Held*, further, that in the existing statement of claim there is a claim for damages or breach of the alleged agreement which could not be disposed of by the registrar under the order for taking accounts, but the liability would have to be decided by the Court itself, so that the order for accounts is not in the nature of a final order disposing of all the issues in the action but only an interlocutory order, and the amendment should be allowed. McKENZIE v. BREMNER. **128**

3.——*Adoption of child — Order for— Made with consent and assistance of mother —Application by mother to set aside— R.S.B.C. 1924, Cap. 6.*] An order for the adoption of an infant was made to a judge in Chambers on the 5th of January, 1925, upon petition under the Adoption Act. The petition was supported by an affidavit of the child's mother giving her consent and approval to the order. More than a year later the mother applied to the same judge to set aside the order on the ground that it was ineffectual to accomplish the purpose intended through having been made in Chambers and not having been under the seal of the Court. *Held*, that the Adoption Act provides that the powers conferred thereunder may be exercised by a judge in Chambers and the order was made in the terms intended and even if the order were wrong in form the Court should uphold it if having jurisdiction it contains the proper

pronouncement of the Court. *Held*, further, on the contention that the order was made *ex parte* and thus may be set aside by the judge making it, that if there was the right to make the order for adoption and confer rights and responsibilities upon those adopting the child and even if the material upon which jurisdiction was exercised was defective or insufficient, it is only by way of appeal that the order could be set aside. *In re* ADOPTION OF STANLEY WARREN, AN INFANT. - - - - - - **322**

4.——*Application to admit further evidence.* - - - - - - - **106**

See APPEAL. 7.

5.——*Costs—Action on promissory note— Maker and endorser, defendants—One set of costs only—Word "party" in tariff—To be read collectively.*] The plaintiff recovered judgment in an action on a promissory note, the maker and endorser of the note both being defendants. The formal judgment recited "together with his costs of the action against each of the defendants to be taxed." The taxing officer only allowed one set of costs which was affirmed in the Court below. *Held*, on appeal, affirming the decision of GREGORY, J. (MARTIN, J.A. dissenting), that although separate defences were pleaded by maker and endorser there was one cause of action only, that the taxing officer properly held that the words "any party" in the tariff must be read collectively and that the plaintiff could recover one set of costs only. WINLOW v. ROSS AND QUICKSTAD. - **412**

6.——*Interrogatories.* - - **207**

See ADMIRALTY LAW. 4.

7.—— *Interrogatories — Delivery of — Application for leave—Objection taken— Marginal rules 344 and 348.*] The allowance by a judge of interrogatories to be administered to a party under marginal rule 344(2) even in the face of objection does not amount to a decision that the party must answer them, but leaves him at liberty under marginal rule 348 to take any objection to answering that he sees fit. ESQUIMALT & NANAIMO RAILWAY CO. v. GRANBY CONSOLIDATED MINING, SMELTING & POWER CO. - - - - - - - **398**

8.——*Judgment of Court of Appeal— Mortgagor and mortgagee — Indemnity— Amount due not ascertained—Taking of accounts—Mortgagee a necessary party.*] The plaintiff sold a brick plant to the defendant Company the Company agreeing to form a new company to take the property

PRACTICE—*Continued.*

over and to assume and pay off a chattel mortgage on the property held by one B. Later the plaintiff at the instance of the Company signed what he thought was a transfer of the property but the instrument was in fact an agreement which included a clause releasing the defendant Company from its obligation to pay off the chattel mortgage. In an action for a declaration that he was entitled to be indemnified by the defendant Company it was held by the Court of Appeal (see 35 B.C. 295) that his signature to the instrument was obtained by fraud and he was entitled to be indemnified by the defendant Company. An application by the plaintiff for an order that the defendant pay the mortgagee the amount due under the chattel mortgage and that it be referred to the registrar to take an account of the amount due, was dismissed. *Held*, on appeal, *per* MACDONALD, C.J.A. and MACDONALD, J.A., that a mortgage account cannot be taken between a mortgagor and a third party, the mortgagee being a necessary party and the registrar cannot make a foreigner (B. being a resident of the United States) a party to the action. *Per* GALLIHER and MCPHILLIPS, JJ.A.: That the mortgagee is not a necessary party; that a reference before the registrar should be directed and an affidavit from the principal creditor be accepted to prove the amount due under the mortgage. The Court being equally divided the appeal was dismissed. JACK V. NANOOSE WELLINGTON COLLIERIES LIMITED. - - - - - - - **99**

9.——*Pleadings—Statement of claim—Amendment—Written agreement set up—Partnership — Accounting — R.S.B.C. 1924, Cap. 191, Secs. 3 and 4(c) (iv.).*] The plaintiff brought action against the defendant for a balance due on money loaned. The evidence on discovery disclosed that the parties had entered into a written agreement with M. whereby they agreed to provide M. with capital up to $2,000 to carry on a lumber business on premises upon which M. had obtained a lease, and to provide him with sufficient logs to enable him to operate the mill at full capacity. M. in consideration therfor agreeing to pay the plaintiff and defendant two-thirds of the net profits. The plaintiff then moved and obtained an order to amend the statement of claim by setting up alternatively that the plaintiff and defendant carried on a partnership with the object of financing M. in the operation of a sawmill and for an accounting of the partnership dealings. *Held*, on appeal, reversing the decision of HUNTER, C.J.B.C. (MARTIN and GALLIHER, JJ.A. dissenting), that the agreement only defined the rights of plaintiff and defendant as against M. and M.'s rights against them. There was no mutual undertakings as between themselves and no partnership. The order should therefore be set aside as embarrassing. The plaintiff should, however, have leave to make a proper amendment and the defendant should have leave to plead in answer to it. MORSE V. HURNDALL. - - - **216**

10.—*Supreme Court — Application to Court of Appeal for leave to appeal—General rule as to—Can. Stats. 1920, Cap. 32, Secs. 35 to 43.*] The plaintiff purchased an automobile under a conditional sale agreement. Being in default the vendor (defendant) seized the car and resold it, receiving in all $532.78 more than the original purchase price. The plaintiff recovered judgment for the surplus which was confirmed by the Court of Appeal (36 B.C. 488). On motion by the defendant for leave to appeal to the Supreme Court of Canada:—*Held* (GALLIHER and MCPHILLIPS, JJ.A. dissenting), that the questions involved are important as they affect all ageements of this character in the several Provinces and leave should be granted. CHAN V. C. C. MOTOR SALES, LIMITED. (NO. 2). - - **88**

PRINCIPAL AND AGENT—*Solicitor—Personal liability—Employment of skilled bookkeeper—Fees so incurred—Disclosed principal.*] A solicitor acting for his client to the knowledge of the other contracting party is in the same position as an agent in a commercial transaction; he speaks for his client, binds his client, but not himself. SHAW, SALTER & PLOMMER V. PHIPPS & COSGROVE. - - - - - - - **184**

PRISONER—Health of—Grounds for reduction of sentence. - - **277**
See CRIMINAL LAW. 8.

PRIVILEGE. - - - - - **305**
See CRIMINAL LAW. 4.

PROCLAMATION. - - - **275**
See CRIMINAL LAW. 3.

PROHIBITION — *County Court—Jurisdiction—Children of Unmarried Parents Act—Appeal—Where the cause of complaint arose—Interpretation—R.S.B.C. 1924, Cap. 34, Sec. 7; Cap. 245, Sec. 77.*] F. gave birth to a child out of wedlock in the city of Vancouver and on complaint against T. under section 7 of the Children of Unmar-

PROHIBITION—*Continued.*

ried Parents Act the evidence disclosed that both parties had previously lived near Abbotsford where conception took place. The stipendiary magistrate for the County of Westminster dismissed the complaint and an appeal was taken to the County Court holden at Chilliwack (the County Court nearest Abbotsford) when the appeal was allowed and T. was ordered to pay maintenance for the child. An application for a writ of prohibition on the ground that the appeal should have been heard in Vancouver, being the County Court nearest to where the child was born, under section 77 of the Summary Convictions Act was dismissed. *Held*, on appeal, affirming the decision of HUNTER, C.J.B.C. that the cause of the complaint was the seduction and not the birth of the child and the appeal to the County Court of Chilliwack was properly taken. FERGUSON v. TAYLOR. - - - **340**

PROMOTERS—Selling own interest. **188**
See VENDOR AND PURCHASER.

RAILWAY—Passenger. - - **387**
See DAMAGES. 3.

REAL ESTATE—*Sale of—Agent—Commission—Licence—Time when cause of action arose—R.S.B.C. 1924, Cap. 53, Sec. 110; Cap. 143, Sec. 21.*] On the 1st of September, 1924, the defendant employed the plaintiff as agent to find a purchaser for his ranch. She immediately proceeded to negotiate with a prospective purchaser but did not obtain a real estate agent's licence until the 16th of September. The purchaser assented verbally to purchase at the price stipulated on the 20th of September and the purchase was finally completed on the 27th. Section 21 of the Real-estate Agents' Licensing Act provides that "no person shall. . . . maintain any action . . . . for the collection of compensation . . . . [unless] duly licensed . . . at the time the alleged cause of action arose." It was held by the trial judge that the plaintiff had done all she was required to do to earn her commission before she obtained a licence and section 21 aforesaid was a bar to her action. *Held*, on appeal, reversing the decision of BROWN, Co. J., that the right of action arose when the sale was completed. It was not completed in a binding fashion until the 27th of September and not even assented to verbally until the 20th, four days after she had obtained a licence. She had therefore a right of action for her commission. *Held*, further, when the defendant asks for and obtains a non-suit and afterwards it is

REAL ESTATE—*Continued.*

found on appeal that the plaintiff has made out a case, it is not usual to grant a new trial, and as it is apparent that the only defence is the alleged want of licence, the plaintiff should have judgment for her commission. CUDWORTH v. EDDY. - **407**

RE-INSURANCE—Contract for. - **202**
See INSURANCE, FIRE.

RULES AND ORDERS—Bankruptcy rule 120. - - - - - - **91**
See BANKRUPTCY. 2.

2.——*County Court Rules, Order IX., r. 9.* - - - - - - - - - **241**
See PRACTICE. 1.

3.——*Marginal rules 344 and 348.* **398**
See PRACTICE. 7.

4.——*Marginal rule 981.* - **445**
See COSTS.

SALE—Instalment plan. - - **326**
See MOTOR-CAR.

SALE OF LAND. - - - - - **188**
See VENDOR AND PURCHASER.

SENTENCE—Revision by Court of Appeal. - - - - - - - - - **277**
See CRIMINAL LAW. 8.

SLANDER—*Variance between words charged and proved—No amendment of pleading—Essential words—Clear proof required.*] In an action for slander the plaintiff alleges that the defendant stated in the presence of W. and I. "that Evans is a damn thief. He stole the engine and I will get him in gaol for it." The evidence of W. was that the defendant referred to the plaintiff and his character in most opprobrious terms but there was nothing said that could have any reference to the stealing of an engine. *Held*, that there was such variance between the words charged and those proved, that the plaintiff could not succeed. The plaintiff further alleged that the defendant spoke and published, in the presence of B. the following words: "I have to have the engine and there is only one word to describe the keeping of Government property, and that is theft and if he [Evans] does not hand over the engine at once, I will have him arrested and you can tell Evans all I have said." In his evidence B. asserted, at the outset, that the defendant's conversation was practically as outlined in the statement of claim, but on cross-examination he waivered and only "thought" that the defendant men-

SLANDER—*Continued.*

tioned an engine but was not sure. *Held*, that clear proof of the essential words, constituting the slander should be afforded, and in view of the flat contradiction of the defendant, and the situation then existing between the parties, there is not the requisite proof to support this paragraph of the statement of claim. EVANS v. MARTYN. - - - - - - - - - - **231**

SMUGGLING. - - - - - **211**
See CRIMINAL LAW. 5.

SOLICITOR. - - - - - **184**
See PRINCIPAL AND AGENT.

SOLICITOR AND CLIENT—*Costs—No bill of costs furnished—Mutual release signed by parties—Originating summons—Application for delivery of bill of costs for taxation—Lapse of over three years—Order directing an issue—Appeal—R.S.B.C. 1924, Cap. 136, Secs. 100 and 101.*] A firm of solicitors carried on extensive litigation for A, defendant in an action commenced in 1915. The case was carried to the Privy Council, and later, on appeal from a reference, it again reached the Privy Council being finally disposed of in December, 1920. In January, 1922, a mutual release was executed by the solicitors and A. reciting that the former had acted for the latter in various matters including the litigation referred to, and had not rendered accounts for their services; that it was agreed that all accounts between them should be settled by A. paying a certain sum to the solicitors and it was thereupon agreed that each should release and discharge the other from all claims and demands. In September, 1925, A. applied by way of originating summons for an order to compel the solicitors to deliver and submit to taxation a bill of costs in respect of the action commenced in 1915, on the ground that when he signed the release he was not aware and had not been advised that the solicitors had received from the plaintiffs in said action the costs ordered by the Court of Appeal when he had been successful before that Court. It was ordered that the following issues be tried: (a) Did A. execute the release referred to? (b) If A. executed the release under what circumstances did he so execute it? *Held*, on appeal, reversing the decision of MCDONALD, J., that an order directing an issue was not the proper course to pursue and it should be set aside. *Per* MACDONALD, C.J.A., MCPHILLIPS and MACDONALD, JJ.A.: That the application for an order for delivery of a bill for taxation should be dismissed not only on the ground

SOLICITOR AND CLIENT—*Continued.*

that the application was not made within three months as required by section 101 of the Legal Professions Act but also on the general law applicable to the facts disclosed even if the section should not be regarded as a bar. *In re* LEGAL PROFESSIONS ACT AND BARNARD, ROBERTSON, HEISTERMAN & TAIT. - - - - - - - - **161**

STATUTES—10 & 11 Geo. V., Cap. 81 (Imperial). - - - - **439**
See ADMIRALTY LAW. 1.

30 & 31 Vict., Cap. 3, Sec. 92, No. 2 (Imperial). - - - - **481**
See TAXATION. 3.

B.C. Stats. 1903-4, Cap. 37, Sec. 4 - **479**
See MINERAL LANDS.

B.C. Stats. 1910, Cap. 33, Sec. 4. - **479**
See MINERAL LANDS.

B.C. Stats. 1924, Cap. 50. - - **28**
See CHURCH UNION.

Can. Stats. 1908, Cap. 40, Secs. 29, 34 and 35. - - - - - - - **275**
See CRIMINAL LAW. 3.

Can. Stats. 1912, Cap. 51, Sec. 1. - **399**
See ADMIRALTY LAW. 3.

Can. Stats. 1919, Cap. 36, Sec. 74. - **91**
See BANKRUPTCY. 2.

Can. Stats. 1920, Cap. 32, Secs. 35 to 43. - - - - - - - - **88**
See PRACTICE. 10.

Can. Stats. 1923, Cap. 22. - **158, 318**
See CRIMINAL LAW. 17.
IMMIGRATION. 3.

Can. Stats. 1923, Cap. 38, Secs. 10(2), 26 and 38. - - - - - **295**
See IMMIGRATION. 1.

Can. Stats. 1924, Cap. 100. - - **28**
See CHURCH UNION.

Can. Stats. 1925, Cap. 39, Sec. 1. - **211**
See CRIMINAL LAW. 5.

Criminal Code, Secs. 226, 228, 641 and 986. - - - - - - - - **309**
See CRIMINAL LAW. 6.

Criminal Code, Secs. 227(*d*), 228, 235(2) and 986. - - - - **248**
See CRIMINAL LAW. 12.

Criminal Code, Secs. 263, 858 and 901. **1**
See CRIMINAL LAW. 14.

STATUTES—*Continued.*

Criminal Code, Sec. 749. - - **280**
See CRIMINAL LAW. 1.

Criminal Code, Secs. 1013(2) and 1022. - - - - - - - **277**
See CRIMINAL LAW. 8.

Criminal Code, Sec. 1124. - - **158**
See CRIMINAL LAW. 17.

R.S.B.C. 1924, Cap. 6. - - **322**
See PRACTICE. 3.

R.S.B.C. 1924, Cap. 34, Sec. 7. - **340**
See PROHIBITION.

R.S.B.C. 1924, Cap. 34, Secs. 7, 9 and 12. - - - - - - - **86**
See CASE STATED.

R.S.B.C. 1924, Cap. 5, Sec. 47. - **240**
See ADMINISTRATION. 1.

R.S.B.C. 1924, Cap. 53, Sec. 110. - **407**
See REAL ESTATE.

R.S.B.C. 1924, Cap. 62. - - **313**
See SUCCESSION DUTY ACT.

R.S.B.C. 1924, Cap. 93, Sec. 114. - **264**
See CRIMINAL LAW. 2.

R.S.B.C. 1924, Cap. 123. - - **81**
See JUDGMENT. 2.

R.S.B.C. 1924, Cap. 127. - - **324**
See LAND TITLES.

R.S.B.C. 1924, Cap. 131, Sec. 139. **106**
See APPEAL. 7.

R.S.B.C. 1924, Cap. 135, Sec. 2(25). **418**
See WOODMAN'S LIEN.

R.S.B.C. 1924, Cap. 136, Secs. 100 and 101. - - - - - - - - **161**
See SOLICITOR AND CLIENT.

R.S.B.C. 1924, Cap. 143, Sec. 21. - **407**
See REAL ESTATE.

R.S.B.C. 1924, Cap. 146, Sec. 53. - **329**
See CRIMINAL LAW. 15.

R.S.B.C. 1924, Cap. 146, Sec. 66, Subsecs. (1) and (2). - - - - **423**
See CRIMINAL LAW. 10.

R.S.B.C. 1924, Cap. 146, Sec. 91. - **289**
See CRIMINAL LAW. 11.

R.S.B.C. 1924, Cap. 191, Secs. 3 and 4(*c*)(*iv.*). - - - - **216**
See PRACTICE. 9.

STATUTES—*Continued.*

R.S.B.C. 1924, Cap. 244, Secs. 2 and 5(1)(*a*). - - - - - **336**
See TAXATION. 4.

R.S.B.C. 1924, Cap. 244, Secs. 34, 41 and 43. - - - - - - - **313**
See SUCCESSION DUTY ACT.

R.S.B.C. 1924, 1924, Cap. 245. - **86**
See CASE STATED.

R.S.B.C. 1924, Cap. 245, Secs. 35 and 77. - - - - - - - **329**
See CRIMINAL LAW. 15.

R.S.B.C. 1924, Cap. 245, Sec. 77. **264, 340**
See CRIMINAL LAW. 2.
PROHIBITION.

R.S.B.C. 1924, Cap. 251. - - **481**
See TAXATION. 3.

R.S.B.C. 1924, Cap. 254, Secs. 42 and 99. - - - - - - - **514**
See TAXATION. 2.

R.S.B.C. 1924, Cap. 254, Secs. 42(*c*), 138 and 141. - - - - - **130**
See TAXATION. 1.

R.S.B.C. 1924, Cap. 256, Secs. 3 and 5. - - - - - - - **518**
See HUSBAND AND WIFE.

R.S.B.C. 1924, Cap. 258. - - **284**
See TRADE UNION.

R.S.B.C. 1924, Cap. 262, Sec. 80. - **41**
See ADMINISTRATION. 2.

R.S.B.C. 1924, Cap. 271, Secs. 100 and 130. - - - - - - - **194**
See TRESPASS.

R.S.B.C. 1924, Cap. 276. - - **418**
See WOODMAN'S LIEN.

R.S.C. 1906, Cap. 48, Secs. 20, 116, 190 and 206. - - - - - - **211**
See CRIMINAL LAW. 5.

R.S.C. 1906, Cap. 113, Secs. 72(*c*), 96 and 100. - - - - - **399**
See ADMIRALTY LAW. 3.

R.S.C. 1906, Cap. 113, Sec. 191. - **24**
See ADMIRALTY LAW. 5.

R.S.C. 1906, Cap. 144. - - - **373**
See WINDING-UP.

SUCCESSION DUTY — Property outside Province—Death of owner outside Province. - - - - **336**
See TAXATION. 4.

SUCCESSION DUTY ACT — *Application under section 34—Judge—In Chambers—Persona designata—Fresh proceeding—Costs—Crown Costs Act—R.S.B.C. 1924, Cap. 244, Secs. 34, 41 and 43; Cap. 62.*] A summons was taken out in the Supreme Court for the defendant to appear before a judge of the Court upon an application of the Minister of Finance of British Columbia who claims $1,601.41 being succession duty payable by the defendant as administratrix of the estate of Leonora Clapham, deceased. It was held on the application that the proceedings were obviously meant to be taken under section 34 of the Succession Duty Act; that under that section the judge is *persona designata* and the proceedings should not have been instituted in the Supreme Court, the application should therefore be dismissed. *Held*, on appeal, that as it appeared that after the proceedings taken before MURPHY, J. Crown counsel gave notice to the defendant that he would apply to the judge for a summons to be issued by the judge himself and duly made an application to MACDONALD, J. for a summons in accordance, as he thought, with the provisions of the Succession Duty Act but the learned judge refused to issue a summons, this was an entirely distinct proceeding which amounted to an abandonment of these proceedings and the appeal should be quashed. THE KING v. BURKE-ROCHE. **313**

SUMMARY CONVICTION. - **158**
See CRIMINAL LAW. 17.

TAXATION—*Assessment—Hops grown on farms—Taxed on income—Personal poperty tax claimed—Petition for refund under section 138 of the Taxation Act—Manifest error—Meaning of—R.S.B.C. 1924, Cap. 254, Secs. 42(c), 138 and 141.*] The British Columbia Hop Company Limited raised hops on its farms in British Columbia. After picking they were dried and bleached in kilns before being baled for sale. Having been taxed on the income derived from the hops for the years 1918 to 1923 inclusive the Company petitioned the Court of Revision for a refund of the difference between the income tax which was paid for these years and the personal property tax which should have been paid claiming that as the income was derived from the growth and sale of hops it was exempt from the income tax under section 42(*c*) of the Taxation Act. The petition was dismissed on the ground that as the income tax was paid under a mistake of law the Company could not recover. *Held*, on appeal (MARTIN and MCPHILLIPS, JJ.A. dissenting), that section 138 only provides for the hearing of cases

TAXATION—*Continued.*

where there is manifest error in the assessment roll, there being no jurisdiction to entertain a petition complaining of an error in a decision of fact which could only be decided by the trial of an issue and the appeal should be dismissed. *Per* MACDONALD, C.J.A.: If the Court of Revision had power to entertain the petition by virtue of section 138, the case would not be governed by the common law rule that one cannot recover money paid under a mistake of law. BRITISH COLUMBIA HOP COMPANY v. THE KING. - - - - - **130**

2.——*Income tax—Company acting as insurance agents — Bonus on commission contingent upon the profits of parent company—Liability to income tax—R.S.B.C. 1924, Cap. 254, Secs. 42 and 99.*] Seeley & Company Limited solicited insurance as agents for several insurance companies. They were paid a commission for the business they did, and it was arranged that at the end of each year a bonus or contingent commission was payable to them only in the event of the parent company making a profit of a certain amount on the year's operations. Seeley & Company were assessed on their income derived from the contingent commissions paid them and an appeal to the Court of Revision on the ground that the parent company had already paid a tax on these profits was dismissed. *Held*, on appeal, affirming the decision of D. MCKENZIE, judge of the Court of Revision, that there is no difference between the two means of remuneration. He bargains for both equally when he becomes an agent and the fact that one is contingent and payable out of the net profits while the other is not contingent and is payable out of gross profits does not differentiate them. They are both liable for income tax. *In re* TAXATION ACT. SEELEY & COMPANY LIMITED v. BROWN. - - - - - **514**

3.——*Provincial — Fuel-oil Tax Act—Indirect taxation — Ultra vires—R.S.B.C. 1924, Cap. 251—30 & 31 Vict., Cap. 3, Sec. 92, No. 2 (Imperial).*] Section 2 of the Fuel-oil Tax Act defines a "purchaser" as "any person who within the Province purchases fuel-oil when sold for the first time after its manufacture in or importation into the Province." Sections 3, 4 and 5 provide, *inter alia*, first, that "Every purchaser shall pay to His Majesty for the raising of a revenue for Provincial purposes a tax equal to one-half cent per gallon of all fuel-oil purchased by him, ... "; secondly, that "Every vendor at the time of the sale

TAXATION—*Continued.*

of any fuel-oil to a purchaser shall levy and collect the tax imposed by this Act in respect of the fuel-oil, ... "; thirdly, that "Every vendor shall, with each monthly payment, furnish to the collector a return shewing all sales of fuel-oil made by him to purchasers during the preceding month, ..." The defendant Company buy fuel-oil from the Union Oil Company of Canada and consume all that they buy in and about the Port of Vancouver. The Union Oil Company of Canada purchase its fuel-oil from the Union Oil Company of California. These two companies have the same executive officers. The shares in the Canadian company are owned or controlled by the California company but they are separate legal entities. The California company ships the fuel-oil from California to the Canadian company at Vancouver and the Canadian company pay the California company for the oil at San Pedro, California, on the date of delivery at Vancouver, plus transportation and other charges, the quantity of oil paid for being equal to the quantity discharged into the tanks of the Canadian company at Vancouver. In an action for payment of the taxes alleged to be due and payable under said Act it was held that the first purchaser after importation of the fuel-oil into British Columbia was the Union Oil Company of Canada and that the tax was therefore indirect and *ultra vires* and that even assuming the defendant was the first purchaser the tax sought to be imposed is *ultra vires* of the local Legislature as not being direct taxation within the meaning of section 92, No. 2 of the British North America Act. *Held*, on appeal, affirming the decision of MORRISON, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that assuming the respondents were the first purchasers and that those who passed the Act were aware of the facts at the time and intended or desired that the tax should be paid by the very person upon whom it was imposed, there must be some line of demarcation between what the Province may tax and what it may not and this line may not be made to depend in all cases on the facts existing at the time the tax is imposed but ought to be made to depend on what may reasonably be expected when conditions shall have become static. The evidence is that fuel-oil has become a commodity of commerce in other countries and reason and experience point to the conclusion that it will be so here. The tax should therefore be construed as an indirect tax and not authorized by section 92, No. 2 of the British North America Act. *Per* GALLIHER and MACDONALD, JJ.A.: The inference from the evidence is that the Canadian company are not purchasers but are the marketing agents of the California company and the defendant is therefore the first purchaser in British Columbia. [Affirmed by the Supreme Court of Canada.] ATTORNEY-GENERAL OF THE PROVINCE OF BRITISH COLUMBIA V. CANADIAN PACIFIC RAILWAY COMPANY AND UNION STEAMSHIP COMPANY OF BRITISH COLUMBIA LIMITED. - - - **481**

4.——*Succession duty—Property outside Province—Death of owner outside Province—R.S.B.C. 1924, Cap. 244, Secs. 2 and 5(1) (a)—Appeal.*] A deceased had lived in British Columbia but shortly before his death he went to Scotland where he died. At the time of his death he owned some real property in British Columbia but the larger portion of his estate consisted of personal property in the form of cash, stocks and other securities in Scotland. On petition it was held that the personal estate was not subject to succession duty. *Held*, on appeal, affirming the decision of MORRISON, J. (MARTIN, J.A. dissenting) that by section 2 of the Succession Duty Act the Legislature left property actually situate abroad, though in contemplation of law situate here, free when a deceased person had died abroad although domiciled here. *In re* SUCCESSION DUTY ACT AND WILSON. - - **336**

TESTATOR'S FAMILY MAINTENANCE ACT. - - - - - - **518**
See HUSBAND AND WIFE.

THEATRE—Stage hands. - - **284**
See TRADE UNION.

TIME POLICY. - - **235, 539**
See INSURANCE, MARINE.

TORT—Infant. - - - - - **453**
See INFANT.

2.——*On high seas.* - - **434**
See ADMIRALTY LAW. 2.

TRADE UNION—*Theatre stage hands—Walk-out — Picketing — Distribution of pamphlets—Statements of opinion—Watching and besetting—Injury to theatre's business—"Fair and reasonable argument"—R.S.B.C. 1924, Cap. 258.*] The plaintiff who owned and operated a theatre reduced the number of his stage hands. The result was a walk-out by the stage hands and the defendant trade-union distributed hand-bills at the theatre entrance addressed to the public stating that the plaintiff's theatre "is

TRADE UNION—*Continued.*

unfair to organized labour." They further had motor-cars and sandwich-men displaying signs and banners bearing the same statement before the entrance to the theatre. In an action for damages and an injunction:—*Held*, that the acts were intended to injure the plaintiff's business for the purpose of forcing him to employ the number of stage hands the defendants desired him to employ and the defendants' acts resulted in a material falling off in the plaintiff's business. The defendants' acts amounted to an unlawful watching and besetting and the Act relating to trade-unions did not save the defendants from liability; the plaintiff is therefore entitled to damages and an injunction. SCHUBERG v. LOCAL INTERNATIONAL ALLIANCE THEATRICAL STAGE EMPLOYEES *et al.* - - - - **284**

TRESPASS—*Cutting timber for clearing—Brushwood fire allowed to spread—Damages—Limitation of action—R.S.B.C. 1924, Cap. 271, Secs. 100 and 130.*] In 1910 the defendant Company constructed a transmission line from Jordan River to Goldstream and it being necessary to pass through the plaintiff's property the Company, under agreement with her, obtained the necessary right of way across her land. In 1924, deeming it necessary that the transmission line should be diverted where it crossed the plaintiff's property, and considering there was the right to do so under the agreement of 1910, the Company, through its engineer and employees, entered upon the plaintiff's lands and began cutting out the right of way for the proposed deviation, set fires to remove *debris* and allowed the fires to spread on plaintiff's land. In an action for damages resulting from the defendant's trespass, the defence was raised that the plaintiff had not given notice of this action to the Attorney-General within six months next after the doing or committing of the damage had ceased as required by section 130 of the Water Act. *Held*, that although the Company had no leave or licence under the 1910 agreement to enter upon the plaintiff's land and construct a second pole line and its employees were negligent in their conduct of the fires used in clearing the right of way, it is entitled to the benefit of section 130 of the Water Act and the action must be dismissed. VOGEL v. VANCOUVER ISLAND POWER CO. - - - - - - **194**

TRIAL—*Action for libel—Venue—Application for change of—Fair trial—Discretion—Appeal.*] An action was brought for damages for libelous statements published at

TRIAL—*Continued.*

the instigation of the defendant in Vancouver in January, 1924, in a pamphlet entitled "The Searchlight" under the heading "A petition for Royal Commission." The writ was issued in Nanaimo and the defendant applied for change of venue. Nine affidavits were read in support of the application, all expressing the belief that a fair trial could not be had in Nanaimo because the plaintiff was returned at the previous Provincial election for Nanaimo; that he was a minister of the Crown; a resident of Nanaimo for many years; was popular amongst the people of the town and was a man of great influence in this comparatively small place. It was held by the judge who heard the application that the defendant had reasonably established that a fair trial could not be had in Nanaimo and ordered a change of venue. *Held*, on appeal, reversing the decision of MACDONALD, J., that the affidavits submitted by the defendant were mere expressions of opinion founded on the plaintiff's popularity that he is a minister of the Crown representing the constituency and of considerable influence. In order to found a case for change of venue facts must be set out, not opinions. The judge below not only founded his order upon insufficient evidence but proceeded on a wrong principle in accepting opinion evidence supported as above without any act of misuse of his popularity or influence, and the venue should be restored to Nanaimo. SLOAN v. MCRAE. - - - - - - - **464**

TRUSTEE. - - - - - - **91**
See BANKRUPTCY. 2.

TUG-BOAT. - - - **235, 539**
See INSURANCE, MARINE.

ULTRA VIRES. - - - - - **481**
See TAXATION. 3.

VAULT—Burglary. - - - - **450**
See INSURANCE, BURGLARY.

VENDOR AND PURCHASER—*Sale of land—Promoters of syndicate selling their own interest—Disclosure—Duty on vendor—Lapse of time—Materiality.*] The defendants Cross & Company formed a syndicate in June, 1912, for the purpose of purchasing a block of land with a view to resale at a profit. On the formation of the syndicate the block of land was purchased by way of an agreement for sale and a first payment was made thereon. Cross & Company took an interest in the syndicate themselves and shortly afterwards sold their interest at a

VENDOR AND PURCHASER—*Continued.*

small profit to the plaintiff. Mr. Cross of the firm of Cross & Company and with whom the negotiations were carried on by the plaintiff died in 1923. The plaintiff brought action in 1926 to set aside the contract and for repayment of the moneys paid mainly on the ground of nondisclosure of the fact that the interest sold belonged to Cross & Company. The plaintiff in his evidence stated his only reason for buying was that the surveyor-general of the Province had taken an interest. *Held*, that it does not appear that the vendor failed in any duty he owed the plaintiff; that his duty to disclose does not extend beyond the facts material to the contract, and the action should be dismissed. YOUNG v. CROSS & COMPANY AND O'REILLY. - - **188**

VENUE—Application for change of—Fair trial. - - - - - **464**
See TRIAL.

WAGES—Action for. - - - **399**
See ADMIRALTY LAW. 3.

WALK-OUT. - - - - - **284**
See TRADE-UNION.

WARRANT—Omission of date of Act—Validity. - - - **318**
See IMMIGRATION. 3.

2.——*Sufficiency of material for.* **309**
See CRIMINAL LAW. 6.

WARRANT OF COMMITMENT. **158**
See CRIMINAL LAW. 17.

WILL. - - - - - - - - **518**
See HUSBAND AND WIFE.

WINDING-UP—*Liquidator—Bond of indemnity — Secured creditor — Instructions to liquidator to realize on securities—Moneys realized not covered by bond—R.S.C. 1906, Cap. 144.*] Messrs. D. E. Brown, Hope & Macaulay Limited, a firm in Vancouver, was ordered to be wound up under the provisions of the Winding-up Act and the defendant Lockwood was appointed official liquidator. He was ordered to furnish security in the sum of $15,000 and the defendant Company being approved as surety, he entered into a bond with the Company to secure this sum. Some years before the liquidation one Ormrod loaned D. E. Brown, Hope & Macaulay $30,000 and received as collateral security an agreement for sale on certain land, three mortgages and an equity in a fourth mortgage. Upon liquidation Ormrod declined to file proof of claim but two years later he gave Lockwood a power of attorney with instructions to foreclose his securities, vest title in Ormrod and sell. These instructions were carried out and Lockwood realized $21,000. Of these moneys he remitted part to Ormrod direct and part to Ormrod's agents in Vancouver but appropriated to his own use a balance of over $9,000. He also misappropriated moneys of the Company, his total defalcations being over $18,000. It appeared from the books that Lockwood deposited Ormrod's moneys in the Company's account. Upon the plaintiff being appointed liquidator he brought action against the surety and recovered the full sum of $15,000. *Held*, on appeal, reversing the decision of HUNTER, C.J.B.C. (MACDONALD, C.J.A. dissenting), that Ormrod having failed to prove his claim or value his securities and having realized on his securities through the agency of Lockwood he was debarred from ranking on the estate for any deficiency. Lockwood therefore acted solely as agent for Ormrod in realizing on his securities and outside the liquidation proceedings and the defendant Company under the bond did not guarantee the fidelity of Lockwood in respect to these transactions. MCFARLAND v. LONDON & LANCASHIRE GUARANTEE & ACCIDENT COMPANY OF CANADA. - - - - - - - **373**

WOODMAN'S LIEN—*Contract to do work —Labourers employed by contractor—Liens —Assignment — Proof of—R.S.B.C. 1924, Cap. 276; Cap. 135, Sec. 2(25).*] B. brought action for services in cutting and hauling logs and for enforcement of a woodman's lien filed in respect thereto and S. brought two actions of the same nature, one for his own services and a second as assignee of eleven workmen who had performed a like service. The defence was that B. was working as a contractor, that S. and the eleven workmen were employed by him and that there was no proof of the assignment to S. The actions were consolidated for trial and it was held by the trial judge that with the exception of S.'s claim on his own behalf the actions to enforce the lien failed but that the plaintiffs were entitled to judgment for services rendered in the three actions. *Held*, on appeal, reversing the decision of MCINTOSH, Co. J., that there was evidence from which it should be inferred that B. was working under a contract with the Company and that the twelve workmen were employed by him and they had no right of action against the Company. *Per* MARTIN,

WOODMAN'S LIEN—*Continued.*

J.A.: As to S.'s claims as assignee of eleven workmen, they cannot be allowed because of absence of necessary legal proof of the assignment or of notice thereof which must be strictly proved if traversed. The decision in *Dempsey* v. *Kurek* (1923), 3 W.W.R. 1007, holding that in actions of this kind for wages the provisions of section 2(25) of the Laws Declaratory Act respecting "absolute assignments" of "any debt or other legal chose in action" do not apply, cannot be affirmed. SHEEPWASH v. DEER MOUNTAIN LUMBER CO. LTD. - **418**

WORDS AND PHRASES—"Any person aggrieved"—Meaning of. **280**
See CRIMINAL LAW. 1.

2.——*"Fair and reasonable argument"—Meaning of.* - - - - - - **284**
See TRADE UNION.

3.——*"Manifest error"—Meaning of.* - - - - - - - - - - **130**
See TAXATION. 1.

4.——*"Watching and besetting"—Meaning of.* - - - - - - **284**
See TRADE UNION.