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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JUSTICES OF THE COURT OF APPEAL.

CHIEF JUSTICE:

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HIS HON. WILLIAM EDWARD FISHER	Atlin

ATTORNEY-GENERAL:

THE HON. ROBERT HENRY POOLEY, K.C.

MEMORANDA

On the 24th of January, 1933, William Edward Fisher, Barrister-at-Law, was appointed Judge of the County Court of Atlin and a Local Judge of the Supreme Court of British Columbia in the room and stead of His Honour Frederick McBain Young, resigned.

On the 30th of January, 1933, Andrew Miller Harper, Barrister-at-Law, was appointed Judge of the County Court of Vancouver and a Local Judge of the Supreme Court of British Columbia.

On the 27th of May, 1933, His Honour Henry Dwight Ruggles, Junior Judge of the County Court of Vancouver, died at the City of Vancouver.

On the 11th of August, 1933, Charles James Lennox, Barrister-at-Law, was appointed a Judge of the County Court of Vancouver and a Local Judge of the Supreme Court of British Columbia.

On the 6th of September, 1933, Harold Edwin Bruce Robertson, one of His Majesty's Counsel learned in the law, was appointed a Puisne Judge of the Supreme Court of British Columbia in the room and stead of the Honourable Francis Brooke Gregory, resigned.

On the 6th of September, 1933, William Garland Ernest McQuarrie, one of His Majesty's Counsel learned in the law, was appointed a Justice of the Court of Appeal in the room and stead of the Honourable William Alfred Galliher, resigned.

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COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

IN RE CAROLINE D. JOHNSON AND MARY C. JOHNSON, INFANTS.

COURT OF APPEAL

1932

June 7.

IN RE JOHNSON

Infants Act—Neglected children—Committed to care of Children's Aid Society—Liability for maintenance—Residence prior to commitment—R.S.B.C. 1924, Cap. 112, Secs. 57, 80 and 91—B.C. Stats. 1928, Cap. 18, Secs. 3 and 4.

Section 80 of the Infants Act provides that "(1.) Any judge shall, upon the application of any society to whose custody or control a child is committed, make an order for the payment by the municipality to which the child belongs for a reasonable sum . . . for the expense of supporting the child by the society. . . . (2.) For the purposes of this section, any child shall be deemed to belong to the municipality in which the child has last resided for the period of one year. . . ." Section 3 of the amending Act of 1928 recites: "Provided that no child shall be deemed to belong to a municipality or to have acquired a residence therein for the purposes of this section by reason only of the fact that the child has resided in the municipality as an inmate of a home or institution in which the child was placed. . . ."

The parents of the two children in question (7 and 8 years old) with their family came to New Westminster from Manitoba in March, 1929, but in the following July moved to the Municipality of Surrey. During the same month the mother became ill and she left the two children in the Academy of the Sisters of St. Ann in New Westminster, where they remained. Shortly after the mother was taken to the Mental

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Hospital in Essondale, and later the father falling into unemployment, the two children, on application to the Juvenile Court in New Westminster, were declared "neglected children" and committed to the care of the Children's Aid Society of the Catholic Archdiocese of Vancouver, but the order made no provision for the costs of their care and custody. On the application of the Children's Aid Society an order was made on the 15th of January, 1932, that the City of New Westminster do pay said society $4 per week in respect of each infant from the 23rd of October, 1930, until they attain the age of 18 years.

Held, on appeal, reversing the order of MORRISON, C.J.S.C. (MACDONALD, C.J.B.C. dissenting), that it is impossible legally to hold that those children "reside" in or "belong to" the City of New Westminster within the meaning of the Infants Act, and the appeal should be allowed.

Statement

APPEAL by the City of New Westminster from the order of MORRISON, C.J.S.C. of the 15th of January, 1932, whereby the said city was ordered to pay the Children's Aid Society of the Catholic Archdiocese of Vancouver the sum of $4 per week in respect of the infants Caroline Dorothy Johnson and Mary Charlotte Johnson, for their maintenance from the 23rd of October, 1930, until they have attained the age of eighteen years. The children's father with his family came to New Westminster from Manitoba in March, 1929, but in the following July they moved into the Municipality of Surrey where the father still lives. The children's mother took them to the Academy of the Sisters of St. Ann at New Westminster in July, 1929, where they remained until the 23rd of October, 1930. In the meantime the mother's health broke down and she was taken to the Essondale Mental Hospital. The father, who previously worked as a labourer, being unable to find employment, an order was made by the judge of the Juvenile Court for New Westminster on the 23rd of October, 1930, declaring the two children to be "neglected children" within the meaning of the term in the Infants Act, and they were committed for "their temporary home" to the Children's Aid Society of the Catholic Archdiocese of Vancouver, but the order made no provision for the costs of their care and custody. The order appealed from was then made on the application of the Children's Aid Society.

The appeal was argued at Vancouver on the 3rd of March, 1932, before MACDONALD, C.J.B.C., MARTIN and MACDONALD, JJ.A.

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McQuarrie, K.C., (*Donaghy, K.C.*, with him), for appellants: The question is whether the two children were residents of New Westminster for one year prior to entering the Children's Aid Society under the order of the judge of the Juvenile Court on October 23rd, 1930. The two children were in St. Ann's Academy in New Westminster for more than a year previous to this, but the family home was undoubtedly in the Municipality of Surrey where the father lived continuously and had his home. The City of New Westminster should not be held liable under the Act and the learned judge below had no jurisdiction to make this order: see *Guardians of Holborn* v. *Guardians of Chertsey* (1884), 54 L.J., M.C. 53.

Argument

A. deB. McPhillips, for Children's Aid Society: These are "neglected children" and when the committal order was made the judge of the Juvenile Court made no provision for maintenance. Under section 80 of the Act we may apply at any time to any judge for relief and we are not bound by any one judge: see *Digges Case* (1600), Moore, K.B. 603; 72 E.R. 787. As to the children's "residence" previous to the order of the judge of the Juvenile Court see *The King* v. *City of Fredericton Assessors* (1917), 36 D.L.R. 685 at p. 689; *Stoke-on-Trent Borough Council* v. *Cheshire County Council* (1915), 3 K.B. 699 at p. 704; *Leicester Corporation* v. *Stoke-on-Trent Corporation* (1918), 83 J.P. 45; *Berks County Council* v. *Reading Borough Council* (1921), 37 T.L.R. 642. The English cases under the Poor Law Act do not apply here owing to the difference in the statute.

H. C. Green, for the Attorney-General.

Donaghy, in reply: There is the distinction in the case of children of tender age when the home of the father is that of the child. The cases referred to apply to children of 15 and over.

Cur. adv. vult.

7th June, 1932.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The two little girls mentioned in the style of cause, on an application to the Juvenile Judge of New Westminster, were on the 23rd of October, 1930, declared to be neglected children within the meaning of the term in the

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Infants Act above mentioned, and were committed to the care and custody of the Children's Aid Society of the Catholic Archdiocese of Vancouver. The children had resided for more than a year previously at St. Ann's Academy in New Westminster. The order made no provision for the costs of their care and custody. The affidavit of J. S. Foran, agent of the said society, shews that the society maintained the said children at its own expense ever since October 23rd, 1930.

On the 5th day of December, 1931, the said society made application to a judge of the Supreme Court praying an order against the City of New Westminster for payment of at least $3 per week in respect of each child for her maintenance and support, and the order was made against the city for $4 per week each.

The city now appeals from that order, the principal grounds being that the infants did not belong to New Westminster; that they did not reside there for one year before their committal and that the said judge had no jurisdiction to make the order. It also referred to the Infants Act Amendment Act, 1928, chapter 18 of the statutes of that year, but in the conclusion at which I have arrived it becomes unnecessary to do so.

MACDONALD, C.J.B.C.

The father is a labourer and had no home in which the children could have been taken care of. He lived in a shack in South Westminster in Surrey Municipality. He was out of employment and could not give the children adequate care; the mother was an inmate of a mental hospital and unable to look after them. I accept the finding of the Juvenile Court judge that the children were neglected children. There was no appeal against his finding. I think they belonged to New Westminster. They were left there by their mother more than a year before the application for their committal, and further neither the father nor mother was able although perhaps willing to take care of the children. There was no home provided to which the children could go. These children resided in New Westminster and were being temporarily taken care of at St. Ann's Academy in New Westminster where they were left by their mother and since it is clear that they resided in New Westminster for more than a year with two or three weeks' absence only during the holiday they can fairly be held to have had their home there.

The application for the committal order was made to the Juvenile Court judge by the secretary of the said Children's Aid Society. His order was that

I do order that the said Caroline Dorothy Johnson and Mary Charlotte Johnson be delivered into the care and custody of the Children's Aid Society of the Catholic Archdiocese of Vancouver and that they be forthwith taken to their temporary home.

MACDONALD, C.J.B.C.

I think I must accept as valid the order of the Juvenile Court judge, and it then comes to this—that the children had been properly committed to the care of the said society but under the order no term appears for the payment to the society. Section 80 of the said Act provides that "any" judge [of whom the judge who fixed the compensation is one designated in the interpretation clause as a judge] shall make an order for compensation to the society upon the application of the society to whose custody and control the child is committed. That section seems to contemplate such an application to "any judge" where the order of committal is silent on the subject which is the case here. See also section 80, subsections (5) and (6).

I, therefore, think the order appealed from should be affirmed.

The appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A.: This is an appeal by the City of New Westminster from an order of Chief Justice MORRISON of 15th January last, whereby that city was directed to pay $8 per week to the Children's Aid Society of the Catholic Archdiocese of Vancouver for the support of two infant children, aged 7 and 8 years respectively, and it is submitted that the order is not warranted by the statute on which it was based, being the Infants Act, Cap. 112, R.S.B.C. 1924, Sec. 80, and the amendment of 1928, Cap. 18, Secs. 3-4, because the children were transients, the residence of their parents being outside said city for the period of time in question, and the case turns upon the meaning of the words "municipality to which the child belongs" and "be deemed to belong" in section 80, as further defined by the proviso added by section 3 of 1928.

By an order of the Juvenile Court for the City of New Westminster dated 23rd October, 1930, the custody of these children was committed for "their temporary home" to the respondent

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society and not for nearly a year and a quarter thereafter did it obtain the said order for support now appealed from, upon a notice of motion dated the 5th of December previous.

Subsection (2) of section 80 provides that

For the purposes of this section, any child shall be deemed to belong to the municipality in which the child has last resided for the period of one year; but in the absence of evidence to the contrary, residence for one year in the municipality in which the child was taken into custody shall be presumed.

By the said amendment of 1928 the following proviso was added to that subsection:

Provided that no child shall be deemed to belong to a municipality or to have acquired a residence therein for the purposes of this section by reason only of the fact that the child has resided in the municipality as an inmate of a home or institution in which the child was placed by the superintendent or by a children's aid society to whose custody or control the child is committed; . . .

MARTIN, J.A.

The evidence, which is not in dispute, as to the "last" residence in the appellant municipality for one year previous to the date of the committal order (23rd October, 1930) in the attempt to establish the fact of the infants "belonging" thereto, shews that these children with their parents, Norwegians, came to this Province in March, 1929, from Manitoba where they had lived for two years, and went to live in the City of New Westminster but left there in July to live in the Municipality of South Westminster, and in that month the mother being ill and the father out of work and very "hard up," the children were charitably and voluntarily taken by the Sisters of St. Ann into their academy at New Westminster at the request of their mother who brought them there and since July, 1929, they have been residing in that academy up to the date of said committal order and of the one now appealed from; the father says be supported the children there "just for two months." The mother became insane about the end of 1929 and was committed to Essondale Asylum; the father was still living in South Westminster and had obtained employment but was unable to look after his family of five children as his deposition taken before the police magistrate of Surrey Municipality on the 3rd of January, 1930, shews, *viz.*:

I am residing at South Westminster in the Municipality of Surrey. I moved into Surrey in July, 1929. I am working at the Timberland Mills. My wife is sick all the time and is not at home now and I have to be away

from and so cannot give proper attention to the children. I am earning $3.20 a day. I am working every day. I have 2 children in St. Ann's Convent. I am a Catholic. I am a Norwegian. My wife was born in the U.S.A. My wife is a Catholic. My wife at the present time is in Essondale. If my wife gets better I wish the children to come home to us. I am quite willing that the Children's Aid Society of the Catholic Archdiocese of Vancouver take care of the children to such time.

On that day the said magistrate made an order that the three boys, out of the five children, should be delivered to the respondent society, on the ground that they were "neglected children" within the meaning of section 56 of said Act, but it is only fair to say that no imputation was or is made against the character of the father, but simply his inability to provide for and look after the children in their mother's absence.

Unfortunately his wife's condition did not improve and he fell into unemployment and at the time of the subsequent committal (23rd October, 1930) of these remaining two little children he said:

Do you want your children? I would like to have them if I could do so.

Do they ever come to visit you? Not very often.

Where is [your] shack? By the first sawmill.

You are not paying rent? No, I can't pay rent.

Were you living there when the children were taken away from you? Yes. A policeman took them away.

MARTIN, J.A.

During the past year the respondent society received $37.50 from an unnamed source and $5 from the father towards the support of the children.

It will be seen from this evidence that the said proviso of 1928 applies to this case because the children were after the committal "inmates of a home or institution in which [they] were placed by the superintendent [of neglected children] or by a children's aid society to whose custody or control [they] were committed," and so that period of statutory custody does not run against the City, and before that they had been placed in said Academy by their mother with their father's consent but with the clearly established intention of bringing them back to him when his unfortunate domestic conditions improved, which intention negatives abandonment.

The said committal by the Juvenile Court was made under section 57 of the Act, and section 91 declares that:

91. Upon an order being made by the judge for the committal of any child to any charitable society authorized under this Part, the order shall

specify the municipality chargeable with the maintenance of the child, and a copy of the order with a copy of the depositions upon which the child has been committed shall be forwarded by registered letter to the clerk of the municipality chargeable under the committal with the maintenance of the child; and unless the municipality moves before the judge to set aside the order in respect of maintenance within one month after receiving a copy of the order, the municipality shall be deemed to have consented to the order and shall be estopped from denying liability thereunder. The judge may at any time vary the order and charge any other municipality, upon which order like proceedings may be taken.

MARTIN, J.A.

It is to be noted that no more evidence of any weight or materiality was adduced before MORRISON, C.J.S.C. in Vancouver than was before the judge of the Juvenile Court in New Westminster and no explanation is given for not taking the obvious course of applying to that same Juvenile Court to "vary" its own order instead of to another judge in another place, not already familiar with the circumstances: this is, moreover, quite apart from obvious objections to such a proceeding, which is in the nature of an appeal by a side wind, and to a Court of no greater jurisdiction *ad hoc,* than the one in effect, appealed from, as is shewn by the definition of the word "judge" in section 51 of the Act (and as employed in the relevant sections 56, 57, 80 and 91), wherein it is said:

"Judge" includes any Judge of the Supreme Court, any Judge of a County Court, any Stipendiary or Police Magistrate, any Judge of a Juvenile Court. . . .

The only relevant additional fact since the committal is that the children have been inmates of the respondent society's "institution" thereunder, but said proviso of 1928 declares that no presumption that a child "belongs" to a municipality or has acquired a residence therein shall arise "by reason only of [that] fact."

It is to be observed that the Juvenile Court judge did not make any order "specifying the municipality chargeable with the maintenance of the child" as the section (91) directs he "shall" do, because, as he said in his judgment on the point:

COURT: I don't see that either municipality should be burdened with this. The family only lived in New Westminster for two months and these children were put in the home by Miss Gray, district nurse, whoever she is. I will make an order committing them, but I will make no order as to who shall support them, having no evidence before me to warrant making an order against either municipality.

That he was justified in adopting this course appears from

the evidence hereinbefore cited and the statute itself shews that there must be cases wherein its own requirements of "belonging" would render it impossible to "specify" that any municipality was so "chargeable," *e.g.*, a child might have resided in this Province for two, or indeed many years in different municipalities but yet has not "resided for the period of one year" in any one of them as subsection (2) requires, and therefore there would be no jurisdiction to make any charging order at all at the time of committal. What the Juvenile Court did here was to refuse to make an order against this appellant municipality, which is included in the refusal to make any order at all, and no good reason has, in my opinion, been shewn for disturbing that finding assuming it was open to any other "judge" (defined as aforesaid), or even to this Court, to do so. It is not to be overlooked that said sections 57 and 80 refer to the "temporary home" of the child and the committal directs that the children "be forthwith taken to their temporary home" with the respondent society.

MARTIN, J.A.

As to the meaning of the said expression "belongs to the municipality" several cases have been cited to us on the meaning of "residence" under the particular language of different statutes, and I have considered all of them, and many others, but that word has not the same import and is one, as all the decisions shew, which has not a fixed but an elastic meaning varying according to the subject-matter dealt with by the particular legislation. The case of most assistance as being closest to the facts before us (though all of them differ materially thereupon) is *Guardians of Holborn Union* v. *Guardians of Chertsey Union* (1885), 33 W.R. 698; 54 L.J., M.C. 137, because it is there laid down that the intention of the father respecting the ultimate return of the children to him from their "temporary home" (though they had been away from him in it, in another parish, for seven years after their mother's death) is a matter of the first consequence in determining their residence, constructive or actual; and with regard to the decision of the local Juvenile Court on that point the following observations of the Master of the Rolls, concurred in by Baggallay and Bowen, LL.J. at p. 139 are most apt, *viz.*:

If the evidence would justify a reasonable person in finding either way,

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the Court below ought not to have overruled the finding. I have a strong opinion that the evidence is in favour of the view that the father always intended to resume living with the children when he was in a position to do so. I do not therefore think that the Court below ought to have overruled what must in fact have been the decision of the magistrates.

And so the judgment of the King's Bench Division was reversed and the magistrates' decision restored, *viz.,* that the children's "residence" was with their father and not in their "temporary home."

In *Berks County Council* v. *Reading Borough Council* (1921), 37 T.L.R. 642, an attempt is made to reconcile the later English decisions, but the uncertainty expressed by Mr. Justice Darling owing to the "very great difficulty" the Court encountered in coming to a decision, is an indication of the divergence in views that is to be expected in such attempt.

MARTIN, J.A.

That the evidence before the judge of the Juvenile Court would "justify a reasonable person in finding either way," as the Master of the Rolls put it, *supra,* is beyond question and therefore his view of the children's real "residence" should not have been disturbed, as it was in substance and effect, by the learned judge appealed from. But, as already pointed out, the expression before us "belongs to the municipality," which imports an element of ownership or attachment to a locality beyond mere "residence" in the ordinary sense, though it is difficult to obtain any authority on its meaning as applied to human beings because it is not so employed in any of the statutes that have come to our attention, and I have been able to obtain little assistance from the few cases on its personal application that I have been able to find.

In *The "Fusilier"* (1865), 3 Moore, P.C. (N.S.) 51, the Privy Council upheld the decision of the Rt. Hon. Dr. Lushington in the Admiralty Court that the words "persons belonging to such ship" in the Merchant Shipping Act include passengers on board the ship as well as the master and crew, Dr. Lushington saying, p. 58:

The phrase "persons belonging to such ship," "belonging" is certainly a phrase of *ancipitis usis,* with reference to the subject-matter; but one of the rules of construing statutes, and a wise rule too, is, that they shall be construed *loquitur ut vulgus,* that is, according to the ordinary interpretation put upon the words by the mass of mankind, according to the common understanding and acceptation of the terms; and I think that nothing is

more common than to say of passengers on board a ship, that they are "persons belonging to the ship." Upon these grounds alone I should hold that "persons belonging to the ship" included passengers.

In affirming this view the Privy Council, *per* Lord Chelmsford, said, pp. 72-3:

It would be strange indeed if an Act intended to encourage and reward the saving of life which is in peril in consequence of the distress and danger of the vessel in which it is embarked, should be construed so as to make a distinction between those who were on board in different capacities and different relations to the vessel. It is a sufficient answer to such an objection to say that nothing is more common in popular language than to speak of "the passengers belonging to such a vessel."

Then *In the Estate of Frogley* (1905), P. 137, it was held that a will creating a trust for all the children who "might belong" to a testatrix included her illegitimate children; and the proprietary idea of "belong" in general is well brought out in the decision of the House of Lords in *Public Trustee* v. *Wolf* (1923), A.C. 544, respecting the charge imposed on the property "belonging" to married women by the Treaty of Peace Order 1919, particularly in the judgment of Lord Birkenhead at p. 558, where he said respecting the expression "belonging to her for her separate use":

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. . . "We are asked to put a limitation on the words 'belonging to her for her separate use,' and to add to them some such words as, 'and not subject to any restraint upon anticipation.' But we must apply the ordinary rule of construction, that the words are to be read in their ordinary sense, and in their full sense, unless there be something in the context to limit their meaning."

After a very careful consideration of this matter (which is one of no small importance in the administration of the Infants Act) it is to my mind impossible legally to hold that these children "reside" in, much less "belong to," the appellant municipality within the meaning of said Act, and therefore, apart from other objections arising out of section 91 as aforesaid, the appeal should be allowed and the order complained of set aside.

MACDONALD, J.A.: I am fully in accord with the reasons for judgment of my brother MARTIN. I am satisfied that these children of tender years do not "belong" to the Municipality of the City of New Westminster. I will only add further that it cannot be said of them that they had the capacity of older children to acquire a residence where they "ate and slept" apart

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from that of their father who resided in the Municipality of Surrey.

I would allow the appeal.

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

Solicitors for appellant: *McQuarrie & Whiteside.*

Solicitors for Children's Aid Society: *McPhillips, Duncan & McPhillips.*

Solicitors for Attorney-General of British Columbia: *Collins & Green.*

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H. E. HUNNINGS & Co. v. HALL

H. E. HUNNINGS & COMPANY LIMITED v. HALL.

Stock-broker—Purchase of shares on margin—Broker's duty—Action against customer for balance of account—Evidence—Onus of proof.

In an action by a stock-brokerage firm against a customer to recover the balance due on margin transactions, the plaintiff recovered judgment.

Held, on appeal, affirming the decision of LAMPMAN, Co. J., *per* MARTIN and MACDONALD, JJ.A., that the trial judge having found, *inter alia*, that the plaintiff as defendant's agent and on his behalf had incurred and discharged liabilities on stock purchases, and had all shares so purchased available for the defendant on payment of the balance due from him, the appeal should be dismissed.

Per MACDONALD, C.J.B.C., and MCPHILLIPS, J.A., that as the plaintiff had failed to prove that it had at all times the shares so ordered available for delivery to the defendant if paid for, the appeal should be allowed: moreover no valid excuse had been given for not selling when the margin was almost exhausted, thereby saving the loss incurred.

The Court being equally divided the appeal was dismissed.

Statement

APPEAL by defendant from the decision of LAMPMAN, Co. J. of the 21st of December, 1931, in an action for the balance due on stock transactions made by the plaintiffs as stock-brokers on behalf of the defendant.

The appeal was argued at Vancouver on the 1st of March, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

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C. G. White, for appellant: We submit that the brokers did not carry out the purchase. There is no proof that the purchase was made or that they paid out any money on behalf of the defendant. The plaintiffs cannot recover unless they shew clearly that they were always in a position to deliver this stock if paid for in full: see *Conmee* v. *Securities Holding Co.* (1907), 38 S.C.R. 601; *Beamish* v. *Richardson & Sons* (1914), 49 S.C.R. 595; *Clark* v. *Baillie* (1909), 19 O.L.R. 545 at p. 554; *Cox & Worts* v. *Sutherland* (1888), 24 C.L.J. 55. The evidence shews that the defendant ordered the plaintiff to sell, and if the instructions had been carried out there would have been no loss.

Argument

Maclean, K.C., for respondents: The broker must have the stock or its equivalent available for delivery, and the learned judge below found that he had: see Meyer on Stock-Brokers, 286. On the burden of proof that the order was not carried out see *MacDonald* v. *Hamilton B. Wills & Co. Ltd.* (1925), 147 N.E. 616. The evidence as to the order to sell is subject to two meanings. It cannot be acted upon unless unambiguous: see Meyer on Stock-Brokers, pp. 269 and 271.

White, in reply, referred to Meyer on Stock-Brokers, 541.

Cur. adv. vult.

7th June, 1932.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: This is an action in the County Court by brokers against a customer for a balance alleged to be due on the accounts between them in stock transactions. The transaction respecting the 450 Spooner shares is the only one that we are concerned with in this appeal. There were previous transactions in Illinois-Alberta shares but they were sold on May 9th, 1929, and the money from them applied to the payment of the margin on the said Spooner shares. The buying order addressed to the plaintiffs and signed by the defendant is as follows:

Buy for my account and risk 450 Spooner at mkt. OA.

It is dated 9th May, 1929.

The order was said to have been sent by the plaintiffs to Solloway, Mills & Company to be filled, who are said to have reported to the plaintiffs:

We have this day bought for your account 450 Spooner.

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The plaintiffs thereupon notified defendant:

We have this day bought for your account and risk 450 Spooner.

There is no evidence to shew the reality of this reported transaction. Did Solloway, Mills & Company actually buy the shares? Did plaintiffs actually receive the shares and pay for them which they claim to have bought and reported?

There is alleged to be the following legend on the defendant's buying order:

It is agreed that the only obligation undertaken by H. E. Hunnings & Company, Ltd., is to place the above order with Solloway, Mills & Co., Limited, and that as from the forwarding of the order by telegraph to Solloway, Mills & Co., Ltd., all responsibility of H. E. Hunnings & Co. Ltd., is at an end and the transaction is one between the undersigned and Solloway, Mills & Co. Ltd., exclusively.

This legend is not above the customer's signature. It purports to make the contract one between the defendant and Solloway, Mills & Company Ltd., when forwarded to them, but this is obviously farcical since the plaintiffs are treated themselves as the buyers. This action is brought on that assumption.

MACDONALD, C.J.B.C.

This being a sale on margin, the plaintiffs had the right to mix the shares bought, when they received them, with other shares of the same kind, and so long as they kept in their common receptacle or within their control sufficient shares for delivery to defendant, they might fill selling orders out of them, but the law is that they must at all times have had on hand the requisite number to meet defendant's demand for delivery on payment. *Conmee* v. *Securities Holding Co.* (1907), 38 S.C.R. 601.

This rule of law is of great importance from the standpoint of the public as well as from that of brokers' customers. It may make the difference between bucketing which is illegal, and honest dealing. If not strictly observed the broker could speculate on his own behalf with his client's shares or money. Indeed a failure to have the shares always on hand may have brought about the failure to exercise his right to sell when the margin was running out. In this case plaintiffs did not sell when the defendant had at least consented to let plaintiffs sell though consent was not necessary.

We should not, I think, countenance any laxity of care or duty or proof on the part of the brokers. Here the plaintiffs

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failed to prove that they had at all times or at any time shares for delivery to defendants, and, moreover, they offered no valid excuse for not selling when the margin was almost exhausted, and when as the evidence shews they could have saved their loss. I, therefore, do not see that justice requires us to place that loss upon the defendant's shoulders.

I should allow the appeal.

MARTIN, J.A.

MARTIN, J.A.: I agree with my learned brother M. A. MACDONALD in the dismissal of this appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In this appeal I am in agreement with my learned brother the Chief Justice. The respondents failed utterly to establish that the shares were purchased outright and that at all times they were in hand ready to be delivered over to the appellant which the law requires and settled by the well known authorities in the Supreme Court of Canada referred to in the argument, notably amongst others *Clarke* v. *Baillie* (1910), 50 S.C.R. 50 and *Conmee* v. *Securities Holding Co.* (1907), 38 S.C.R 601, where Mr. Justice Duff at p. 618 used this language. which can be applied to the respondents in this case:

> Had they as a result of the transaction in question 300 shares of the specified stock which on payment of the sums referred to they were legally entitled to appropriate and deliver to the defendant? To shew that they had was, I think, part of the respondents' case.

At most in this case they set up—but failed even to establish—that they had agreed to buy the shares upon margin. Their duty was to buy the shares outright and they were not in a position at any time when called upon to make delivery of the shares. For the respondents to say that they had the shares when they commenced the action means nothing as the shares being worthless were easily obtainable. Further the evidence shews that the appellant was unable to carry out his purchase and so apprised the respondents, and if it were true that the respondents had purchased the shares on margin the respondents should have then and there desisted from completing the application for the shares.

Upon full consideration of all the facts and the law I am convinced that the learned trial judge, with great respect, came

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1932

June 7.

H. E. HUNNINGS & CO. v. HALL

to a wrong conclusion and the judgment should, in my opinion, be reversed—that is, the appeal should be allowed.

MACDONALD, J.A.: Findings of fact, made by the learned trial judge, justified by the evidence, disposes of this appeal. He found, in effect, that no definite order to sell was given by the appellant. The latter's subsequent conduct, apart from the evidence of respondents' witnesses, warrants this conclusion. He also found that the respondents had shares available for appellant upon payment of the balance due on stocks purchased on margin. The respondents, as appellant's agent, at his request, and on his behalf, incurred and discharged liabilities on stock purchases made through Solloway, Mills & Company and the only question involved is the balance due on this trading account. Appellant must discharge liabilities incurred by respondents on his behalf. Evidence admitted, without objection, shews that the shares were in fact properly purchased.

MACDONALD, J.A.

It was suggested for the first time at the close of the argument that appellant should at least be credited with the further sum of $225 because a statement filed as an exhibit indicated a sale of shares for this amount and it was submitted this sum should be credited to appellant. I would not give effect to this view at this stage. I think the statement is more properly open to the suggestion that it represents a mere valuation made for some purpose not disclosed in evidence in no way affecting the balance due.

I would dismiss the appeal.

The Court being equally divided the appeal was dismissed.

Solicitors for appellant: *White & Martin.*
Solicitor for respondents: *H. H. Shandley.*

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1932

March 1.

REX v. STEWART

REX v. STEWART.*

Criminal law — Trial by jury — Conviction—Appeal—Juryman previously convicted of indictable offence—Disqualification of juror—New trial—R.S.B.C. 1924, Cap. 123, Sec. 6 (a)—Criminal Code, Secs. 81, 921, 1011 and 1013 (c).

The defendant was convicted on a charge of attempting to incite to mutiny His Majesty's forces at Work Point Barracks at Victoria, under section 81 of the Criminal Code. After the conviction it was found that one of the petit jurors had been convicted of two separate indictable offences of theft and had not obtained a free pardon. The defendant then appealed from his conviction on the sole ground that said juror was "absolutely disqualified for service as a juror" under section 6 of the Jury Act and section 921 of the Criminal Code.

Held, on appeal, MACDONALD, C.J.B.C. dissenting, that as there was no attempt to answer the appellant's affidavits clearly setting out the absolute disqualification of the impeached juror, and as this goes to the constitution of the jury, their verdict cannot stand and there should be a new trial.

Statement

APPEAL by the accused from his conviction by MURPHY, J. and a jury on the 8th of October, 1931, on a charge of attempting to incite to mutiny His Majesty's forces at the Work Point Barracks in Victoria, contrary to the provisions of section 81 of the Criminal Code, the sole ground of appeal being that one of the petit jurors was "absolutely disqualified for service as a juror" because he was a person who had been convicted of two separate indictable offences of theft, namely, stealing blankets from the Government of Canada, and had not obtained a free pardon. Upon his conviction he had been let off on suspended sentence.

The appeal was argued at Victoria on the 11th of January, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Gordon M. Grant, for appellant: This is a motion for leave to appeal: see *Rex* v. *Boak* (1925), S.C.R. 525. Accused appeared in person and challenged twelve jurors peremptorily and none for cause. The juror we now object to was the second man called and was accepted by both Crown and prisoner. This

* Reversed by Supreme Court of Canada. See (1932), S.C.R. 612.

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Argument

man came within section 6 (*a*) of the Jury Act and is absolutely disqualified. The only course is to grant a new trial.

Johnson, K.C., for the Crown: Although this juryman was disqualified it is not a good ground of appeal after conviction owing to the provisions of section 1011 of the Criminal Code: see *Shaw* v. *McDonald* (1921), 29 B.C. 230; *Hill* v. *Yates* (1810), 12 East 229; *The King* v. *Sutton* (1828), 8 B. & C. 417; *Reg.* v. *Mellor* (1858), 7 Cox, C.C. 454; *Rex* v. *Crane* (1920), 3 K.B. 236; *Rex* v. *Horatio Bottomley* (1922), 16 Cr. App. R. 184; *Brisebois* v. *The Queen* (1888), 15 S.C.R. 421; *Rex* v. *Brown and Diggs* (1911), 45 N.S.R. 473; *Rex* v. *Morrow* (1914), 24 Can. C.C. 310; *Regina* v. *Earl* (1894), 10 Man. L.R. 303; *Montreal Street Railway Company* v. *Normandin* (1917), A.C. 170; *Rex* v. *Boak* (1925), 36 B.C. 190 at p. 192; *Regina* v. *Loader* (1896), 22 V.L.R. 254; *Abrahams & Co.* v. *Scales* (1899), 25 V.L.R. 389; *Sinclair* v. *Harding* (1871), 2 V.R. (L.,) 185.

Grant, in reply, referred to *Rex* v. *McCrae* (1906), 12 Can. C.C. 253 at p. 268; *The King* v. *Tremearne* (1826), 5 B. & C. 254; *The King* v. *Wakefield* (1918), 1 K.B. 216.

Cur. adv. vult.

1st March, 1932.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The accused appeals from his conviction by a jury one of whom was a juror who had previously been convicted of an indictable offence. Section 6 of the Jurors Act, Cap. 123 of the Revised Statutes of British Columbia, 1924, enacts that:

> Every person coming within any of the classes following shall be absolutely disqualified for service as a juror, that is to say:— . . .
>
> (*c*.) Persons convicted of indictable offences, unless they have obtained a free pardon.

The juror in question had not obtained a free pardon.

Section 15 of the Jurors Act provides how the selectors are to proceed. They are to meet at the time or times therein mentioned for the purpose of selecting a preliminary list of persons liable to serve as jurors, and the number to be included in such list was to be in the discretion of the selectors. It will, therefore, be seen that they are to select persons "liable" to serve

as jurors which means, of course, qualified to serve. This direction was not followed in the present case.

There was no contention on appellant's behalf that he had been prejudiced by the inclusion of this man in the jury; all that was relied upon in the notice of appeal or in argument was the fact of the said disqualification. Many cases were cited particularly by Crown counsel and amongst them *Abrahams & Co.* v. *Scales* (1899), 25 V.L.R. 389, on a statute (the only one resembling ours in any other jurisdiction). The Victorian statute contains sections analogous to section 6; and section 1011 of the Criminal Code of Canada. The Court in that case refused to set aside a verdict in circumstances similar to those in question here. *Montreal Street Railway* v. *Normandin* (1917), 86 L.J., P.C. 113 was also referred to by Crown counsel. That case is not so strong a case as the present since there was no express disqualification but the matters referred to in the judgment throw a good deal of light on the present case. *Rex* v. *Boak* (1925), S.C.R. 525 at p. 531, was also relied upon. That case was primarily decided upon the failure of the appellant to obtain leave to appeal but the Court went further and expressed an opinion respecting the effect of said section of the Code 1011 upon a case of this kind. It was there said:

MACDONALD, C.J.B.C.

. . . We incline to agree with Mr. Justice GALLIHER that s. 1011 of the Criminal Code, notwithstanding the absence from it of the word "summoning," was meant to preclude the impeaching of a verdict on the grounds such as these. The defendant's appeal to the Court of Appeal on this ground should, therefore, likewise stand dismissed.

The ground in that case was precisely the same as in this. It was disqualification under said section 6 (*a*), where a juror was alleged to have been disqualified by reason of deafness. The Court said (p. 530):

Under these circumstances we are not disposed to admit the right of the defendant to contend on appeal that the presence of Keown on the petit jury resulted in a miscarriage of justice; and, if he should be allowed to do so, we are fully convinced that "no substantial wrong or miscarriage of justice has actually occurred."

I think there could be no question apart from section 1011 about the invalidity of the verdict. Disqualification goes to the very root of it. The prisoner was entitled to be tried by twelve qualified jurors and he has been tried by only eleven and a twelfth man who had no right to be there at all, but nevertheless

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Parliament had the power to provide that such a defect should not be raised after verdict, and in my opinion section 1011 so declares.

It will also be noted that the Code confines challenge for cause to four cases which do not include a challenge of disqualification with which we are concerned here. It may be that Parliament thought that section 1011 was sufficient to protect a verdict against a defect of the kind here alleged. If it does not then there appears to be no means provided in the procedure of selecting a jury for guarding against what occurred in this case except by peremptory challenge. Neither the Crown nor a prisoner has the right to question a juror for cause as to whether or not he has been convicted of an indictable offence.

MACDONALD, C.J.B.C.

A motion for leave to appeal on the facts was made in this case although the question was not contested in the appeal. I think it was accepted as common ground that the juror aforesaid was disqualified. There was, therefore, no question of fact to be decided. I shall formally grant leave to appeal.

I would dismiss the appeal.

MARTIN, J.A.: This is a motion under section 1013 (*c*) of the Criminal Code for leave to appeal from the conviction of the appellant at the last Victoria Assizes, *coram* Mr. Justice MURPHY, for an offence under section 81 of the Criminal Code, the sole ground being that one of the petit jurors, L. C. Impey, was "absolutely disqualified for service as a juror" because he was a person who had been convicted of two separate indictable offences of theft (stealing blankets from the Government of Canada) and had not obtained a free pardon, contrary to the joint effect of section 6, Cap. 123, R.S.B.C. 1924, and section 921 of the Code.

MARTIN, J.A.

This raises a question apart from the right to challenge for cause under section 935, or otherwise, and many cases have been cited thereupon but since the passing in 1923 of the Act to Amend the Criminal Code, Cap. 41, and the decision of the Supreme Court of Canada (in accord with that of the Quebec Court of Appeal—King's Bench—in *Rex* v. *McCrae* (1906), 16 Que. K.B. 193; 12 Can. C.C. 253; sections 734-5 therein corresponding to sections 1010 and 1011) in an appeal from us

in *Rex* v. *Boak* (1925), S.C.R. 525; (and *cf.* the explanation in 36 B.C. 190, 192) the matter has been set at rest because it was therein decided, on another "absolute disqualification" (deafness) under the same section 6, that such an objection could be raised by leave under subsection (*c*) of 1013 as falling within its language—"any other ground which appears to the Court of Appeal to be a sufficient ground of appeal." The Court held (529) that:

> The question is as to the constitution of the petit jury. Where such a defect in the constitution of the petit jury is charged as might involve a miscarriage of justice (s. 1014 (1) (*c*)) the Court of Appeal may regard it as something which, if established, would be a sufficient ground of appeal. But an appeal lies under clause (*c*) of s. 1013 only "with leave of the Court of Appeal."
>
> We are, therefore, of the view that leave of the Court of Appeal was a condition precedent to the defendant's right of appeal. Inasmuch as the Court of Appeal proceeded on the view that such leave was unnecessary it did not exercise the discretion conferred on it by the statute in respect to the giving or refusing of leave. It follows that its order setting aside the defendant's conviction and directing a new trial cannot be maintained on the ground on which it was based.

MARTIN, J.A.

The Court went on to say that in "the usual course" it would remit the case to us to pass upon it on that ground (*i.e.*, of disqualification affecting the constitution of the jury), but under the special circumstances did not do so because the disqualification could not be relied upon and the appeal "must fail" owing to the appellant's conduct as set out at p. 530, *viz.*:

> It is thus apparent that the question of the deafness of the juror Keown was canvassed during the trial and that, with the knowledge that the learned trial judge was aware that that question had been raised and must have satisfied himself that Keown's deafness was not so great as to be incompatible with his discharge of the duties of a juror before allowing the trial to proceed with him as a member of the petit jury, counsel representing the defendant, to suit his own purposes, acquiesced in that course being taken.
>
> Under these circumstances we are not disposed to admit the right of the defendant to contend on appeal that the presence of Keown on the petit jury resulted in a miscarriage of justice; and, if he should be allowed to do so, we are fully convinced that "no substantial wrong or miscarriage of justice has actually occurred." (Cr. C. s. 1014 (2)).
>
> We, therefore, think that so far as the defendant's appeal to the Court of Appeal rests on this ground it should now be dismissed.

No conduct of the kind is present in the case at Bar; on the contrary, it appears by the affidavits filed that the disqualification of the juror was not discovered till after the conviction.

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There was no suggestion in the *Boak* case that the appeal would have failed because of the curative provisions of section 1011 of the Code, though if it did apply it would be even more fruitless to remit the appeal because it would fail on a clear point of law. That section was invoked by the Court in relation to the second and entirely distinct objection to the constitution of the grand jury (p. 530) arising out of an omission in the special order of the trial judge in summoning additional jurymen and to that question it is obviously restricted.

MARTIN, J.A.

It, therefore, becomes our duty, in my opinion, to allow the motion and grant leave to appeal on the said ground, and as we were informed by counsel, as I understood them, that no more evidence was to be introduced if this motion succeeded and that we were to hear the appeal and deal with the ground which we allow upon that evidence without further argument, it follows that, as the ground itself must be a valid one (otherwise we should have rejected it pursuant to the *Boak* case, 529) all that remains to be done is to see if it is "established" by the evidence, and as to that no attempt is made to answer the appellant's affidavits clearly setting out the absolute disqualification of the impeached juror as aforesaid, and as this goes to the "constitution" of the jury, their verdict cannot stand and a new trial should be had in due course of law.

MCPHILLIPS, J.A.

MACDONALD, J.A.

MCPHILLIPS and MACDONALD, JJ.A. agreed in ordering a new trial for the reasons given by MARTIN, J.A.

New trial ordered, Macdonald, C.J.B.C. dissenting.

Solicitor for appellant: *Gordon M. Grant.*
Solicitor for respondent: *A. M. Johnson.*

MACDONALD, J.

1932

June 29.

GAMON v. EASTMAN

GAMON v. EASTMAN.

Motor-vehicles — Collision between motor-cycle and automobile — Plaintiff passenger on motor-cycle—Defendant driving automobile negligent—Motor-cycle operated contrary to Motor-vehicle Act—Right of action of plaintiff—R.S.B.C. 1924, Cap. 177, Sec. 19A.

The plaintiff was a passenger on a motor-cycle driven by G. proceeding northward on the Gorge Road in the Municipality of Saanich. The defendant who was parked on the proper side of the Gorge Road backed his car across the road just as the motor-cycle was approaching, in such a position that the driver of the motor-cycle could not, with the exercise of reasonable care, avoid running into him, and the plaintiff was injured. It was found that the accident was due to defendant's negligence, but the evidence disclosed that the driver of the motor-cycle at the time of the accident was not sitting on the driver's seat (the plaintiff being on the seat and behind the driver) and was driving in contravention of section 19A of the Motor-vehicle Act.

Held, that the civil right of the plaintiff has not been affected in any way by G. having committed an offence under the Motor-vehicle Act that in no way contributed to the accident, and he is entitled to recover damages from the defendant.

Statement

ACTION by a passenger on a motor-cycle for damages resulting from a collision between the motor-cycle and the defendant's automobile when driven by the defendant. The plaintiff claimed the accident was due to the defendant's negligence. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Victoria on the 11th of May, 1932.

E. L. Tait, for plaintiff.
Manzer, for defendant.

29th June, 1932.

Judgment

MACDONALD, J.: On the 22nd of March, 1931, the plaintiff, while a passenger on a motor-cycle, the property of and operated by Arthur Grant, was proceeding northward along the Gorge Road in the Municipality of Saanich, when he was struck and injured by an automobile driven by the defendant. Plaintiff alleged that such accident arose through the negligence of the defendant and various particulars of such negligence were outlined, but the point upon which I find the defendant liable was

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Judgment

in driving his automobile backwards, across the Gorge Road, in such a manner and with such lack of care, that Grant in operating the motor-cycle could not, with the exercise of reasonable care, have avoided an accident. It was apparent, at the close of the evidence, that I had reached this conclusion upon the question of negligence and that there was also a finding of no contributory negligence on the part of the said Grant. In this connection, I need only add, that in arriving at these conclusions I accepted the evidence of George J. Dangerfield, who was a competent and independent witness. He observed the defendant's automobile parked on the proper side of the road. It was then started and backed up by defendant in jerks and swerved out into the crown of the road and at the same time he saw the motor-cycle approaching. It was quite apparent that a collision was bound to take place. At the last moment Grant tried to avoid it occurring and escaped injury himself but the plaintiff was not so fortunate. I reserved judgment, however, giving counsel an opportunity of submitting written arguments, with respect to a contention made by counsel for the defendant, that his client was in any event not liable, on the ground that the motor-cycle was at the time of the accident being operated contrary to the provisions of section 19A of the Motor-vehicle Act (Cap. 177, R.S.B.C. 1924). This section was enacted in 1924 and was added to and amended in 1925. It now reads as follows:

No person shall ride as a passenger, nor shall any person permit any other person to ride as a passenger, on the handlebars or frame of any motor-cycle, on any highway, in front of the person driving or operating the motor-cycle; and no person shall drive or operate a motor-cycle on any highway unless he is seated in the driver's seat of the motor-cycle.

It is quite clear that this section, as originally enacted, simply prohibited the carrying of passengers upon motor-cycles in front of the driver. It implied that in the future they should be carried behind the driver. Then the amendment of 1925 further restricted the use of motor-cycles and required that the driver or operator of a motor-cycle on any highway should be seated in the driver's seat. It is submitted that while the plaintiff was in the rear of Grant, still that he was occupying the driver's seat, to the exclusion of Grant who, as driver, was utilizing a seat improvised for that purpose. It appears this

mode of operation had previously been in vogue by Grant and was not simply adopted upon the day in question. In strictness, however, I think, in this respect, the Act was not complied with. The point then to be determined is whether, if I be correct in this conclusion, it deprives the plaintiff of any remedy against the defendant. It would be apparent that Grant would thus have been guilty of an offence under the statute and liable to the penalty therein provided. It is contended by the defendant that not only could such penalty be imposed, but the plaintiff would have any civil right he possessed destroyed. I do not think such a result follows. The earlier decisions might have supported a defence as against Grant, should he have been injured and seeking redress. I however consider the point in this Province now concluded by several authorities. In *Boyer* v. *Moillet* (1920), 30 B.C. 216 any responsibility, beyond incurring the penalties prescribed, under provisions of the Motor-vehicle Act, was considered. MACDONALD, C.J.A., after discussing the particular section there in question, dealt with the matter of civil liability, as distinguished from a penalty under the Act, as follows (p. 220):

Judgment

There is nothing in the Act from beginning to end to suggest that the rights of individuals in civil actions were to be disturbed.

Then MCPHILLIPS, J.A., at p. 224, said:

It therefore follows that, in my opinion, the British Columbia legislation, in its whole purview, confines the responsibility to the penalties imposed by the Act. (See *Atkinson* v. *Newcastle Waterworks Co.* (1877), 2 Ex. D. 441; *Groves* v. *Wimborne (Lord)* (1898), 2 Q.B. 402 at p. 407).

In *Walker* v. *B.C. Electric Ry. Co.* (1926), 36 B.C. 338 the question was considered and in *Burchill* v. *City of Vancouver* (1932) [45 B.C. 169], 1 W.W.R. 641, the matter received further consideration. MACDONALD, J.A. in the latter case discussed the authorities at length. He drew a distinction between an action, in which parties were jointly using a highway, and one where a remedy is sought by a party, so using the highway, against the owner thereof, usually a municipality. He said at p. 648:

This Court held in *Walker* v. *B.C. Electric Ry. Co.* (1926), 1 W.W.R. 503, 36 B.C. 338 that the failure of the owner and driver of a car to possess a licence did not prevent him from recovering damages against a negligent defendant. In *Boyer* v. *Moillet* (1921), 3 W.W.R. 62, 30 B.C. 216 it was also held that statutory prohibitions in the Act were of a penal nature,

MACDONALD, J. 1932 June 29.

GAMON v. EASTMAN

passed for the protection of the public and to punish offenders, and did not affect civil rights. The case at Bar is different and other considerations arise. Respondent's claim is not against another negligent driver but against the owner of the highway.

So that, even if Grant had a civil remedy against the defendant, it would not be destroyed by his failure to comply with such provisions in the Motor-vehicle Act, in operating his motor-cycle. This of course is subject to the qualification that the non-compliance did not bring about or contribute to the accident.

Judgment

Then, if Grant be in this position, as to not having a civil right destroyed, it follows that the plaintiff should be in as good a position as Grant. It is contended that the judgment of Latchford, J. (now C.J.) in *Roe* v. *Township of Wellesley* (1918), 43 O.L.R. 214 at p. 216, supports a contention of the defendant to the contrary. The citation from this judgment submitted by the defendant might lend him some assistance, if read by itself, but when the entire judgment is considered, it seems quite evident that the success of the defendant was due to the failure of the plaintiff to shew negligence on the part of the defendant. Further that the accident could have been avoided by the exercise of reasonable care by the plaintiff's son. It is true that the judgment concludes with a reference to the son as follows: "who, moreover, was prohibited by the statute from acting as the driver of a motor-vehicle." This statement was in a sense *obiter* and did not form the basis of the judgment.

Then again, if Grant had committed an offence under the Motor-vehicle Act which would render his operation of the motor-cycle an unlawful act, it would only afford a defence to the defendant, if such unlawful act caused or contributed to the accident.

In Barron's Canadian Law of Motor Vehicles, p. 533, the law as to prohibitory statutes, depriving a party of redress, is as follows:

> When the law prohibits an act, then that act is unlawful, and the doing of an unlawful act deprives the person who does it of the right to recover damages resulting from such unlawful act.

The accident was in no way attributable to the manner in which Grant was operating the motor-cycle or to the breach of any statute. He was not a trespasser "in the sense in which

that word is strictly and technically used in law": *Vide* Lord Halsbury in *Lowery* v. *Walker* (1911), A.C. 10—nor was he an "outlaw" and deprived of the use of the highway.

Judgment

I think the civil right of the plaintiff has not been affected in any way and that he is entitled to recover damages from the defendant. The amount to be awarded to him is difficult to determine. Plaintiff had to undergo a major operation. Then his leg had to be rebroken and a second operation required. He thus endured considerable pain and suffering. There was permanent disability but to a limited extent. The large amount paid by John C. Gamon, father of the plaintiff, for medical, surgical, hospital and other expenses should not be considered, as plaintiff has no right of recovery in respect thereto. I think a fair and reasonable amount to allow the plaintiff for damages would be $1,800 with costs. Judgment accordingly.

Judgment for plaintiff.

COURT OF APPEAL

1931

Oct. 6.

REX v. MORLEY

REX v. MORLEY.

Criminal law—Indian Reservation—Killing pheasants thereon by one other than an Indian—Conviction under Game Act—Effect of the Indian Act —R.S.C. 1927, Cap. 98, Secs. 2, 34, 35, 36, 117 and 156; R.S.B.C. 1924, Cap. 98, Sec. 9.

An appeal to the County Court from the conviction of a white man for shooting a pheasant in the close season on an Indian reserve was dismissed.

Held, on appeal, affirming the decision of SWANSON, Co. J. (MACDONALD, C.J.B.C. and MACDONALD, J.A. dissenting), that the conviction is valid as founded upon a Provincial statute respecting property and civil rights, an exclusive jurisdiction of the Province under the B.N.A. Act, and the legislation is not *ultra vires* in respect to Indian Reserves.

Statement

APPEAL by defendant from the decision of SWANSON, Co. J. of the 14th of May, 1931, affirming the conviction of the appellant by D. W. Rowlands, stipendiary magistrate for the County of Yale, on the 9th of April, 1930, for that he at Kamloops Indian Reserve in the County of Yale, on or about the 2nd of November, 1929, being the close season, unlawfully did kill a pheasant, contrary to section 9 of the Game Act. He was fined $25 and costs. The accused appealed on the ground that the Game Act is *ultra vires* of the Provincial Legislature as regards Indian Reserves. The appeal was argued at Vancouver on the 27th of April, 1930, before MACDONALD, C.J.B.C., GALLIHER, MCPHILLIPS and MACDONALD, JJ.A., when judgment was reserved. The Court later ordered that the appeal be reargued.

The appeal was re-argued at Victoria on the 3rd of July, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Burns, K.C., for appellant: The shooting was on an Indian Reserve, and all Indian Reservations are controlled by the Indian Act (Dominion). The Dominion Parliament has entered this field and is paramount, and the Province is excluded. Game birds are part and parcel of the land itself. That this is within Dominion legislation see *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1888), 58 L.J., P.C. 54 at p. 57. As it had

already been entered into by the Dominion the Province cannot enter: see *Rex* v. *Edward Jim* (1915), 22 B.C. 106; *Rex* v. *Cooper* (1925), 35 B.C. 457; *Rex* v. *Rodgers* (1923), 33 Man. L.R. 139; *In re Combines Investigation Act and S. 498 of the Criminal Code. Proprietary Articles Trade Association* v. *Attorney-General for Canada* (1931), 1 W.W.R. 552 at p. 562; *Rex* v. *Anderson* (1930), 2 W.W.R. 595 at p. 598.

Pratt, for respondent: The Indian Act is *qua* Indians and Indian lands. We rely on section 92 (13) and (16) of the B.N.A. Act. The cases referred to by appellant apply to Indians only. Any person other than a member of the reserve is subject to the Provincial Act: see *Rex* v. *Hill* (1907), 15 O.L.R. 406; *Cunningham* v. *Tomey Homma* (1903), A.C. 151; Maxwell on Statutes, 3rd Ed., 71; *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia* (1898), A.C. 700 at p. 716; *Canadian Pacific Railway* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1899), A.C. 367 at p. 372; *Sanderson* v. *Heap* (1909), 11 W.L.R. 238 at p. 241; *Attorney-General for Canada* v. *Giroux* (1916), 53 S.C.R. 172; *Rex* v. *McLeod* (1930), 2 W.W.R. 37. Should the Indian Reserve be abandoned the land would come back to the Province.

Argument

Burns, in reply: The conviction states this was on an Indian Reserve.

Cur. adv. vult.

6th October, 1931.

MACDONALD, C.J.B.C.: The appellant a white man was convicted under the Game Act of the Province of shooting a pheasant on an Indian Reserve and this appeal is from his conviction for such offence under that Act.

Shortly after the Treaty of Paris, 1763, the Crown shewed its interest in protecting the Indians in their hunting fields and throughout the various changes which have since occurred in the management of the Indians and their lands that interest has been maintained. Section 91 (24) of the British North America Act assigns exclusively to the Dominion Parliament the right to legislate concerning Indians and the management of their lands.

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The Province under the said Provincial Act fixed certain

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seasons as closed seasons, that is to say seasons in which game might not be shot and the offence in question was committed on the Indian Reserve during one of these closed seasons and hence the prosecution. The Indian Act, section 34, enacts that:

No person, or Indian other than an Indian of the band, shall without the authority of the superintendent general, reside or hunt upon, occupy or use any land or marsh, or reside upon or occupy any road, or allowance for road, running through any reserve belonging to or occupied by such band.

Sections 35 and 36 provide punishment for breach of this section. It is, therefore, clear that the Dominion, by its legislation, occupies the field in question. The contention of the Province is that the question is one falling within section 92 (13), namely, property and civil rights, the right to legislate thereon being assigned by the said section to the Province. It may be conceded at once for the purposes of this case, that each had power to so legislate but the legislation, I think, must be confined to its respective field of operation. While there has been much dispute concerning the property rights of the Indians in Indian Reserves or more correctly of the Dominion Government, there has been no such dispute concerning the Dominion legislation in respect of Indians and the management of their lands. The pheasants on the reserve belong to the reserve and the Indian Act was passed, *inter alia,* to protect the interest of the Indians in these pheasants and to prohibit the hunting of them on Indian Reserves. In *Grand Trunk Railway of Canada* v. *Attorney-General of Canada* (1907), A.C. 65 at p. 68 the Privy Council said:

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But a comparison of two cases decided in the year 1894—*viz., Attorney-General of Ontario* v. *Attorney-General of Canada* (1894), A.C. 189 and *Tennant* v. *Union Bank of Canada* [*ib.* 31]—seems to establish these two propositions: First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires,* if the field is clear; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail.

That statement of the law is peculiarly applicable to the present case.

In the recent decision of the Privy Council in *In re Combines Investigation Act and S. 498 of the Criminal Code* (1931), 1 W.W.R. 552 at p. 562, the law is stated thus:

If then the legislation in question is authorized under one or other of the

heads specifically enumerated in section 91, it is not to the purpose to say that it affects property and civil rights in the Provinces.

And see the saving clause at the end of section 91.

In *Rex* v. *Rodgers* (1923), 33 Man. L.R. 139, it was held that where the offence against the Provincial Act occurred beyond the limits of the Indian Reserve the Indian offender must be punished under the Provincial Act; here the offence was committed not outside the Reserve but within it and I think must be dealt with under the Indian Act, the field being occupied by that Act. Section 69 of the Indian Act enables the superintendent general to give public notice that the Provincial laws of

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Manitoba, Saskatchewan or Alberta, or the Territories, or respecting such game as is specified in such notice, shall apply to Indian Reserves within the said Province or Territories, as the case may be, or to Indian Reserves in such parts thereof as to him seems expedient.

This section does not apply and in any case has not been applied in this Province.

The appeal must therefore be allowed with costs.

MARTIN, J.A.: On the 9th of April, 1930, the following conviction of the appellant was made by the stipendiary magistrate at Kamloops, B.C., *viz.*:

For that he, the said Henry L. Morley of the City of Kamloops in the County of Yale, Solicitor, at Kamloops Indian Reserve in the County of Yale aforesaid on or about the second day of November, 1929, being the close season unlawfully did kill a pheasant contrary to section 9 of the Game Act being R.S.B.C. 1924, chapter 98, and I adjudge the said Henry L. Morley for his said offence to forfeit and pay the sum of Twenty-five dollars to be paid and applied according to law; and also to pay to the prosecutor the sum of Six dollars and twenty-five cents, for his costs in this behalf . . . [and to imprisonment upon default of such payment].

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An appeal was taken from this conviction to His Honour Judge SWANSON of the County Court of Yale and its was dismissed by him, whereupon a further appeal was taken to this Court.

I pause here to note that by some strange error and oversight this criminal appeal (*cf. Chung Chuck* v. *The King* (1930), A.C. 244, 251, 254, 257-8) was not lodged or entered upon the list in the usual way under the proper title or heading pertaining thereto (as in *e.g., Rex* v. *Edward Jim* (1915), 22 B.C. 106; *Rex* v. *Cooper* (1925), 35 B.C. 457; *Rex* v. *McLeod* (1930), 2 W.W.R. 37; and *Rex* v. *Rodgers* (1923), 33 Man. L.R. 139),

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but was wrongly entered as if it were an ordinary civil appeal, which error gives a misleading complexion to the whole matter and is of importance in view of certain decisions hereinafter to be cited; therefore I give the proper title herein, *viz.*, *Rex* v. *Morley*.

From the outset it is to be borne in mind that this case is not one of the conviction of an Indian but of a white man who trespassed upon an Indian Reserve and therein committed the offence complained of, and the ground of his appeal is that the said "Game Act . . . is *ultra vires* of the Province as regards Indian Reserves."

It becomes unnecessary therefore to consider what is the application of the said Game Acts to Indians in general or those of the particular band living upon the reserve in question, in regard to which it is to be observed that we have no evidence in the record and no other information than the admission by counsel of the bare fact that it is a "Reserve" within the meaning of the Indian Act, R.S.C. 1927, Cap. 98, Sec. 2, though under other circumstances full information on the history of the reserve would be essential to define the rights of particular Indians as many reported cases shew, *e.g.*, *Attorney-General for Canada* v. *Giroux* (1916), 53 S.C.R. 172.

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In support of said ground it is submitted that the National Parliament has under the "exclusive authority" over "Indians, and Lands reserved for the Indians," conferred upon it by section 91, class (24), of the B.N.A. Act, occupied the field in question to the entire exclusion of the exclusive right of the Provincial Legislature to make "laws in relation to property and civil rights in the Province" and "Generally all matters of a merely local or private nature in the Province" as conferred by classes (13) and (16) respectively of section 92 of said Act.

On legislation respecting animals *feræ naturæ* we are fortunate in having for our assistance the leading and convincing judgment of the Manitoba Appellate Court in *The Queen* v. *Robertson* (1886), 3 Man. L.R. 613, delivered by Mr. Justice Killam, wherein it was decided that the Game Protection clauses of the Agricultural Statistics & Health Act, 1883, of the Manitoba Legislature were *intra vires* under both of said classes (13)

and (16), and so a conviction of the appellant for having a moose in his possession during the "protected season" was affirmed. The whole judgment merits careful perusal but as it does not relate primarily to Indian Reserves and as its conclusions are not indeed attacked but sought to be avoided I shall make only three citations therefrom which throw light upon the present question, *viz.*, p. 622:

The prohibitions against the killing or taking of wild birds or other animals, and against having them in possession are prohibitions pure and simple of the exercise of civil rights. This was disputed upon the argument of the application, but it appears too clear to require any considerable discussion.

Sir Wm. Blackstone, in his Commentaries on the Laws of England, Vol. 2, c. 26, p. 403, lays down the principle, "With regard, likewise, to animals *feræ naturæ* all mankind had by the original grant of the Creator a right to pursue and take any fowl or insect of the air, any fish or inhabitant of the waters, and any beast or reptile of the field; and this natural right still continues in every individual unless where it is restrained by the civil laws of the country. And when a man has once so seized them, they become while living his *qualified* property, or if dead, are *absolutely* his own."

And at p. 623 after an informing citation from Brown & Hadley's Commentaries on the Laws of England he proceeds:

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This last citation exhibits the plain distinction which exists between the personal right of each individual to pursue and take or kill animals *feræ naturæ* and the right to do so upon particular land, and this serves to shew that although in this Province as claimed in argument, the right to enter upon and pursue game over ordinary public lands can, as against the Crown, be conferred only by the officers of the Crown for the Dominion, yet the right to do so in a particular manner or at a particular season or even to do so at all is not necessarily on that account subject to the control of the Dominion Parliament.

It is to be remembered that at the time the learned judge was speaking the "ordinary public lands" of the Crown in Manitoba belonged to the Dominion and therefore his observations are of particular force in this Province which has always owned such lands.

At p. 625 he says:

I must, however, cite one sentence from the remarks of Chief Justice Ritchie in the same case, *The Citizens' Insurance Co.* v. *Parsons* [(1880)], 4 S.C.R. 243, "I think the power of the Dominion Parliament to regulate trade and commerce ought not to be held to be necessarily inconsistent with those of the Local Legislatures to regulate property and civil rights in respect to all matters of a merely local and private nature, such as matters connected with the *enjoyment and preservation of property* in the Province, or matters of contract between parties in relation to their property or deal-

ings, *although the exercise by the Local Legislatures of such powers may be said remotely to affect matters connected with trade and commerce,* unless, indeed, the laws of the Provincial Legislatures should conflict with those of the Dominion Parliament passed for the general regulation of trade and commerce."

But a "conflict" is suggested to arise herein from section 34 of said Indian Act as follows in the group of six sections under the heading

Trespassing on Reserves.

34. No person, or Indian other than an Indian of the band, shall without the authority of the superintendent general, reside or hunt upon, occupy or use any land or marsh, or reside upon or occupy any road, or allowance for road, running through any reserve belonging to or occupied by such band.

2. All deeds, leases, contracts, agreements or instruments of whatsoever kind made, entered into, or consented to by any Indian, purporting to permit persons or Indians other than Indians of the band to reside or hunt upon such reserve, or to occupy or use any portion thereof, shall be void.

Section 35 follows to provide for the "removal or notification" of such trespassers and others in general, *viz.*:

35. If any Indian is illegally in possession of any land on a reserve, or if any person, or Indian other than an Indian of the band, without the licence of the superintendent general,

(*a*) settles, resides or hunts upon, occupies, uses, or causes or permits any cattle or other animals owned by him, or in his charge, to trespass on any such land or marsh;

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(*b*) fishes in any marsh, river, stream or creek on or running through a reserve; or

(*c*) settles, resides upon or occupies any road, or allowance for road, on such reserve;

the superintendent general or such other officer or person as he thereunto deputes and authorizes, shall, on complaint made to him, and on proof of the fact to his satisfaction, issue his warrant, signed and sealed, directed to any literate person willing to act in the premises, commanding him forthwith as the case may be,

(*a*) to remove from the said land, marsh or road, or allowance for road, every such person or Indian and his family, so settled, or who is residing or hunting upon, or occupying, or is illegally in possession of the same; . . .

And it goes on to deal similarly with the other classes of trespassers and to empower the Indian Agent to deal with trespassers in certain cases. Section 36 provides for the punishment of "any person or Indian" who returns to the reserve for said prohibited purposes after being removed therefrom, by arrest under warrant of the superintendent general and imprisonment on summary conviction by certain specified magistrates. Section 37 directs the sheriff to deliver the convict to the proper gaoler and the final section 38 directs and declares that:

38. The superintendent general, or such officer or person aforesaid, shall cause the judgment or order against the offender to be drawn up and filed in his office.

2. Such judgment shall not be appealed from, or removed by *certiorari* or otherwise, but shall be final.

Therefore we find in this group of "Trespass" sections a special and final tribunal created for the purpose of preventing trespassing of all kinds upon Indian Reserves and for summarily punishing offenders of that class. Power is also given by section 115 to impose the additional penalty of a fine and costs, "half of which penalty shall belong to the informer."

With the greatest respect for other opinions I find myself unable to perceive any real conflict of jurisdiction between the National Parliament and the Provincial Legislature in the said special provisions of general prohibition against encroachments of any kind upon an Indian Reserve not only, be it noted, by "any person" but also by those Indians who are not "of the band" occupying the reserve in question. Even were there no game laws in existence such legislation would be necessary to protect these aboriginal wards of the Crown from the incursions of trespassers in general (as has been done "from the earliest period"—*Totten* v. *Watson* (1858), 15 U.C.Q.B. 392, *in banco*) and the matter is not dealt with in the said Indian Act *qua* game but as a general prohibition against "hunting" (*i.e.*, pursuing to capture or kill, Game Act, Sec. 2) of any kind, even though the thing, be it furred or feathered or scaled, "hunted" is not "game" in the ordinary sporting sense (*cf.* article, "Game Laws," Encyclopædia of the Laws of England, Vol. VI., p. 36), or as defined in the B.C. Game Act, Secs. 2 and 9, now under consideration, which deals not only with the "hunting, trapping, taking, wounding or killing" of ordinary "game" and "game birds" but with "fur-bearing animals as defined in this Act" (which definition is constantly changing to meet new conditions, *e.g.*, the introduction of wild turkeys—section 9 (v.) amended) and a variety of cognate subjects, and authorizes and even offers bounties (section 41 (*e*)) for the destruction of certain predatory birds and animals (*e.g.*, sections 6 (*d*), 13) which are beyond the pale of the Act as being either enemies of game or dangerous and destructive to domestic stock and otherwise, *e.g.*, eagles, timber wolves and cougars.

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Ever since the British conquest of Quebec at least it has been the declared policy of the Government, by the Royal Proclamation of 7th October, 1763,

> that the several nations or tribes of Indians with whom we are connected, and who live under our protection, should not be molested or disturbed in the possession of such parts of our dominions and territories as, not having been ceded to us, are reserved to them, or any of them, as their hunting-grounds;. . . .
>
> And we do further declare it to be our Royal will and pleasure, for the present as aforesaid, to reserve under our sovereignty, protection and dominion, for the use of the said Indians, all the land and territories not included within the limits of our said three new governments, or within the limits of the territory granted to the Hudson's Bay Company; as also the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest as aforesaid; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and licence for that purpose first obtained.
>
> And we do further strictly enjoin and require all persons whatsoever, who have either wilfully or inadvertently seated themselves upon any lands within the countries above described, or upon any other lands which, not having been ceded to or purchased by us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such settlements.

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Though this Proclamation did not extend to what is now this Province, which had not then been visited even by the two later Royal Naval expeditions of the King of Spain, which preceded by several years the arrival of Captain Cook, R.N., on this Pacific Coast in 1778, yet it is a striking indication of the initial policy of excluding trespassers in general from Indian Reserves which is preserved till today by the group of sections above quoted.

There is to my mind no practical obstacle in the continuation of that historical Imperial policy in favour of the Indians and also in the later inauguration of the wider Provincial policy, since Confederation at least, of the preservation and regulation of wild life at large for the general benefit of all the "residents" (section 2), including the Indians, of the Provinces as the local Legislatures may think best under their widely varying conditions, in the due exercise of their said powers under the B.N.A. Act.

It is clearly established by repeated decisions of the Privy Council that the incidental occupation by the Dominion in the

exercise of its exclusive powers of an otherwise exclusive Provincial area can only be justified by and must be restricted to the reasonable necessity of the case, which becomes a question of degree under the circumstances—"trenching to any extent," as Lord Watson put it in *Tennant* v. *Union Bank of Canada* (1894), A.C. 31, at p. 45. Thus in *Citizens' Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96 it was said at p. 108, in a passage cited by Killam, J. in the *Robertson* case, *supra*, p. 626:

Notwithstanding this endeavour to give pre-eminence to the Dominion Parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the Legislature could not have intended that the powers exclusively assigned to the Provincial Legislature should be absorbed in those given to the Dominion Parliament.

And again, *ib.* at pp. 108-9:

In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each Legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.

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This view was later reaffirmed and adopted by the same tribunal in *John Deere Plow Company, Limited* v. *Wharton* (1915), A.C. 330, wherein at p. 338, while considering said sections 91 and 92 "and the degree to which the connotation of the expressions used overlaps" their Lordships first said it was "unwise on this or any other occasion to attempt exhaustive definitions of the meaning and scope of these expressions" because this "must almost certainly miscarry," and then went on to say:

It is in many cases only by confining decisions to concrete questions which have actually arisen in circumstances the whole of which are before the tribunal that injustice to future suitors can be avoided. Their Lordships adhere to what was said by Sir Montague Smith in delivering the judgment of the Judicial Committee in *Citizens' Insurance Co.* v. *Parsons* [*supra*] to

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the effect that in discharging the difficult duty of arriving at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain and give effect to them all, it is the wise course to decide each case which arises without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand. The wisdom of adhering to this rule appears to their Lordships to be of especial importance when putting a construction on the scope of the words "civil rights" in particular cases. An abstract logical definition of their scope is not only, having regard to the context of ss. 91 and 92 of the Act, impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases. It must be borne in mind in construing the two sections that matters which in a special aspect and for a particular purpose may fall within one of them may in a different aspect and for a different purpose fall within the other. In such cases the nature and scope of the legislative attempt of the Dominion or the Province, as the case may be, have to be examined with reference to the actual facts if it is to be possible to determine under which set of powers it falls in substance and in reality. This may not be difficult to determine in actual and concrete cases.

And again on p. 342:

Lines of demarcation have to be drawn in construing the application of the sections to actual concrete cases, as to each of which individually the Courts have to determine on which side of a particular line the facts place them.

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In *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1928), 98 L.J., P.C. 65; (1929), A.C. 260, the Privy Council said, after a consideration of the leading cases, p. 267:

As a matter of construction it is now well settled that, in the case of a company incorporated by Dominion authority with power to carry on its affairs in the Provinces generally, it is not competent to the Legislatures of those Provinces so to legislate as to impair the *status* and essential capacities of the company in a substantial degree.

And went on to hold that "the statutes now under consideration do so impair the *status* and powers of such a company . . ."

In the British Columbia Fisheries Reference case, *Attorney-General for Canada* v. *Attorney-General for British Columbia* (1930), A.C. 111, it was contended by the National Government that certain sections of the National Fisheries Act of 1914 (authorizing the minister of fisheries to withhold licences to fish) were valid on the ground (p. 120) that they were "necessarily incidental to effective legislation upon an enumerated subject" (class 12. "Sea Coast and inland fisheries") though otherwise the matter admittedly fell within the exclusive jurisdiction of the Province as "property and civil rights," but it

was held (pp. 121-2) that they were not so incidental and consequently "the impugned sections . . . cannot be supported."

On page 118 four "propositions" were stated on the question of legislative conflict of which the 3rd and 4th are of special relevancy, *viz.*:

(3.) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the Provincial Legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91: see *Attorney-General of Ontario* v. *Attorney-General for the Dominion* (1894), A.C. 189; and *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348.

(4.) There can be a domain in which Provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail: see *Grand Trunk Railway of Canada* v. *Attorney-General of Canada* (1907), A.C. 65.

Still more recent is the decision of the same tribunal in *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (1931), A.C. 310 wherein the principles hereinbefore cited from the *Citizens* and *John Deere Plow* cases were approved pp. 316-7 with the additional observation:

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The object is as far as possible to prevent too rigid declarations of the Courts from interfering with such elasticity as is given in the written constitution. With these two principles in mind the present task must be approached.

And it was held that the "pith and substance" of the impugned Federal statute was, under the circumstances, not "in substance" (p. 325) an encroachment on the exclusive power of the Provinces to legislate on property and civil rights, though in *The Board of Commerce Act* case (1922), 1 A.C. 191 (which was much relied upon by the Provinces concerned, but was now distinguished on the facts, p. 325) it was held by the same tribunal that there had been on the part of the Dominion "attempts to interfere with Provincial rights," sought to be justified under the head of criminal law, but which had been made "colourably and merely in aid of what is in substance an encroachment."

And at p. 317 it was said:

Their Lordships entertain no doubt that time alone will not validate an Act which when challenged is found to be *ultra vires;* nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment. But one of the questions to be con-

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sidered is always whether in substance the legislation falls within an enumerated class of subject, or whether on the contrary in the guise of an enumerated class it is an encroachment on an excluded class. On this issue the legislative history may have evidential value.

In the attempt to determine the vexed question as to whether the two legislations really "meet" (which must mean meet in conflict) in a field which is not clear, great difficulty is often encountered in drawing the "lines of demarcation" on the ever varying facts before the Court. Upon rare occasion there is little difficulty, *e.g.*, in *Madden* v. *Nelson and Fort Sheppard Railway* (1899), A.C. 626 wherein it was found (p. 628) that the Provincial Legislature had attempted to "enter into a field . . . which is wholly withdrawn from them and is therefore, manifestly *ultra vires*." But in so holding the Privy Council referred to a case which was on the line, *viz.*, their own very recent decision in *Canadian Pacific Railway* v. *Corporation of the Parish of Notre Dame de Bonsecours, ib.* 367, and which is relied upon by the present respondent, and it undoubtedly does assist his submission that even a great railway corporation, created by special Act of Parliament for exceptional National purposes, may still be under Provincial obligations (there to keep its own authorized ditches clean) delegated to municipalities, even though, as Lord Watson said, p. 371:

It is not matter of dispute that, by virtue of these enactments, the Parliament of Canada had and have the sole right of legislating with reference to the matter of the appellants' railway.

On the other hand, we have a later decision of the same tribunal, also with regard to a Dominion railway, *Grand Trunk Railway of Canada* v. *Attorney-General of Canada* (1907), A.C. 65, that it was "truly railway legislation" on the part of the company to enter into contracts with its employees which were prohibited by Parliament even though (p. 68) "it is true that in so doing it does touch what may be described as the civil rights of those employees. But this is inevitable. . . ."

Then the leading case from this Province of *Cunningham* v. *Tomey Homma* (1903), A.C. 151 is noteworthy and very instructive on the present question because it was one of an alien, and only two classes of persons as such are specifically enumerated in said sections 91 or 92, *viz.*, "(25.) Naturalization and aliens," and "(24.) Indians," etc. It was sought in

that case to expand the personal rights of naturalized aliens, and the power of Parliament over that exclusive subject-matter, to such an extent that they had the right to have their names placed upon the Provincial register of voters, and it was submitted (p. 155) that under said class (25) "the whole subject of naturalization is reserved to the exclusive jurisdiction of the Dominion" and that by the Naturalization Act of Canada a naturalized alien is within Canada entitled to all political and other rights powers and privileges to which a natural-born British subject is entitled in Canada. But this submission was rejected, their Lordships saying, pp. 156-7:

The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion—that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question as to what consequences shall follow from either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality.

This decision was followed in another case from this Province —*Brooks-Bidlake and Whittall, Ld.* v. *Attorney-General for British Columbia* (1923), A.C. 450 wherein it was stated, p. 457:

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It is said that, as s. 91, head 25, of the British North America Act reserves to the Dominion Parliament the exclusive right to legislate on the subject of "naturalization and aliens," the Provincial Legislature is not competent to impose regulations restricting the employment of Chinese or Japanese on Crown property held in right of the Province. Their Lordships are unable to agree with this contention. Sect. 91 reserves to the Dominion Parliament the general right to legislate as to the rights and disabilities of aliens and naturalized persons; but the Dominion is not empowered by that section to regulate the management of the public property of the Province, or to determine whether a grantee or licensee of that property shall or shall not be permitted to employ persons of a particular race. These functions are assigned by s. 92, head 5, and s. 109 of the Act to the Legislature of the Province; and there is nothing in s. 91 which conflicts with that view.

Then there is the important decision of the Supreme Court of Canada in *Quong-Wing* v. *The King* (1914), 49 S.C.R. 440 wherein it was held that a general prohibition, to be enforced by penalties after conviction, in a Saskatchewan statute, against the employment by any person, of white women or girls in "any restaurant, laundry or other place of business or amusement

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owned, kept or managed by any Chinaman" was *intra vires* even though the Chinese appellant convicted thereunder was a naturalized alien, and *Tomey Homma's* case, *supra,* was relied upon, and the submission was again rejected that under said class (25) Parliament had exclusive authority over all matters which directly concern the rights, privileges and disabilities of naturalized aliens. Mr. Justice Davies said, p. 447:

While it [class 25] exclusively reserves these subjects to the jurisdiction of the Dominion in so far as to determine what shall constitute either alienage or naturalization, it does not touch the question of what consequences shall follow from either, I am relieved from the difficulty I would otherwise feel.

The legislation under review does not, in this view, trespass upon the exclusive power of the Dominion Legislature. It does deal with the subject-matter of "property and civil rights" within the Province, exclusively assigned to the Provincial Legislatures, and so dealing cannot be held *ultra vires,* however harshly it may bear upon Chinamen, *naturalized or not,* residing in the Province.

And p. 448:

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I think the pith and substance of the legislation now before us is entirely different. Its object and purpose is the protection of white women and girls; and the prohibition of their employment or residence, or lodging, or working, etc., in any place of business or amusement owned, kept or managed by any Chinaman is for the purpose of ensuring that protection. Such legislation does not, in my judgment, come within the class of legislation or regulation which the Judicial Committee held *ultra vires* of the Provincial Legislatures in the case of *Union Colliery Company of British Columbia* v. *Bryden* (1899), A.C. 580.

Mr. Justice Duff said, p. 462:

The enactment is not necessarily brought within the category of "criminal law," as that phrase is used in section 91 of the British North America Act, 1867, by the fact merely that it consists simply of a prohibition and of clauses prescribing penalties for the non-observance of the substantive provisions. . . .

The authority of the Legislature of Saskatchewan to enact this statute now before us is disputed upon the ground that the Act is really and truly legislation in relation to a matter which falls within the subject assigned exclusively to the Dominion by section 91 (25), "aliens and naturalization," and to which, therefore, the jurisdiction of the Province does not extend.

And he proceeds to dispose of that submission, basing his convincing opinion largely upon *Tomey Homma's* case, which removed (p. 466 *et seq.*) the obstacle raised by Lord Watson's observations in *Bryden's* case.

Finally* I refer to the first case cited herein, *Chung Chuck* v. *The King* (1930), A.C. 244, which followed *Nadan* v. *The King* (1926), A.C. 482, wherein it was held that each of the two distinct appeals from the Appellate Court of Alberta affirming separate convictions, was a "criminal case" within section 1025 of the Criminal Code, even though one of the convictions was under the Alberta Liquor Control Act, 1924, for unlawfully having liquor in possession, and the other was under the Canada Temperance Act, R.S.C. 1906, for unlawfully transporting liquor through that Province: on the first charge the appellant was fined $200 and costs and the liquor and his motor-car forfeited, and on the second he was fined $500 and costs, and in default of payment to be, in each case, imprisoned.

Both the appeals were dismissed even though it was desired (p. 496) to question the validity of the respective Provincial and Dominion statutes on which the separate convictions were based, their Lordships saying in conclusion, p. 496:

> It is of the utmost importance that a decision on a criminal charge so reached should take immediate effect without a long drawn out process of appeal, and it is undesirable that appeals upon such decisions should be encouraged by the Board.

MARTIN, J.A.

In *Chung Chuck's* case, *supra,* which was a conviction for shipping vegetables contrary to the Produce Marketing Act of this Province, leave to appeal was also refused upon the same ground, as appears from the judgment at pp. 251, 257, 257-8, particularly at p. 251, wherein is approved the judgment of Lord Sumner in *Rex* v. *Nat Bell Liquors, Ld.* (1922), 2 A.C. 128 "that there was a part of the criminal law which was within the competence of the Provincial Legislature," though by class (27) of said section 91 the Parliament of Canada is given exclusive jurisdiction over the subject-matter of "The Criminal Law," except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters.

These two cases, therefore, are a striking illustration of the way in which in the practical working out of liquor control or prohibition the enactments of two distinct Legislatures may

* NOTE.—To these cases should now be added the later and confirmatory decision of the Privy Council in *Mayland and Mercury Oils Ltd.* v. *Lymburn et al.* (1932), 1 W.W.R. 578, 582-3; and *cf.* also *In re Silver Bros. Ltd. Attorney-General for Quebec* v. *Attorney-General for Canada, ib.* 764, 767.—A. M.

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stand side by side and be reasonably enforced without meeting in conflict in the field.

Approaching, then, the present circumstances in the light of all the foregoing principles as a guide I have little difficulty in reaching the conclusion the "lines of demarcation" between these statutes should be drawn to hold that the total prohibition in the said group of sections of the Indian Act, entitled "Trespassing on Reserves" against all kinds of trespassers upon reserves, extending even to Indians not of the band in occupancy thereof, does not meet in conflict the said Game Act of this Province in its practical operation so far as concerns any "person," who comes within the definition in the Indian Act, Sec. 2, of that word as meaning "an individual other than an Indian," and there is nothing to induce me to think or apprehend that in its "special aspect" and for the attainment of its "particular purpose" (to use the very apt expressions already cited from the *Parsons* case) said Act has not been and will not be fully effective, taken in conjunction with other sections, such as 118, to protect the Indians from the encroachments of trespassers of all kinds including hunters and fishermen, and there is no necessity to seek for or resort to other incidental powers which would conflict with those of property and civil rights as asserted by said Game Act for the general benefit of all residents of the Province as aforesaid. In other words, a trespassing "person" who violates the special prohibitions of said sections may, as in *Rex* v. *Nadan,* so act as to find himself open to two distinct prosecutions and penalties, first, to one under said trespass group of sections and section 115, and second to the additional one of violating the game laws of the Province.

MARTIN, J.A.

The truth is, that in order to secure the practical working out of Parliamentary powers relating to such a special and personal subject-matter as Indians not only the Courts but the respective Legislatures must "in performing a difficult duty" work in harmony to find a way to make it

> possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them.

as was laid down by the *Parsons* and *John Deere Plow* cases,

supra, and in the Indian Treaty case, *Dominion of Canada* v. *Province of Ontario* (1910), A.C. 637, it was said, p. 645:

The Crown acts on the advice of ministers in making treaties, and in owning public lands holds them for the good of the community. When differences arise between the two Governments in regard to what is due to the Crown as maker of treaties from the Crown as owner of public lands they must be adjusted as though the two Governments were separately invested by the Crown with its rights and responsibilities as treaty maker and as owner respectively.

With respect to the effect of the words "without the authority of the superintendent general to reside or hunt upon, occupy or use any land or marsh . . . " said section 34, it is not necessary for the disposition of this case to consider them because no "authority" was in fact given, and so the question does not arise, therefore I shall content myself by saying that under certain circumstances the superintendent would unquestionably have the power, in the exercise of general control over the subject-matter of trespassing, to give authority to any Indians to occupy reside or hunt upon any part of any reserve where it would be for the benefit of them or its Indian occupants to do so: it might, *e.g.*, be for the general or particular benefit of the Indians in a Province to allow some of them to occupy temporarily the reserve of another band and to hunt and fish thereon in times of scarcity for food, or to cut timber for fuel, and even also to allow other "persons" (defined as aforesaid) to enter the reserve for the benefit of the Indians, but never otherwise: *e.g.*, to hunt and destroy wolves and cougars as aforesaid, or wild horses under the Animals Act, Cap. 11, R.S.B.C. 1924, Sec. 18, or sea lions interfering with their fisheries, or other harmful beasts birds or insects, etc. But whether that authority could lawfully be extended to allow game to be hunted on reserves by such "persons" during a close season defined by a Provincial Game Act is a question which will require full and careful consideration should it ever arise. That it would not be lawful for the superintendent to get up a shooting party on an Indian Reserve for the benefit of himself or his friends or allow anyone else to do so in a close season or at any time, may be conceded, though it is not for a moment to be presumed that he would sanction such improper proceedings.

Illustrations may well be given, as some of my learned

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brothers have done, of the unexpected results of pushing these two respective legislations to an extremity, but then any power, even judicial, may be abused and we must assume that the Governments concerned will act in concert in a reasonable manner in the practical furtherance of the two distinct matters under their control. So far, happily, that wise course has been adopted, and several sections in this Provincial Game Act shew that the Legislature is alive to the just claim of the Indians for protection, and indeed special consideration, respecting game (*cf.* sections 6, 9, 22, 40 and 41) which, as my brother GALLIHER says, is peculiar owing to the mobile habits of birds and animals, and it is just as much, if not more, in the interest of Indians that game should be generally preserved outside their reserves because the more it is produced outside the more will be found inside them.

MARTIN, J.A.

During the argument it was submitted that the game on this Indian Reserve is part and parcel of the land itself and the absolute property of the National Government, as pertaining to its ownership of the land, but no authority was cited to support that position, which, though doubtless sound as to Nationally-owned "Territories," is as regards the Provinces contrary to the whole ground of the decision in *The Queen* v. *Robertson, supra,* and to the line of decisions by the Privy Council beginning with *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1888), 14 App. Cas. 46, and continuing through *Ontario Mining Company* v. *Seybold* (1903), A.C. 73, and the Indian Treaty case, *Dominion of Canada* v. *Province of Ontario, supra,* at 644-6, and also not overlooking *Burk* v. *Cormier* (1890), 30 N.B.R. 142, and Lord Herschell's statement in *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia* (1898), A.C. 700 at 709 that:

> It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it.

The case of *Attorney-General for Canada* v. *Giroux, supra,* is instructive though it was one of a special title through a com-

missioner. In *Quirt* v. *The Queen* (1891), 19 S.C.R. 510 at p. 519, Mr. Justice Strong truly said, "the rights of the Crown as regards Indian lands are of . . . an anomalous and peculiar nature"; and *cf.* also Martin's Hudson's Bay Company's Land Tenures, 1898, Cap. V., on "The Indian Title and Half-Breed Claims."

With respect to the language "of which legal title is in the Crown" in the said definition of "reserve," the word "Crown" is used in the broad sense indicated in the *Dominion of Canada* case, *supra,* at pp. 645-6 as including the Crown Provincial in appropriate circumstances, as had also been held by the same tribunal in the earlier Vancouver "Street Ends case," *Attorney-General for British Columbia* v. *Canadian Pacific Railway* (1906), A.C. 204, at p. 211.

There remain for consideration sections 117 and 156 and 69. The first relates only to cases where the Indians of a band have consented to the leasing or granting "to any person" of shooting or fishing privileges over their reserve in whole or in part, and "in such case" there is a general prohibition, with a penalty, against "every person" not entitled under such lease or grant (which would include the consenting Indians themselves) from shooting or fishing within such leased or granted area. This is so clearly the special case of active participation by the Indians themselves in the disposition and restriction of their own personal rights in their own reserve that it would undoubtedly be a matter falling within the jurisdiction of Parliament under class 24, and it would be, obviously, in any event, a necessary incident to that jurisdiction that "every person" other than the Indians should be excluded from fishing or shooting in the "leased or granted" area, quite apart from any fish or game laws that might lawfully be enacted by the Province respecting its "property and civil rights": in other words, the two legislations do not in reality "meet."

MARTIN, J.A.

Section 156 is simply in essentials a repetition, for no apparent purpose, of the prohibition contained in said section 117, and therefore governed by the same observations.

Section 69 provides that:

69. The superintendent general may, from time to time, by public notice, declare that, on and after a day therein named, the laws respecting game in

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force in the Province of Manitoba, Saskatchewan or Alberta, or the Territories, or respecting such game as is specified in such notice, shall apply to Indians within the said Province or Territories, as the case may be, or to Indians in such parts thereof as to him seems expedient.

MARTIN, J.A.

This is an enabling section to authorize the application of Federal and certain Provincial game laws in whole or in part, but as it does not extend to this Province it is not relevant to this case. Obviously it has reference to the origin and history (alluded to in *The Queen* v. *Robertson, supra,* pp. 616-7, 619, and discussed in "The Rise of Law in Rupert's Land," 1890, 1 West. Law Ti. 49, 73 and 93) of those three Provinces and of the old North-West Territories (under Cap. 49 of 1875), formerly Rupert's Land and the easterly part of the Indian Territories, out of which they were after Confederation partly carved (as long before was also the Colony of Vancouver Island in 1849 by 12 & 13 Vict., Cap. 48) the "ordinary Crown lands" of which were, as has been noted *supra,* till quite recently the property of the Dominion of Canada, and still are in the case of the "Territories" named in said section, which by the interpretation section 2 (*m*) "means the North-West Territories and the Yukon Territory"; and in all cases its application is not general as it is only declared to "apply to Indians within the said Province or Territories as the case may be . . . ."

We are not informed that the superintendent general has taken advantage of the power so conferred upon him which might well be usefully exercised in co-operation with the said Legislatures to the mutual benefit of all concerned, though that is purely a matter for them to decide upon their varying conditions (*cf. The Queen* v. *Robertson, supra,* 619) which differ greatly from those on this Pacific Coast, and we must assume, as the Privy Council said in the *Street Ends* case (*supra*) "that all necessary communications between the Governments would always take place."

Pursuant to the "wise course" suggested in *Parsons'* case, *supra,* I have refrained from considering more than is absolutely necessary the *status* or rights of Indians as distinguished from other "persons" under the legislation in question, and though several cases have been decided upon that interesting question (the principal ones being *Totten* v. *Watson* (1858), *supra; Reg.*

v. *Gibb* (1870), 5 Pr. 315; *Rex* v. *Hill* (1907), 15 O.L.R. 406; *Rex* v. *Beboning* (1908), 17 O.L.R. 23; *Rex* v. *Martin* (1917), 41 O.L.R. 79; *Sanderson* v. *Heap* (1909), 19 Man. L.R. 122; *Rex* v. *Rodgers* (1923), 33 Man. L.R. 139; *Rex* v. *Edward Jim* (1915), 22 B.C. 106; *Rex* v. *Chan Lung Toy* (1924), 34 B.C. 194; *Rex* v. *Cooper* (1925), 35 B.C. 457; and *Rex* v. *McLeod* (1930), 2 W.W.R. 37), I need only refer to our decision in *Rex* v. *Cooper* for the sole purpose of saying that it was a case wherein an Indian was personally concerned by the selling of intoxicating liquor to him, and we were of opinion that the Liquor Act of this Province did not apply to such an offence because there had been "a complete occupation *ad hoc* by the Federal Parliament of this particular field," which I may add is peculiarly one that that Parliament should have the control of so as to protect the Indians as much as possible from the shocking results of inflaming them with intoxicants.

MARTIN, J.A.

It follows that in my opinion the learned judge appealed from was right in affirming this conviction, doubtless in pursuance of the views expressed in his prior carefully prepared judgment in *Rex* v. *McLeod, supra,* with which I am in general accord, and therefore this appeal should be dismissed.

GALLIHER, J.A.: I agree in the result with my brother McPHILLIPS. The act complained of was for shooting a pheasant during the close season. The offence took place on an Indian Reserve over which the Dominion Government have jurisdiction and the Federal Government under the Indian Act have passed a law making it an offence to shoot birds at any time upon the Indian Reserves without permission and was designed for the preservation of game generally in the interests of the Indians.

GALLIHER, J.A.

The Provincial Act is one passed for the protection of game in the Province and a close season is fixed from time to time between certain dates in which it is unlawful to shoot game dealing with certain species of game birds and animals.

The prosecution was under the Provincial Game Act and among other objections raised to the conviction is that the Dominion Government having entered the field prosecutions must be under that Act where the offence is committed on an

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Indian Reserve. It is well known that each Province has its own game laws restricting the shooting of wild game and fixing close seasons.

It is scarcely to be thought that in dealing with the subject in a general way the Dominion would have had in mind that they were covering a subject where owing to climatic and other prevailing conditions the different Provinces would and have different restrictions and different close seasons where they could by permission given to certain persons allow indiscriminate shooting on Indian Reserves regardless of any Provincial laws passed for the preservation of game generally.

We all know of the flight of birds and their moving from one area to another.

Today numbers of birds may be on an Indian Reserve and in a few days outside that reserve entirely so that as I view it the Provinces are dealing with the protection of the game generally as game and the Dominion was dealing with the subject not so much directly for the protection of the game as for the protection of the Indians on the reserve. In other words, in my view, they were not dealing with the matter in the same aspect as the Provinces have in legislating as to close seasons.

In this view I would uphold the conviction and dismiss the appeal. My brother McPHILLIPS has dealt at length with other aspects of the case which it is unnecessary for me to enter into but which I think carry weight.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: This appeal is one from the judgment of His Honour Judge SWANSON affirming a conviction made by a stipendiary magistrate in the County of Yale whereby the appellant was convicted for that he at Kamloops Indian Reserve in the County of Yale on or about the 2nd day of November, 1929, being the close season, unlawfully did kill a pheasant contrary to section 9 of the Game Act, being R.S.B.C. 1924, Cap. 98, and a fine was imposed of $25 and failing payment imprisonment for the term of seven days would follow. The appeal is put upon the ground that the Game Act is *ultra vires* of the Province as regards Indian Reserves. This certainly brings up a very important matter but at the outset I venture to say that the contention is wholly fallacious. Further it would

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be a most astounding result if the contention made had merit. It would in its result have the effect of a serious and disastrous result upon the game of the Province; it would mean that game could be, in the close season, slaughtered upon Indian Reserves, in truth, all that would be necessary would be to carry out a drive of game on to the Indian Reserve and there a wholesale slaughter could take place. That this could be is unthinkable and of course it is not difficult to at once call up authority to absolutely controvert any such contention. I may say that this is not a case of an Indian upon the reserve shooting, although I do not consider that even he would be entitled to disobey the Provincial law.

MCPHILLIPS, J.A.

It is pressed that the decision of this Court in the case of *Rex* v. *Cooper* (1925), 35 B.C. 457 stands in the way of it being held that the conviction in the present case is a valid one. With great respect to all contrary opinion that is not my view. The case there was express Dominion legislation (section 135, Cap. 98, R.S.C. 1927) covering the offence, and the holding was that the Provincial statute did not apply to a sale of liquor which is within the terms of the Indian Act and the conviction was quashed. We have no such case here. What we have here is Provincial legislation imposing a ban on shooting throughout the Province during certain close seasons and it was within a close season that the shooting took place. It was not shewn that the appellant came within section 115 of the Indian Act, *i.e.*, that he had the authority of the superintendent general to hunt upon the reserve but if he had he still would be subject to the Provincial law and could not shoot out of season. This is not the case of the same act as that legislated against by the Dominion. Here even if the appellant had not the authority of the superintendent general to hunt upon the reserve and would be subject to a penalty, the act that is covered by the Provincial legislation is shooting out of season, a very different act. The gist of the decision in *Rex* v. *Cooper, supra,* as defined by the learned Chief Justice of this Court is found on p. 460 of the report and reads as follows:

The assertion of the right by two distinct legislative bodies to make the same act an offence and subject the offender to a double penalty, is, I think, contrary to the accepted principles of our law and contrary to the

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British North America Act. No doubt that result may sometimes be brought about indirectly but there is no case in the books which goes the length of holding that when the Dominion has created a particular act a crime the Province may for its purposes create the same act a crime.

I would refer to a judgment of Killam, J. (as he then was, afterwards Chief Justice of Manitoba, later one of the justices of the Supreme Court of Canada and later again Chief Railway Commissioner for Canada), a most learned judgment of that very eminent and distinguished Canadian jurist in *The Queen* v. *Robertson* (1886), 3 Man. L.R. 613, dealing with the Manitoba statute 46 & 47 Vict., Cap. 19 as amended by 47 Vict., Cap. 10, s. 25, s-s. (g) regulating the killing and possession of game at certain seasons of the year, and it was held that the legislation was *intra vires* being within the clauses of the B.N.A. Act relating to "Property and civil rights" and "Matters of a merely local or private nature."

The learned judge dealt with the object of the Manitoba Act at p. 620:

> The object of the Act, or the portion relating to the protection of game, is essentially local. It is to secure the increase, or to prevent, at any rate as far as possible, the decrease of the supply of game within the Province, in order that the people of the Province may enjoy the sport of pursuing and killing the birds or other animals mentioned in the Act, or may have at hand a ready supply of them for food or for profit. All of the enactments against having them in possession or exporting them, are evidently so many accessories to the prohibition upon the killing at certain seasons, and all are plainly directed to the purpose mentioned.

Then at p. 622 we have this language:

> The prohibitions against the killing or taking of wild birds or other animals, and against having them in possession are prohibitions pure and simple of the exercise of civil rights. This was disputed upon the argument of the application, but it appears too clear to require any considerable discussion.

The appellant in the present case had imposed upon him, as well as upon all the inhabitants of British Columbia, inhibition of not being entitled to shoot pheasants during the close season. I would here again call attention to the language of Killam, J., above quoted:

> "The prohibition against the killing or taking of wild birds or other animals, and against having them in possession are prohibitions pure and simple of the exercise of civil rights.

No matter where the appellant was—upon an Indian Reserve with or without authority—the Provincial legislation is para-

mount in respect of "(13) Property and civil rights in the Province" (British North America Act). The Game Act is legislation in the way of regulation of property and civil rights. In passing for instance fire regulations under the Fire Marshal Act (Cap. 91, R.S.B.C. 1924) such regulations would have application in Indian Reserves, if not see the peril that would result from fire upon an Indian Reserve perilous to adjoining territory! Would not the Provincial legislation extend into the reserve? Assuredly this would be so.

Then we have Lord Watson in *St. Catherine's Milling and Lumber Company* v. *The Queen* (1888), 14 App. Cas. 46 at p. 55 saying:

There has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a *plenum dominium* wherever that title was surrendered or otherwise extinguished.

I would refer to what Lefroy has said in his work on the Constitutional Law of Canada, at p. 141:

. . . it does not follow that when the Dominion Parliament has drawn an Act into the domain of criminal law, the right of the Provincial Legislatures to pass laws in regard to such an Act necessarily ceases. They may still, in many instances, legislate against the same Act in another aspect.

MCPHILLIPS, J.A.

Compare Clement's Canadian Constitution, 3rd Ed., pp. 586-7; *Regina* v. *Boardman* (1871), 30 U.C.Q.B. 553, 556; *Quong-Wing* v. *The King* (1914), 49 S.C.R. 440, 462. See also *Regina* v. *Boscowitz* (1895), 4 B.C. 132.

The short point really in this appeal is this that the legislation (Game Act) has effect throughout the whole Province inclusive of Indian Reserves and must be obeyed. I would again make a quotation from Killam, J., in *The Queen* v. *Robertson* case at p. 627:

The Provincial Legislature, under its authority to legislate upon the subject of "Property and civil rights," could undoubtedly limit civil rights, could take away some already existing, could prohibit their exercise as such. If it could do this, it could do it in the interests of the Province, and those in the Province, at large, as well as in the interest of special individuals or classes of individuals. It must then follow that, the power being expressly given to it by statute, it can enforce its law by the imposition of punishment, and cannot be considered as thereby enacting a "criminal law," or legislating upon the subject of "criminal law" within the meaning of the British North America Act.

I am therefore clearly of the opinion that the conviction here was a valid one founded upon a Provincial statute respecting

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property and civil rights, an exclusive jurisdiction of the Province under the British North America Act and it is idle to contend that the legislation is *ultra vires* as respects Indian Reserves. The legislation of the Dominion as respects hunting on reserves is one aspect but the other aspect is materially different—it is a prohibition from shooting within the close season. This is an interference with civil rights and clearly within the power of the Provincial Legislature, an exclusive power into which domain the Dominion Parliament cannot enter. That being the case His Honour Judge SWANSON was right in his affirmance of the conviction. It follows that the appeal in my opinion should be dismissed.

MACDONALD, J.A.

MACDONALD, J.A.: This is an appeal from a conviction of one Morley (not an Indian) by a stipendiary magistrate, affirmed on appeal by His Honour J. D. SWANSON, judge of the County Court of Yale, for unlawfully killing a pheasant in November, 1929 (during the close season), on the Kamloops Indian Reserve contrary to section 9 of the Provincial Game Act, being Cap. 98, R.S.B.C. 1924. The point raised is that the Game Act does not extend to Indian Reserves; that the Province has no authority to create the act complained of an offence or to prosecute in respect thereto and that a conviction, if any, could only be made by the Federal authorities under the Indian Act (Cap. 98, R.S.C. 1927) exclusive legislative authority over "Indians and lands reserved for the Indians" being vested only in the Dominion Parliament (B.N.A. Act, Sec. 91 (24)).

By section 2 (*e*) of the Indian Act the term "Indian lands" means any reserve or portion of a reserve which has been surrendered to the Crown and by subsection (*j*)

"Reserve" means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, and which remains so set apart and has not been surrendered to the Crown, and includes all the trees, wood, timber, soil, stone, minerals, metals and other valuables thereon or therein.

If an Indian living on the reserve had been convicted of this offence under a Provincial statute it would be invalid (*Rex* v. *Edward Jim* (1915), 22 B.C. 106). What is the situation where, as here, a white man enters a reserve and kills a pheasant

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contrary to the provisions of the Provincial Game Act? Has the Federal Parliament jurisdiction to legislate with respect to a person other than an Indian, who may commit an offence on an Indian Reserve? I think it has but that does not conclude the point. It purports to exercise that right by several sections of the Indian Act. By section 10, subsection (4) (R.S.C. 1927, Cap. 98) any "person" with whom an Indian child resides who fails to cause such child between certain ages to attend the industrial or boarding schools provided as required by that section is liable to a fine. "Person" in that Act means "an individual other than an Indian." Here we have legislation applying to a white man, living off a reserve, in respect to his conduct towards Indians under Dominion supervision. If Dominion legislation is necessary before a white man living off the reserve can be prosecuted it does not follow that because of failure to make such provision—assuming for the moment it is within the power of the Dominion Parliament to do so—the Provincial Parliament has authority to legislate on the same point (*Madden* v. *Nelson and Fort Sheppard Railway Company* (1899), A.C. 626). If that class of legislation is wholly within Federal jurisdiction, whether the field is occupied by Dominion legislation or not, the Provincial Parliament will not be permitted to enter it. It follows that if the Dominion Parliament has authority to make it an offence for a white man to enter a reserve and shoot game thereon the local Legislature cannot under its Game Protection Act make a similar act an offence.

However, it is not necessary to go as far as indicated. The Dominion Parliament did legislate in respect to persons, other than Indians, trespassing or "hunting" upon parts of a reserve without authority and have therefore occupied the field. Section 34 provides that

No person, or Indian other than an Indian of the band, shall without the authority of the superintendent general, reside or hunt upon, occupy or use any land or marsh, or reside upon or occupy any road, or allowance for road, running through any reserve belonging to or occupied by such band.

The caption of this section is "Trespassing on Reserves." I cannot agree, however, with respect, with the view of SWANSON, Co. J. in *Rex* v. *McLeod* (1930), 2 W.W.R. 37 at p. 41 in giving a restricted meaning to the word "hunt" confining it to a

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trespass. Hunting may not eventuate in the killing of game but if game is killed on part of a reserve the offender, as a necessary and natural sequel, must have been engaged in hunting. The accused, to kill the pheasant, must necessarily have hunted on part of the reserve, and would be liable to the penalties imposed under section 115 of the same Act; and, if so, and these sections are *intra vires* of the Dominion Parliament the local Legislature cannot make the same act an offence by a Provincial statute. Other sections in the Indian Act dealing with game and hunting by white men or Indians indiscriminately are sections 35, 117, and 156. It follows therefore that the Dominion Parliament having legally occupied the field any legislation of the local Legislature creating the same act an offence is, to the extent that it does so, displaced (*Rex* v. *Cooper* (1925), 35 B.C. 457).

MACDONALD, J.A.

The Dominion Parliament has authority to legislate and did legislate in respect to birds found on or over a reserve. It is within its rights in making it an offence to "hunt" game of any kind on the reserve and having done so the Provincial Legislature cannot make the same act an offence. *Rex* v. *Cooper, supra,* governs this case unless upon the construction of the relevant sections of the Indian Act it should be held that the offence of "hunting" on a reserve is something different from "killing a pheasant." It is enough to say that one who kills a pheasant while out for game cannot be heard to say that although he did so he was not hunting.

If the appellant produced authority from the superintendent general for hunting upon the reserve he would not be guilty of an offence in killing a pheasant thereon. The respondent's contention really is that such authority would be without validity during the close season for game provided by the Provincial Game Act. In other words, if one armed with such authority should shoot a pheasant in the close season he could be prosecuted under the Provincial Act. That is no so, however. The reservation of Federal jurisdiction in respect to "Indians and lands reserved for the Indians" has a definite object in view, *viz.,* safeguarding the rights and privileges of the wards of the Dominion at all times, and one of its main purposes is to protect

game on the reserve for the exclusive use of the Indians, subject to minor exceptions. Section 34 *ante* does not apply to "an Indian of the band." They do not require authority to hunt. They may hunt on the reserve at any time and a Provincial Act cannot curtail that right by attempting to establish a close season applicable to reserves.

If therefore the rights of the Indians are to be preserved in these limited areas known as reserves it is incidentally necessary to prevent appellant and others of the white race from "hunting" and killing game thereon at all times of the year. Such an Act is legislation in respect to "Indians," *i.e.*, in respect to the requirements of Indians. If too the Provincial Legislature has authority to provide for a close season for shooting game on Indian Reserves it could by the same authority except reserves from the operation of the local Game Act and permit all and sundry to "hunt" thereon throughout the year. The Provincial Legislature would have power, if it chose to exercise it, to declare a close season for certain kinds of game, or for all kinds of game, in all parts of the Province except for example the District of Cariboo. Could it also declare a close season for the shooting of pheasants in all parts of the Province except upon Indian Reserves permitting indiscriminate slaughter in that area: and if so would not the latter part of the Act be *ultra vires* and anyone attempting to take advantage of it liable to prosecution under the Indian Act?

MACDONALD, J.A.

When authority was reserved to the Federal authorities to legislate in respect to its wards, the Indians, it means in respect to all matters affecting their welfare and civil rights. If their welfare is to be protected, others besides Indians must be restrained if they enter reserves. They cannot commit acts—such as shooting game—likely to interfere with their well being, if the Indian Act prevents it. The preservation of game affects their well-being and to preserve it the ordinary civil rights of others must be curtailed.

This contention is presented against the views I have outlined. Mankind, it is said, have a natural right to pursue and take game at all times and a law interfering with it (such as providing for a close season) is an invasion of that civil right

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and therefore within Provincial authority to enact it. It is said to be a matter affecting "property and civil rights" of a "merely local and private nature": that the object of the Provincial Game Act is the protection of game in this Province and hence an essentially local matter. It is a prohibition pure and simple of the exercise of civil rights. But the civil rights of an Indian may be affected and are affected by Dominion legislation by certain sections of the Indian Act and it cannot be said that such sections are *ultra vires* of the Dominion Parliament because, "property and civil rights" is a subject of legislation reserved to the Provinces. If interference with civil rights alone brings the matter within the jurisdiction of the Province these sections would be *ultra vires.* A division of legislative authority was provided by the British North America Act and under it the civil rights of all may be curtailed by the Dominion Parliament if by exercising them they conflict with the superior rights of the Indians on reserves to have the game thereon preserved for their own use and sustenance. If we had no Game Act and no Provincial legislation to interfere with the natural right of men to hunt at all seasons it would be possible, if this contention prevailed, to hunt on reserves at all times, notwithstanding the prohibitions contained in the Indian Act. If that view prevailed one of the purposes in reserving to the Dominion Parliament questions respecting "Indians and Lands Reserved for Indians" would be defeated. Protection of game on an Indian Reserve is under Dominion control. Incidental to that protection is the necessity of preventing hunting and shooting by anyone. It may be faulty or improvident legislation. That would not permit the Province to legislate in respect to the reserves to supplement it or to make it more effective. With some exceptions the Federal Parliament provides for a close season on reserves at all times. If the Provincial Act applies shooting would only be prevented for a limited period in each year. It necessarily follows that if it is illegal to shoot on a reserve by Provincial law during the close season it would be permissible to do so outside that period. That, however, is not the case. The Dominion Act prevents anyone, except those of a certain class—Indians of the band—or those having authority from the super-

intendent to hunt at any time. The appellant herein was within the prohibition of that Act. He could be convicted under it for the offence committed unless he produced authority to hunt from the superintendent; and Federal legislation preventing him from destroying game on a reserve is legislation in respect to Indians inasmuch as it preserves for them hunting privileges and a means of livelihood.

I would allow the appeal.

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

MARSHMAN v. SCOTT & PEDEN.

Interpleader — Execution creditor — Bill of sale — Validity — Fraudulent preference—County Court—Jurisdiction—Form of interpleader order—R.S.B.C. 1924, Cap. 53, Secs. 40 (1) and 86; Cap. 97, Sec. 3.

M. brought action in the County Court against B. for wages on the 4th of January, 1932. On the 13th of January following B. transferred to S. & P. by bill of sale a herd of cows and two horses. M. obtained judgment and an execution being issued on the 22nd of January, the sheriff seized one of the cows and the two horses. On the trial of an issue ordered to decide as to the ownership of the animals seized it was held that the bill of sale was void under section 3 of the Fraudulent Preferences Act, and M. recovered judgment.

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

Per MACDONALD, C.J.B.C.: Section 86 of the County Courts Act confers jurisdiction upon the County Court in interpleader. The learned judge not having founded his decision on fraud, it was contended he had no jurisdiction under section 40 (1) of said Act unless there was fraud. If there was want of *bona fides* in giving the bill of sale this would amount to fraud and entitle him to try the issue. The evidence discloses that the bill of sale was obtained by fraud and it is open to this Court to give the judgment that should have been given in the Court below, and the conclusion there arrived at should be affirmed.

Per MARTIN, J.A.: By section 86 of the County Courts Act general jurisdiction over interpleader is conferred on the County Court in matters within its jurisdiction, and there is nothing in either the County Courts Act or the Fraudulent Preferences Act disbarring parties to an inter-

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pleader issue from establishing their title to the property in dispute by invoking any statute which declares an opposing instrument of title to said property to be "utterly void" under certain circumstances by reason of the acts of the parties concerned in its creation.

Held, further, *per* MARTIN, J.A., that the issue to be tried was incorrectly stated in the interpleader order by being broken up into two "questions," the first improperly relating to the validity of the bill of sale and the second properly being in substance "whether at the time of the seizure by the sheriff the goods seized were the property of the claimants as against the execution creditor." The second was the sole and only question to be tried and the addition of another is contrary to precedent, misleading, and should be struck out.

Statement

APPEAL by Scott & Peden plaintiffs in the issue from the decision of LAMPMAN, Co. J. of the 13th of February, 1932, on an interpleader issue. The defendants in the action, Breadin and Christie, leased what is known as the Rithet Farm in 1922, where Christie kept his cattle and supplied Breadin who had a dairy in Victoria with milk. Breadin took the milk at a certain price and provided Christie with supplies on the farm. Christie gradually got into Breadin's debt, and in 1927 they moved the cattle to what is known as the Bunker's Farm, where the defendant in the issue, Marshman, was employed by Breadin to assist Christie in looking after the stock at $17.50 per week. Marshman was not paid regularly and on the 4th of January, 1932, he started an action in the County Court against Breadin for $407.15, the balance due for wages. In the meantime Scott & Peden had been providing Breadin and Christie with feed and other supplies, the debt accumulating to $1,600, and by bill of sale of the 13th of January, 1932, Breadin and Christie transferred to Scott & Peden seventeen cows, a Jersey bull, a colt and a filly for $605. Scott & Peden removed the stock with the exception of one cow, and the two horses, and later the sheriff under the plaintiff Marshman's execution, seized the cow and the two horses. On the application of the sheriff an interpleader was ordered between Scott & Peden as plaintiffs and Marshman as defendant as to (1) Whether or not the bill of sale under which the claimants claim certain of the goods seized by the sheriff, to wit, one cow and one mare and one colt is a good and valid bill of sale so far as the sheriff and the execution creditor are concerned. (2) Whether or not the said goods claimed were at the date of the said seizure by the said sheriff

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the property of the claimants as against the execution creditor.

The appeal was argued at Vancouver on the 2nd and 3rd of March, 1932, before MACDONALD, C.J.B.C., MARTIN, McPHILLIPS and MACDONALD, JJ.A.

Argument

D. S. Tait, for appellant: We submit (1) That there was no evidence upon which to found a judgment, that there was a fraudulent preference and (2) the County Court judge had no jurisdiction to entertain an application under the Fraudulent Preferences Act: see *Parsons Produce Co.* v. *Given* (1896), 5 B.C. 58; *Brethour* v. *Davis and Palmer* (1919), 27 B.C. 250.

Prior, for respondent: New grounds of appeal cannot be raised now: see *Re Hilton; Ex parte March* (1892), 67 L.T. 594; Halsbury's Laws of England, Vol. 17, p. 612. That the County Court judge had jurisdiction see *West* v. *Ames Holden & Co. et al.* (1897), 3 Terr. L.R. 17 at p. 35; *Cole* v. *Porteous* (1892), 19 A.R. 111.

MACDONALD, C.J.B.C.: We will now hear Mr. *Tait* on the question of jurisdiction.

Tait: The procedure is under section 7 of the Fraudulent Preferences Act: see Maclennan on Interpleader, p. 254. The County Court has no power to set aside deeds for fraud or mistake. It is not open to the County Court judge.

Prior, in reply: At the time of the bill of sale there were three executions against Breadin and Christie: see Parker on Frauds, pp. 176 and 210.

Cur. adv. vult.

7th June, 1932.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: Marshman is an execution creditor of one Breadin and Scott & Peden are purchasers of Breadin's stock, consisting of a herd of cows and a couple of horses. The sheriff seized one cow and two horses, parcel of the herd transferred as aforesaid and Scott & Peden made a claim under their bill of sale necessitating an interpleader between Marshman and them. It is from the judgment in the interpleader that this appeal is taken. Section 86 of the County Courts Act confers jurisdiction upon the County Court in interpleader. Objection

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was taken that the learned judge held Scott & Peden's bill of sale to be void under the Fraudulent Preferences Act. It was contended upon behalf of the defendants that the County Court had no jurisdiction unless there was fraud under section 40 (1) of the County Courts Act. The learned judge, however, did not found his decision upon fraud. If, however, there was a want of *bona fides* in the granting of the bill of sale, this would amount to fraud and entitle the County Court to try the issue in this case. That, I think, is the *ratio decidendi* in the decision in *Adams and Burns* v. *Bank of Montreal* (1899), 8 B.C. 314; (1901), 32 S.C.R. 719; and *Hazell* v. *Cullen* (1914), 20 B.C. 603. See also *Parsons Produce Co.* v. *Given* (1896), 5 B.C. 58, decided before subsection (1) was added to the Act. Section 40 amended by adding (1) after the decision in *Parsons Produce Co.* v. *Given* gives the County Court jurisdiction in questions of fraud up to the sum of $2,500 and this case is within that sum. If, therefore, the bill of sale in question here was not *bona fide,* and falls within the principle of the cases aforesaid, the plaintiff is, I think, entitled to succeed. I agree with the findings of fact of the learned trial judge that a preference was given to the defendants and the question in this appeal is was such preference given with intent to hinder and delay the plaintiff and the other creditors of the grantors. In other words it was, though innocent as a preference, fraudulent as against creditors. I may add here that Breadin was alleged to have been the owner of the cattle in question although Christie also professed to have been the owner. This issue was found by the learned judge in favour of the plaintiff.

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Peden, one of the defendants, was asked at trial: "How did it come about that you took the bill of sale?" His answer shews that for six or eight months defendants had been trying to buy the cattle from Christie though they, as found by the judge, belonged to Breadin; that the grantors finally agreed to sell them to the defendants, both alleged owners joining in the agreement. The defendants knew that the plaintiff had a claim against Breadin for wages and that Breadin was insolvent to the knowledge of both defendants and Christie. Plaintiff sued in the County Court on the 4th of January, nine days before the date of the bill of sale. The defendants had been carrying

Breadin and Christie along for months, purchases being made from day to day and generally for cash and claimed that at the date of the bill of sale there was owing from the grantors $1,600. At the time of the execution of the bill of sale the defendants paid an execution then in the hands of the sheriff. This was as alleged by defendants to clear title to the property so that the defendants might take the bill of sale. Judgment was about to be entered for the plaintiff in his County Court action for wages at the date of the bill of sale and Breadin was asked to instruct the defendants' solicitors to file a dispute note which was done. That staved the judgment off for a sufficient time to let the bill of sale be completed. The price of the herd of cattle was agreed upon in the solicitor's office at $605, no cash was paid except that paid to the sheriff—$110.23. The defendants removed the cattle, except those in question here, to another place, and the sheriff seized under the plaintiff's execution for wages upon those which were left. Mr. *Marchant* one of the defendants' solicitors called by them said that Peden and Christie came to his office to have the bill of sale drawn and Peden said that Christie was arranging to sell the herd of cattle.

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It is quite apparent to me that, with knowledge of Breadin's insolvency which was proved, and which is further shewn by the executions against him, the intent to hinder and delay the plaintiff and other creditors by the staving off of the plaintiff's action for wages until the bill of sale should have been completed, and the failure to prove pressure (there appears to have been no *bona fide* pressure, if any, used by defendants), the bill of sale was obtained by fraud, and the County Court had jurisdiction to so declare. The learned trial judge has not so declared, but it is open to this Court to give the judgment which he should have given. The learned judge decided under section 3 of the Fraudulent Preferences Act that it was void, proceedings having been taken within 60 days.

I would, therefore, affirm the conclusion arrived at by him (for, with deference, erroneous reasons) and dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: This is an appeal from the judgment of the County Court of Victoria in favour of the defendants on the trial of a sheriff's interpleader issue to determine the ownership of

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certain goods, live-stock, seized by the sheriff on an execution of the plaintiff for $182.50 and claimed by the defendants under a chattel mortgage which was declared by said judgment to be void under the Fraudulent Preferences Act, Cap. 97, R.S.B.C. 1924.

The first ground of appeal is that the said Act does not apply to those interpleader proceedings and so the learned judge had no jurisdiction thereunder, and reliance is placed upon the decision of Mr. Justice DRAKE in *Parsons Produce Co.* v. *Given* (1896), 5 B.C. 58, which was upon an action brought under the equitable jurisdiction of the County Court to set aside a chattel mortgage, and it was held that such an action would not lie for lack of jurisdiction. But by section 86 of the County Courts Act, Cap. 53, R.S.B.C. 1924, general jurisdiction over the matter of interpleader is thus conferred upon those Courts:

86. Relief by way of interpleader may be granted:—

(*a*) [At the instance of an] "applicant" [liable to be sued for debt or goods] by two or more parties making adverse claims . . .

(*b*) [At the instance of] a sheriff or other officer charged with the execution of process, ...

And *cf.* Order XIII. for the practice thereupon.

MARTIN, J.A.

Such relief would, of course, be confined to amounts and claims within the Court's jurisdiction, but within it there is no provision in either the County Courts Act or the Fraudulent Preferences Act debarring the parties to an interpleader issue from establishing their title to the property in dispute by invoking the assistance of any statute that declares an opposing instrument of title to said property to be "utterly void" (section 3) under certain circumstances by reason of the acts of the parties concerned in its creation, just as also, *e.g.,* by failing to have it "duly attested and registered" within the appointed time, or for other defects rendering it "null and void" under the Bills of Sale Act, Cap. 22, R.S.B.C. 1924, Sec. 8, or because it was a fraudulent document apart from any statute, *e.g.,* as being a forgery.

Our attention has been drawn to the special summary procedure under sections 7-10 of the said Fraudulent Preferences Act and an argument was founded on the restriction of its application "to the Supreme Court or a Judge or Local Judge thereof," but the special tribunal thereby created has jurisdic-

tion only over "a conveyance or other disposition of any of his [judgment debtor] lands in the land registration district in which the judgment is registered," and does not extend to personal property with which we are now dealing.

In coming to this conclusion I have not overlooked the addition, subsequent to *Parsons Produce Co.* v. *Given, supra,* of clause (*l*) to section 40 of the County Courts Act conferring jurisdiction in

(*l*) Actions for relief against fraud or mistake in which the damage sustained, or the estate or fund in respect of which the relief is sought, does not exceed in amount or value the sum of two thousand five hundred dollars.

This is taken *verbatim* from section 67 (8) of the English County Courts Act, 1888, with the sole change from pounds to dollars (Annual County Courts Practice, 1932, p. 59) and it is suggested that it applies said Frandulent Preferences Act to the trial of issues in interpleader proceedings, but having regard to the language of that subsection and the definition in section 2 of our County Courts Act that " 'action' . . . means a civil proceeding commenced in manner prescribed by Rules of Court," the submission of Mr. *Tait* that it is not applicable but relates only to substantial proceedings initiated in that specified manner has so much weight that I prefer to base my decision upon the former and firm ground (as I regard it) leaving this uncertain one for future consideration when that necessity arises.

MARTIN, J.A.

This first ground of appeal, therefore, in my opinion, is not supportable; and as to the second one, *viz.,* that on the facts the judgment is not sustainable, it is sufficient to say that the conclusion reached by the learned judge below is not, I think, one that we should be justified in disturbing.

During the argument we pointed out the incorrect way the sole issue to be tried was stated, being wrongly broken up into two "questions" so called, the first improperly relating to the validity of the bill of sale, and the second properly being, in substance, "whether at the time of the seizure by the sheriff the goods seized were the property of the claimants as against the execution creditor"—County Court Form No. 32: that issue was the sole and only question to be tried, and the addition of another miscalled one is not only contrary to proper precedent

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but confusing and misleading and therefore it should be struck out. It is well to remember what the Master of the Rolls said in *Mason* v. *Bolton's Library, Limited* (1913), 1 K.B. 83 at 88:

Now the words "interpleader issue ordered" are technical terms. They are, I should have thought, pre-eminently technical terms in interpleader proceedings.

And Farwell, L.J., said, p. 90:

The proviso is expressed in terms of art; technical phrases are used. It is a stringent rule of construction that in construing an Act of Parliament or a deed containing technical words those words must be given their technical meaning. It is idle to speculate what the Legislature might have done if its attention had been called to the fact that there are other modes of disposing of an interpleader summons than by ordering an interpleader issue.

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And Hamilton, L.J., said, at p. 92:

The term "interpleader issue" has been so long in use, since the statute 1 & 2 Will. 4, c. 58, created a mode of trying such questions by a feigned issue, and then the statute of 8 & 9 Vict. c. 109 altered the form from a feigned issue to an issue framed in the manner prescribed by that statute, that an interpleader issue and an order for an interpleader issue on an interpleader summons have not only had in the technical but in the general language of the law a perfectly precise meaning. I do not think we are at liberty to amend this proviso by giving it another meaning.

Seeing that on several occasions of late such issues, improperly framed in substance, have come before us it is desirable to keep these observations in mind for future guidance. The way in which the issue is tried and the onus of proof thereupon, are well displayed by the decision of the Court of Appeal in *Peake* v. *Carter* (1915), 85 L.J., K.B. 761; (1916), 1 K.B. 651.

It follows that the appeal should be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal. The learned trial judge, in my opinion, arrived at the proper conclusion and was clothed with complete jurisdiction in the interpleader proceedings to adjudicate upon all questions arising therein inclusive of the question of fraud.

MACDONALD, J.A.

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

Appeal dismissed.

Solicitors for appellants: *Tait & Marchant.*

Solicitor for respondent: *C. J. Prior.*

NEWTON v. CITY OF VANCOUVER *ET AL.*

MACDONALD, J.

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NEWTON v. CITY OF VANCOUVER

Defamation—Libel—Report by "Commissioners" on hospitals in Vancouver —Justification—Qualified privilege—Publication—Costs.

The plaintiff owned and operated the Grandview Private Hospital in Vancouver. The three defendants, Haywood, MacEachern and Walsh, Doctors of Medicine, were appointed by the Provincial Government, the City of Vancouver and the Vancouver General Hospital to make a survey of the Hospital situation in greater Vancouver, and after making an inspection of the hospitals they made a detailed report which included the following:

"Grandview Hospital.

"This institution is in charge of a lay woman who was graduated from the London Homœopathic Hospital. This hospital is in a poor locality of the city and those using it are of very moderate means. At the time this building was visited it was dirty, odorous and very poorly equipped for the class of work attempted. It has accommodation for fifteen patients. There are no facilities for sterilization, the whole place seemed to be in a very poor condition and the impression was gained that very questionable work might be done here without interference." In an action for damages for libel:—

Held, that if the words were published "without lawful justification or excuse" they constituted a libel and on the evidence the Commissioners' plea of justification fails, but in making their report they were fulfilling a task undertaken on behalf of their employers and under such circumstances the occasion was privileged and the plaintiff having failed to shew any malice the action as against them is dismissed.

Held, further, that as the city, upon receipt of the Commissioners' report, gave instructions to have it printed and subsequently circulated it, and the Vancouver General Hospital having received copies of the printed report and circulated them, publication is established in both cases and they are equally liable in damages.

Statement

ACTION for libel arising out of statements in a report made by Commissioners appointed by the Provincial Government the Vancouver General Hospital and the Vancouver City Council to make a survey of the whole hospitalization situation as affecting greater Vancouver. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 10th of June, 1932.

Dickie, for plaintiff.

McCrossan, K.C., and *Lord*, for defendants Vancouver General Hospital and City of Vancouver.

Reid, K.C., for defendants Haywood, MacEachern and Walsh.

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MACDONALD, J.: This action for libel arises out of statements contained in a small portion of a lengthy printed report, published in April, 1930, containing "a Survey of the Hospital situation" in Greater Vancouver. It represented the united labour of the three defendants: Doctors Haywood, MacEachern and Walsh, hereafter called "the Commissioners."

For many years prior to such publication it had been recognized by the directors of the General Hospital, the Vancouver Medical Association and the City Council, that knowledge should be acquired, as to the actual hospital situation in Greater Vancouver, to the end that plans might be formulated for the future and remedies afforded where deemed advisable. It was a difficult problem to solve and in the selection of the members to make, what is termed a "Hospital Survey," those interested, were required to go outside the Province. They rightly determined that it was only by adopting such a course, that results would be obtained, which would have due weight and be beneficial. They thus selected commissioners who were skilled physicians of wide international reputation. They had made a special study of hospitalization and executed previous "surveys" of a similar nature. They might be termed experts and were well qualified to perform the important work which they undertook.

The report submitted by the commissioners to the Provincial Secretary, the City Council and the Board of Directors of the Vancouver General Hospital shewed great research and a close study of the situation. It contained criticisms and also recommendations for improvements. They considered it not only within the scope of their authority, to inspect and report upon hospitals receiving government aid, in the cities of Vancouver, New Westminster and North Vancouver, but also to take a like course with respect to private hospitals in the City of Vancouver. The latter were dealt with in the report under the caption "proprietary institutions for the care of the sick (organized for profit)." Then followed this reference:

> The following institutions which might be called "nursing homes" since few, if any could be properly classified as complete hospitals, were visited.

Nine of these institutions were inspected and the result discussed in the report. It was quite apparent that the commis-

sioners did not deem it within their power to recommend any changes in these licensed institutions, where defects existed. The object of these inspections and report thereon, was apparently only, to give information, as to the nature and extent of private hospital accommodation. The Grandview Private Hospital owned and operated by plaintiff was referred to in the report at p. 143 in the following terms:

Grandview Hospital.

This institution is in charge of a lay woman who was graduated from the London Homœopathic Hospital. This hospital is in a poor locality of the city and those using it are of very moderate means. At the time this building was visited it was dirty, odorous and very poorly equipped for the class of work attempted. It has accommodation for fifteen patients. There are no facilities for sterilization, the whole place seemed to be in a very poor condition and the impression was gained that very questionable work might be done here without interference.

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Plaintiff complains that the statements contained in this "criticism," so terming it, would injure her reputation "in the minds of ordinary, just and reasonable citizens," *per* McCardie, J. in *Myroft* v. *Sleight* (1921), 90 L.J., K.B. 883 and thus were defamatory and, if untrue, became actionable. These statements referred not only to the manner in which the plaintiff was carrying on her private hospital, but also to the condition of the hospital itself and thus affected her trade or occupation and in this respect came within the scope of *South Hetton Coal Company* v. *North-Eastern News Association* (1894), 1 Q.B. 133. I deem it unnecessary to enlarge upon this phase of the situation. I will simply refer to the fact that more than one of the doctors called on her behalf, in supporting the good character, reputation and usefulness of this private hospital in the Grandview district, also added that such portion of the report would be calculated to give it "a black-eye." Even if I had not been assisted by the evidence produced on the part of the plaintiff, I would not have had any doubt that these statements would have the result to which I have referred. If they were published "without lawful justification or excuse" they constituted a libel, "whatever the intention may have been": *Vide* Parke, B. in *O'Brien* v. *Clement* (1846), 15 M. & W. 435 at p. 437.

The commissioners however did not withdraw any of their statements upon complaint being made, and action then commenced. They justified their actions and pleaded, that such

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portion of their report was "true in substance and in fact." In other words, that these statements, which might be considered defamatory, were not untrue and falsity forms an essential of libel. If they were successful in this plea of justification, then it afforded a complete defence to all the defendants. The defendants the City of Vancouver and Vancouver General Hospital, while not pleading justification, assisted to some extent with evidence in its support.

Then as to the truth or falsity of the statement complained of, a number of prominent and well-known citizens, as well as the doctors who were more closely connected with the institution, gave evidence proving that upon several points the statements were untrue. After referring, without any apparent significance, to the fact that the institution was in charge of a lay woman, who was graduated from a London Homœopathic Hospital, it then adds that the hospital is in a poor locality of the city. This was admitted by the defendant Haywood as not being true and he explained how the mistake had occurred. It does not seem very material nor would it by itself be defamatory. The object of any reference to the locality in which the institution might be situate or the financial ability of its patients is not apparent. This criticism of the locality however invited discussion in the City Council and formed the subject of a condemnatory resolution. Then it was stated that the building was dirty. From the standpoint of the character or efficiency of the institution this was important. The reference however was only made as applying to the time, when the inspection took place. I find that there was abundance of evidence from doctors of good reputation and in active practice who had utilized this hospital with satisfaction and found it clean, odorless and properly equipped at all times. I accept their evidence and think that the defendant Haywood must either have found an exceptional condition upon the day of his short inspection of the institution or perchance placed it upon too high a standard. He may have overlooked for the moment, what he properly mentioned, afterwards, in formulating his report, as to this and other institutions, only being "nursing homes and that they could not be properly classified as complete hospitals."

Upon the question of equipment, lengthy evidence was pro-

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duced tending to support the statement that "there are no facilities for sterilization." This statement is not correct. The apparatus for sterilization was produced in Court and its four parts became exhibits. They had been used for years by the doctors, who utilized the hospital, though they were not up to date and plaintiff was well aware of that fact. They were similar to those at one time in use in the Vancouver General Hospital. The lack of any sterilizing facilities would be a serious defect in an institution where confinements took place and one of the witnesses called on behalf of the defence termed these four appliances simply a means of disinfecting, as distinguished from sterilizing. Defendant Haywood however candidly called the apparatus a semi-sterilizer. I think the report should read that the "facilities for sterilization" were not adequate or up-to-date. The sting, however, which formed the greatest cause of complaint from the plaintiff's standpoint, was in the last part of the alleged libel reading as follows:

> The impression was gained that very questionable work might be done here without interference.

Plaintiff submitted that this statement, coupled with what preceded it, meant and was intended to mean, not only that the plaintiff was incapable and unfitted to be in charge of the Grandview Hospital, but that the inspection properly gave the impression referred to. Further that this statement made in such a manner would convey to the minds of ordinary, just and reasonable citizens that the institution had either allowed or had connived at the procuring of abortions. Such interpretation of this particular statement was supported by reputable witnesses. I am not bound by their evidence in this respect, but in view of all the circumstances I do not consider that their conclusions are unreasonable and I accept them. Defendant Haywood was very emphatic in disavowing any intention to convey any such meaning to the prospective readers of the report. He referred to the fact that there were no records or rather that the records were not kept in a satisfactory manner. It is quite true that they did not afford the information nor follow the practice of large hospitals, though they seem to have complied with the requirements of the Provincial Government. Doctor Haywood gives the lack of such complete records, as a basis upon which he formed the "impression" referred to, but omitted to make any

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reference to that effect or that this defect constituted his foundation, for the statement complained of. It is not however, as I have mentioned, the intention which a party states, he may have had, when the libel was published, which governs, but the meaning which may be attached to the words, through independent witnesses or determined by the Court from the document itself and without the assistance of extrinsic evidence. The law does not consider the motive or intention of the publisher, but its tendency and the consequences, in determining liability:

It does not signify what the motive of the person publishing the libel was, or whether he intended it to have a libellous meaning or not:

Per Lord Esher, M.R. in *Nevill* v. *Fine Arts and General Insurance Company* (1895), 2 Q.B. 156 at p. 168.

A person who publishes matter injurious to the character of another must be considered in point of law to have intended the consequences resulting from that Act (*per* Lord Tenterden, C.J. in *Fisher* v. *Clement* (1830), 10 B. & C. 472 at p. 475). Then again "he cannot defend himself by shewing that he intended in his own breast, not to defame" or that he intended not to defame the plaintiff, if in fact he did both (*per* Lord Loreburn, L.C. in *E. Hulton & Co.* v. *Jones* (1910), A.C. 20 at p. 23). Objection was taken to Dr. Haywood giving evidence, as to his intention, in reporting his "impression" and while not unmindful of the law, as I have just stated it, I allowed him to give such evidence. I considered that under the circumstances, it was only fair to remove any stigma which might be attached to the plaintiff and her hospital, in the matter, especially in view of the interpretation which had been placed upon this statement by witnesses for the plaintiff. It follows, without further discussion, that the plea of justification fails and this issue, consuming a considerable portion of the trial, is found in favour of the plaintiff.

Judgment

Defendant commissioners then contended that in any event they were relieved from any liability, on the ground, that in making and transmitting the said report, the occasion was privileged. If this plea succeeded then such relief would be afforded. It is founded upon public policy, requiring that upon certain occasions, a person may make statements which are found to be untrue, if he does so honestly and not from any indirect or

wrong motive. He obtains what is termed a "qualified privilege" and it depends entirely upon his honesty in making the statements complained of. The protection thus given to a defendant exists under divers circumstances. Here the commissioners, having been appointed for the purpose indicated, submit that they simply carried out their duties and made their report honestly believing it to be true. With respect to the portion of the report, the subject of this action, and which arises from the inspection of the defendant Haywood, there was no attack made upon the honesty of such defendant in the matter. I might add that if his honesty had been impugned it would have been of no avail.

It is then contended that the commissioners went beyond the scope of their authority and duties, in inspecting and reporting upon private hospitals. There is no question that the inspection and consequent report of the commissioners was intended to deal with "the hospital situation of Greater Vancouver." The letter transmitting the report makes a reference to that effect. Apparently, while originally the Vancouver General Hospital moved in the matter, subsequently the City Council became interested and when the Provincial Government assisted and agreed to bear a portion of the expense, it was intended that the commissioners should make a survey of the whole hospitalization situation, as affecting Greater Vancouver. As I have already mentioned, they considered to some extent this situation, in the cities of New Westminster and North Vancouver. So far as private hospitals are concerned, as they are licensed by the Government and come under the Hospital Act, I think it was fully intended that the survey should include these institutions. They were properly inspected by the commissioners and coming within their research, required to be dealt with in their report. They were thus fulfilling the task undertaken on behalf of their employers. I think under such circumstances, that the occasion was privileged. It was in discharge of their duty and intended by their engagement.

Judgment

Plaintiff can only destroy the relief thus obtained by these defendants from liability by proving actual malice on their part. In view of what I have already stated, I deem it only necessary to add, that the plaintiff has failed to shew any malice on the

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part of any of the defendants. So the plaintiff has a grievance without an adequate remedy. In this connection I refer to the remarks of Lord Sands, in *Dunnet* v. *Nelson* (1926), S.C. 764 at p. 769:

It may be unfortunate that a person against whom a charge that is not true is made should have no redress, but it would be contrary to public policy and the general interests of business and society that persons should be hampered in the discharge of their duty or the exercise of their rights by constant fear of actions for slander. . . .

Then to shew the extent to which persons are relieved from liability, where there is a qualified privilege "for the common convenience and welfare of society" (*per* Parke, B. in *Toogood* v. *Spyring* (1834), 1 C.M. & R. 181 at p. 193) I might refer to two citations, in Gatley on Libel and Slander, 2nd Ed., p. 213 as follows:

It was in the public interest that the rules of our law relating to privileged occasions and privileged communications were introduced, because it is in the public interest that persons should be allowed to speak freely on occasions when it is their duty to speak, and to tell all they know or believe, or on occasions when it is necessary to speak in the protection of some [self or] common interest. (*Per* Bankes, L.J. in *Gerhold* v. *Baker* (1918), W.N. at p. 369). In such cases no matter how harsh, hasty, untrue, or libellous the publication would be but for the circumstances, the law declares it privileged because the amount of public inconvenience from the restriction of freedom of speech or writing would far out-balance that arising from the infliction of a private injury. (*Per* Willes, J. in *Huntley* v. *Ward* (1859), 6 C.B. (N.S.) at p. 517.

The "Commissioners" thus being relieved from liability what is the defence presented by the defendants, the City of Vancouver and the Vancouver General Hospital as against the allegation that they "published" the statements affecting the plaintiff, which I have found to be defamatory? In a lengthy plea, outlining the circumstances attendant upon the report they, to put it shortly, submit that they are relieved from liability, on the ground that the report emanating from the commissioners was received by these defendants innocently and in good faith, without knowledge of its contents. Further that with such lack of knowledge and being entirely unconscious of the fact that such report might contain any matter defamatory to the plaintiff, they assisted financially and otherwise in the printing, publication and distribution of many copies of the report. It is necessary for them to prove that they did not know that the report contained or was of a character likely to contain a libel. Also that such ignorance was not due to any negligence on their part.

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While each case must depend upon its own facts, the defendants submit that the facts herein are such that I should follow the judgment in *Emmens* v. *Pottle* (1885), 16 Q.B.D. 354. The judge at the trial in that case, upon findings of the jury, ordered judgment to be entered for the defendants and in the Court of Appeal Lord Esher said (pp. 356-7):

I agree that the defendants are *prima facie* liable. . . . But the defendants did not compose the libel on the plaintiff, they did not write it or print it; they only disseminated that which contained the libel. The question is whether, as such disseminators, they published the libel? If they had known what was in the paper, whether they were paid for circulating it or not, they would have published the libel, and would have been liable for so doing. . . . But here, upon the findings of the jury, we must take it that the defendants did not know that the paper contained a libel. I am not prepared to say that it would be sufficient for them to shew that they did not know of the particular libel. . . . Taking the view of the jury to be right, that the defendants did not know that the paper was likely to contain a libel, and, still more, that they ought not to have known this, which must mean that they ought not to have known it, having used reasonable care—the case is reduced to this—that the defendants were innocent disseminators of a thing which they were not bound to know was likely to contain a libel.

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The above passage was quoted by A. L. Smith, L.J. in *Vizetelly* v. *Mudie's Select Library, Limited* (1900), 2 Q.B. 170, C.A. at pp. 175, 176. *Emmens* v. *Pottle* (1885), 16 Q.B.D. 354 C.A., was followed by *Ridgway* v. *Smith and Son* (1890), 6 T.L.R. 275, *Mallon* v. *W. H. Smith and Son* (1893), 9 T.L.R. 621, and *Martin* v. *British Museum (Trustees) & Thompson* (1894), 10 T.L.R. 338, as stated in the judgment of Romer, L.J., in *Vizetelly* v. *Mudie's Select Library, Limited, supra,* at p. 180. The result of the cases was thus summed up by Romer, L.J. (*ibid*):

I think that, as regards a person who is not the printer or the first or main publisher of a work which contains a libel, but has only taken, what I may call, a subordinate part in disseminating it, in considering whether there has been publication of it by him, the particular circumstances under which he disseminated the work must be considered. If he did it in the ordinary way of his business, the nature of the business and the way in which it was conducted must be looked at; and if he succeeds in shewing (1.) that he was innocent of any knowledge of the libel contained in the work disseminated by him; (2.) that there was nothing in the work or the circumstances under which it came to him or was disseminated by him which ought to have led him to suppose that it contained a libel; and (3.) that, when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained the libel, then, although the dissemination of the work by him was *prima facie* a publication of it, he may nevertheless, on proof of the before-mentioned facts, be held not to have published it. But the onus of proving such facts lies on him, and the question of publication or non-publication is in such a case one for the jury.

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It is to be noted that Romer, L.J. in a previous portion of his judgment, just referred to, discussing *Emmens* v. *Pottle, supra,* expressed an opinion, that the decision in that case, worked substantial justice, but the manner in which such result was reached did not appear to him, altogether satisfactory. He did not think that the judgments, in that case, very clearly indicated, on what principles Courts ought to act, in dealing with similar cases in the future. Apparently his view of the law was that the "reasons," supporting the judgment in *Emmens* v. *Pottle, supra,* ought not necessarily be followed. Aside from consideration of this point, it is quite evident that the defence of being an "innocent disseminator," is not applicable to a printer or the first or main publisher of a work, which contains a libel. It may be said, in a general way, to apply only to vendors of newspapers and booksellers, though of course including porters and carriers. In discussing the defence of being "innocent disseminators" Odgers on Libel and Slander, 6th Ed., pp. 139-40 reads as follows:

"If the paper [*e.g.*, a newspaper] was sold in the ordinary way of business by a newsvendor who neither wrote nor printed the libel, and who neither knew nor ought to have known that the paper he was so selling did contain or was likely to contain any libellous matter, he will not be deemed to have published the libel which he thus innocently disseminated. The onus of establishing this defence lies upon the defendant.

Then follows this important statement:

Such defence is not open to the author, printer or the original publisher of the libel (*Morrison* v. *Ritchie & Co.* (1902), 4 F. 645 (Ct. of Sess.)).

A perusal of this Scotch case, supports such statement of the law. The defendants who were proprietors and publishers of the "Scotsman" had innocently inserted a birth notice, which was false, and plaintiff's right of action was sustained. *Emmens* v. *Pottle, supra,* was discussed as follows (p. 651):

In the absence of any Scottish decision in his favour, the defenders' counsel endeavoured to bring this case within the principle of a class of cases, of which the English case of *Emmens* v. *Pottle* (16 Q.B.D. 354) is an illustration. That case extended to newsvendors, that is persons who merely sell newspapers at bookstalls or in the streets, an exemption from liability which had previously been accorded to porters, carriers, and other such persons who are ordered to carry or deliver letters or papers which contain a libel, but who have no occasion and perhaps no right to know the contents of such letters or papers. Technically every person who passes on or delivers a letter or paper containing a libel is held in England to have published the libel; but according to the law of England, in the cases to

which I have referred, the persons in question (a limited class) are held to have freed themselves from liability provided they satisfy a jury that they did not know that the letter or paper contained a libel, and that their ignorance did not proceed from negligence. The burden, however, is put on the defendants to establish this; and if they succeed they are held not to have published the libel, but simply to have innocently disseminated it.

Then again in *Dunning* v. *Thomson & Co., Ltd.* (1905), T.H. 313 *Emmens* v. *Pottle, supra,* was also considered, but not applied as affording any relief to the defendants. It was there held that newsvendors, who, in ignorance of its defamatory contents, circulated a newspaper containing a libel should be liable in damages, on the ground that they acted, not as innocent disseminators of the newspaper in question, but more as registered publishers thereof. Though they had not printed the newspapers they had utilized them for purposes foreign to those of mere newsvendors. Here, these defendants, were not pursuing their "ordinary business" in printing and circulating the reports containing the defamatory matter. Are they not then deprived of a defence of this nature? There is no doubt that the city, upon receipt of the typewritten report from the commissioners, instead of simply filing it for further consideration, with a view of acting upon any recommendations or benefits to be derived therefrom, gave instructions to have it printed. Under the circumstances, I think the printing of itself amounted to publication, though the correctness of an earlier decision on this point has been questioned. The reason why I consider, that the printing alone amounted to "publication," was because, although the mechanical work was done by the printers, who were under contract to the city, still the proof-reading was done by a portion of the staff in the city clerk's office. Control and supervision was exercised. Even if the printing did not constitute publication still the subsequent extensive circulation by the city had that effect. Then the defendant Vancouver General Hospital, having received a number of copies of such printed report, circulated them in such a manner as to amount to publication. See on this point the Exhibits 8 and 16, also evidence of J. H. McVety and Dr. A. S. Monro. Neither of these defendants was under any obligation to print or circulate copies of this report. In my opinion they do not, upon several grounds, come within the provisions of the relief, afforded and referred to, in the above

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extract from the judgment of Romer, L.J. They did not exercise due care and thus were negligent. They became, as it were, printers and publishers, as distinguished from innocent disseminators. They were in the same position, as the publishers of a newspaper, containing libellous statements. Both defendants, in my opinion, are equally liable in damages. *Vide* Odgers on Libel and Slander, 6th Ed., p. 143:

> Every one, who writes, prints or publishes a libel, or is in any way responsible for its being written, printed or published, may be sued by the person defamed. And to such an action it is no defence that another wrote it, or that it was printed or published by the desire or procurement of another, whether that other be made a defendant to the action or not. All concerned in publishing the libel or in procuring it to be published are equally responsible for all damages which flow from the joint publication, whether the author be sued or not; for there is no contribution between tort-feasors.

Judgment

As to the damages which should be awarded to the plaintiff, I find difficulty in arriving at a proper estimate of the amount. I should consider the whole defamatory document, *per* Gaselee, J. in *Blackburn* v. *Blackburn* (1827), 3 Car. & P. 146 at p. 159. The plaintiff seeks to recover over $20,000 as damages. I think this claim is excessive, to say the least. The evidence was not sufficient to warrant me in considering such an amount. There is no doubt that her business has not been as profitable as it was formerly. I think, however, that this is due, in a great measure to the depression, coupled with opposition and cheaper means of obtaining hospital relief, than utilizing a private hospital. Still the wide circulation of the report might have affected her character as well as the reputation of her institution. It is true that this attack has been unsuccessful and plaintiff's character has been vindicated. It is not a case where only nominal damages should be awarded. I think a reasonable amount should be allowed under the circumstances. The damages are at large—*vide* Lord Esher, M.R. in *South Hetton Coal Company* v. *North-Eastern News Association* (1894), 1 Q.B. 133. Compare Dorion, C.J. in *Mail Printing Co.* v. *Laflamme* (1888), M.L.R. 4 Q.B. 84 and Cameron, C.J. in *Massie* v. *Toronto Printing Co.* (1886), 11 Ont. 362. Wilde, C.J. in *Turner* v. *Meryweather* (1849), 7 C.B. 251 affords me assistance in the matter. In view of the nature of the libel, affecting both her character and business, and "having no certain test for

ascertaining the precise measure of damages" in the case, I think a proper amount to allow would be $500. The result is that the plaintiff is entitled to judgment against the defendants, the City of Vancouver and The Vancouver General Hospital. As to the defendants, Doctors Haywood, MacEachern and Walsh (the commissioners), the action is dismissed with costs "minus such costs as the plaintiff can prove to have been occasioned by the plea of justification: *vide* Odgers on Libel and Slander, 6th Ed., p. 361 and cases there cited. Judgment accordingly.

Judgment for plaintiff.

TAYLOR v. MILLMAN.

MORRISON, C.J.S.C. (In Chambers)
1932
Sept. 17.
TAYLOR v. MILLMAN

Practice—Application for payment out of Court—Costs—Taxation—Appendix "N," items 6 and 7.

Items 6 and 7 of Appendix "N," Tariff of Costs in the Supreme Court are as follows: "6. Fee to cover each interlocutory application brought by any party in the action or proceeding to go to such party as may be ordered. 7. All process for payment into and out of Court."

The plaintiff having recovered judgment applied for and obtained an order for payment out of certain moneys in Court and in taxing the costs of the application he sought to include both items 6 and 7 in the bill. On review of the taxation:—

Held, that as soon as the application is launched and the order made item 7 can no longer apply, as the "process" was involved in the application. Item 6 should therefore be allowed and item 7 disallowed.

Statement

REVIEW of taxation from the deputy district registrar at Vancouver. Heard by MORRISON, C.J.S.C. in Chambers at Vancouver on the 13th of August, 1932.

Argument

Craig, K.C., for the application: The registrar should have allowed the costs of the application for payment out of Court to the plaintiff of the amount of his judgment. This item should be allowed under Appendix "N," item 6, "Fee to cover interlocutory applications." This is not covered by item 7, which includes merely the clerical work of obtaining the money out of Court after the order has been made: *Bradshaw* v. *British Columbia*

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

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Rapid Transit Co. (1927), 38 B.C. 430. The application for payment out is an interlocutory motion although made after judgment: see *In re Lewis. Lewis* v. *Williams* (1886), 31 Ch. D. 623; *Blakey* v. *Latham* (1889), 43 Ch. D. 23; *In re Wheater* (1928), Ch. 223.

Hossie, contra.

17th September, 1932.

MORRISON, C.J.S.C.: This is a review of taxation from the deputy district registrar in the above cause. It appears that on the settlement of the judgment, Mr. *Hossie* for the defendant declined to approve it unless the paragraph ordering the sum of $3,000 to be paid out to the plaintiff be elided. The judgment was settled with this paragraph struck out and the costs taxed pursuant thereto.

Subsequently an application was made on behalf of the plaintiff for payment out and the order was made. The plaintiff seeks to tax a bill of costs in connection with this application in which he invokes items 6 and 7 of the Appendix "N."

Judgment

In my opinion resort cannot be had to item 7. As soon as the application is launched (and I take it that that is what the plaintiff is relying on to invoke item 6) and the order made, item 7 can no longer apply as the "process" was involved in the application. I cannot think that the framers of the tariff contemplated the writing out of a *præcipe* as "process." The word "process" should not have found itself associated with the other words and phrases in these schedules. "Process" is defined in all the law dictionaries:

> Since the Judicature Acts the process for the commencement of all actions is the same in all Divisions of the High Court. It is either a writ of summons or an originating summons:

Mozley and Whiteley's Law Dictionary, 3rd Ed., 259. See also Byrne's Law Dictionary. In none of the definitions does the word bear the meaning sought to be put upon it in the present instance. These observations are of course irrelevant to the particular point which has arisen in this case. Item 6 is allowed, item 7 disallowed. There will be no costs of this review.

Application granted.

QUICKSTAD v. McNEILL AND CONNORS.

MCDONALD, J.

1931

July 2.

COURT OF APPEAL

1932

March 11.

QUICKSTAD v. McNEILL

Contract—Mineral claims—Agreement for sale—Breach—Damages—Former judgment—Parties—Intervention—Res judicata.

On the 18th of May, 1925, the defendants, owners of the Red Top group of mineral claims near Stewart, B.C., gave an option to one Johnson for the purchase of the claims for $250,000 and $1,000 was paid on account thereof. Johnson was acting as agent for the plaintiff, and on the 25th of May following, a formal agreement was prepared to carry out the preliminary agreement, and on being signed by the defendants and Johnson a further $1,000 was paid. The agreement was delivered by the parties to Dexter Horton National Bank in Seattle, along with an escrow agreement containing a bill of sale of the property, a term of the escrow providing that in case of default the bank, unless and until the defendants had demanded the return to them of their bill of sale, might accept any past due payment whereupon the agreement would be reinstated. The plaintiff and two of his associates then proceeded to work the property and expended considerable money in development. The next payment under the option of $10,000 fell due on the 20th of July, but it was not paid. The defendants did not withdraw the bill of sale from the bank, and on the 8th of August following, the plaintiff, with the financial assistance of one Duthie, paid $10,000 into the bank, and he and Duthie then proceeded to Stewart to examine the property. They told the defendants that the $10,000 was deposited in the bank, but when they attempted to enter the property they were forcibly ejected by the defendants. The plaintiff then telegraphed the bank to stop payment of the $10,000 to the defendants. The defendants then proceeded to Seattle and brought action against the bank to recover the $10,000. The plaintiff intervened under the provision of a Washington statute, and by order of the Court made with the consent of the parties the money was paid into Court and the question of the right to the fund was left to be decided as between the plaintiff and the defendants. Later the Court, with a jury, decided the fund belonged to the plaintiff. In an action for damages by reason of the defendants' breach of contract in ousting the plaintiff from the property, the defence was raised that the defendants, by bringing their action in the State of Washington, attorned to the jurisdiction and were bound by any judgment given on a cross-action by the present plaintiff, that the plaintiff should have then brought these proceedings, that the claim was therefore *res judicata*, and he was estopped from bringing this action. It was held that the onus was on the defendants to establish that the plaintiff was estopped, and in this they failed. The damages were assessed as follows: $2,000 being the payments made under the option, $2,000 special damages, and $6,000 general damages, in all $10,000.

MCDONALD, J. — 1931 July 2. — COURT OF APPEAL — 1932 March 11. — QUICKSTAD v. MCNEILL

Held, on appeal, affirming the decision of MCDONALD, J. (MCPHILLIPS, J.A. dissenting), that by the case and statute law of the State of Washington, where a foreign plaintiff resorts to the Courts of that State to enforce a claim, not against the respondent but against the bank in which the subject in controversy is defined, the respondent cannot intervene except on the basis of a claim to that particular fund, and the defence of *res judicata* therefore fails.

Statement

APPEAL by defendants from the decision of MCDONALD, J. in an action for damages for breach of a contract of the 25th of May, 1925, made between the defendants and one David Johnson for the sale to the said Johnson of eleven mineral claims, the property of the defendants, situate in the Portland Canal Mining Division, Cassiar Mining District in British Columbia, which said contract was prior to the said breach, assigned by the said Johnson to the plaintiff, with the knowledge and consent of the defendants, said breach occurring at or near the town of Stewart in British Columbia. The further relevant facts are set out in the judgment of the trial judge. Tried at Victoria on the 27th and 28th of May, 1931.

D. S. Tait, and *C. H. Tait*, for plaintiff.

Maitland, K.C., and *J. G. A. Hutcheson*, for defendant McNeill.

G. B. Duncan, for defendant Connors.

2nd July, 1931.

MCDONALD, J.

MCDONALD, J.: On 18th May, 1925, the defendants McNeill and Connors being the owners of certain mineral claims known as the Red Top, situate near Stewart, B.C., the defendant McNeill received from one David Johnson, on behalf of himself and his co-owner $1,000 as a first payment upon an option to purchase said claims for the price of $250,000. At some later date, not given in evidence, Johnson, for a consideration of $1, assigned to the plaintiff and to one T. M. Winlow and to one F. J. Winlow all his interests in "the said properties." F. J. Winlow is since deceased and T. M. Winlow claiming no interest in the matters in litigation is added as a matter of form as a defendant. Quickstad swears that Johnson in acquiring the option was acting as his agent, and I see no reason for not accepting that evidence. It is true Quickstad's evidence

is not in all respects satisfactory, but I find no difficulty in reaching the conclusion that as to that fact he has stated the truth.

On 25th May, 1925, a formal agreement was prepared in Seattle to carry out the preliminary agreement and was signed by McNeill, Connors and Johnson. This agreement purports to have been made in quadruplicate and to have been "signed, sealed and delivered." Three counterparts are produced, none of them bearing a seal and one counterpart admittedly was delivered by the parties to Dexter Horton National Bank in Seattle along with an escrow agreement and a bill of sale duly sealed. The bank has been unable to produce its counterpart and it is contended that that document bore the seals of the contracting parties. Upon the whole of the evidence I am unable so to find, and shall treat the agreement as a simple contract. It was a term of the escrow agreement that in case of default the bank, unless and until McNeill and Connors had demanded the return to them of their bill of sale might accept any past due payment, whereupon the agreement should be reinstated, "to the extent of payment made."

MCDONALD, J.

Shortly after the agreement was made, the plaintiff and the Winlows proceeded to work the property and expended considerable money in development and in building roads. On 20th July, 1925, a payment of $10,000 fell due and was not paid. The plaintiff was meanwhile occupied in interesting in the property one Duthie, a wealthy mining man of Seattle. Certain telegrams passed, as a result of which the plaintiff procured Duthie to pay into the bank $10,000 on or before 8th August. In my opinion the option had not then expired and the bank was entitled to receive the money, and to forward as it did a "cashier's cheque" for $5,000 each to McNeill and Connors. On 10th August the plaintiff and Duthie arrived at Stewart, met McNeill (who throughout represented his partner Connors), and told him that the $10,000 had been deposited in the bank. McNeill instead of accepting this statement as true, or (as a reasonable man would have done), instead of telegraphing to the bank to ascertain the fact, assumed the statement to be untrue, and on 11th August when the plaintiff and Duthie arrived upon the ground to inspect the mine, in the most unrea-

MCDONALD, J. 1931 July 2. COURT OF APPEAL 1932 March 11. QUICKSTAD v. MCNEILL

sonable and high-handed manner refused to allow an inspection and ordered them off the property. Duthie thereupon went to Stewart and telegraphed the bank to "stop payment" of the cheques. Whether the bank had power to do so is beside the point; the fact is, it did do so.

In my recital of the facts so far, I have omitted mention of certain details as to failure of the plaintiff to pay wages, as to assignments of interests, etc., not because I have overlooked them or the arguments based upon them, but because I think they do not go to the decision of the case. I think the action does not fail for want of parties and I think that if there was any breach of the contract to pay wages such breach was waived.

We now come to what I consider the really important and difficult phase of the case. Shortly after payment of their cheques had been stopped, the defendants McNeill and Connors proceeded to Seattle and there entered actions (later consolidated) against the bank for the recovery of the $10,000 in question. Thereupon plaintiff consulted counsel and the latter, taking advantage of a statute of the State of Washington entered into a "stipulation" with counsel for McNeill and Connors, which stipulation was afterwards made an order of the Court, whereby it was agreed that the question of the title to the fund in question should be decided as between Quickstad on the one hand, and McNeill and Connors on the other, and that the bank, being merely a stakeholder, should be eliminated from the litigation. The proceeding so far as I can understand is exactly similar to our proceeding in interpleader. The Court and jury in that action decided that the fund must be paid over to the present plaintiff.

MCDONALD, J.

The present action is brought for damages suffered by the plaintiff by reason of the defendants' breach of contract in ousting him from the property, and the main answer is that this claim, if it exists, ought to have been litigated in Seattle in the action above-mentioned. Mr. Griffiths of the Washington Bar was called for the plaintiff and he testified that both under the statute which allows a third party to intervene and under the only agreement which he was able to make with opposing counsel, the only question which could have been litigated in Seattle was the question of the ownership of the $10,000 fund.

Mr. Gregory, called for the defendants, was of opinion that the present defendants by bringing their action in the State of Washington, thereby attorned to the jurisdiction, and would have been bound to submit to any judgment given in the cross-action of the present plaintiff even though such action included a claim for damages for breach of the contract in respect of which the $10,000 was paid. Both these gentlemen gave their evidence in a perfectly satisfactory manner, and according to their best skill and ability. I have had the greatest difficulty in reaching a conclusion and I finally base my judgment on this: that the onus is upon the defendants to establish that the claim now in question is *res judicata* or in the alternative that the plaintiff is estopped, and, in my opinion, that onus has not been discharged.

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The evidence as to damages is not definite and is in some respects incapable of satisfactory analysis. The fact that the plaintiff expended money belonging to the Barite Mining Company of which he was chief owner does not I think affect the case. He is entitled to recover the combined down-payments of $2,000. The evidence as to special damages is very indefinite. I think on this heading at least $2,000 has been proven; and I assess his general damages at $6,000 though I know quite well there is no basis on which I can fix them. There will be judgment for the plaintiff for $10,000.

From this decision the defendants appealed. The appeal was argued at Vancouver on the 30th of October to the 5th of November, 1931, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Maitland, K.C., for appellant McNeill: The original option was given to Johnson who assigned to Quickstad and the two Winlows, but on May 25th a formal agreement was entered into between the defendants and Quickstad to carry out the original agreement. The first payment of $10,000 was due on July 20th, but it was not paid and the option expired on that date. On the 8th of August following Quickstad paid $10,000 into the bank where the escrow was deposited, and two days later arrived at Stewart to examine the mine, but McNeill ordered

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them off the property, and it was owing to this that the plaintiff claims a breach, but we submit that at this time they were in default: see *Johnson* v. *Jones* (1897), 50 Pac. 983.

G. B. Duncan, for appellant Connors: Security was wanted about August 1st for wages due for work done on the property, and Winlow obtained $500 for this purpose but he absconded with the money. As to the $10,000 paid into the bank on August 8th, it was not paid in compliance with the agreement, as the money should have been paid to the bank as our agents, whereas it was paid in such manner as to leave the bank in control of the money. Damages cannot be claimed as well as rescission: see *Towers* v. *Barrett* (1786), 1 Term Rep. 133 at p. 136; *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1; *Newbigging* v. *Adam* (1886), 34 Ch. D. 582; *Smith* v. *Mitchell* (1894), 3 B.C. 450; Williams on Vendor and Purchaser, 3rd Ed., 1011; *Davis* v. *Street* (1823), 1 Car. & P. 18. The plaintiff was given damages under three heads. In trover you cannot recover damages for what you lose: see Mayne on Damages, 6th Ed., 414; *Johnson* v. *Stear* (1863), 33 L.J., C.P. 130. As to the effect of the option not being under seal see *In re Seymour; Fielding* v. *Seymour* (1913), 1 Ch. 475; *Alexander* v. *Yorkshire Guarantee and Securities Corporation* (1916), 23 B.C. 1; *Ashdown* v. *Manitoba Land Co.* (1886), 3 Man. L.R. 444; Bowstead on Agency, 8th Ed., 311; Halsbury's Laws of England, Vol. 7, p. 333, sec. 686; *Berkeley* v. *Hardy* (1826), 5 B. & C. 355; *Henderson* v. *Henderson* (1843), 3 Hare 100 at p. 115 *et seq.; In re International Contract Co.* (1871), 6 Chy. App. 525.

Argument

D. S. Tait, for respondent: All we had to do was to pay the money to the bank and our rights were safeguarded. They drove us off the property and broke the contract. There was rescission of the contract and we sue for damages. A foreign judgment is never a bar to an action here. The Court is free in acting on a foreign judgment: see *Smith* v. *Nicolls* (1839), 5 Bing. (N.S.) 208; *Bank of Australasia* v. *Harding* (1850), 9 C.B. 661; *Hall* v. *Odber* (1809), 11 East 118. Estoppel in case of a former judgment is not an inflexible rule: see *Taylor* v. *Hollard* (1902), 1 K.B. 676; Dicey's Conflict of Laws, 5th Ed., 409; *Barber* v. *Lamb* (1860), 8 C.B. (N.S.) 95 at p. 99; *Winter* v. *Dewar & Co.* (1928), 40 B.C. 228; (1929), 41 B.C.

336; *Brunsden* v. *Humphrey* (1884), 14 Q.B.D. 141; *Conquer* v. *Boot* (1928), 2 K.B. 336; *Callandar* v. *Dittrich* (1842), 4 Man. & G. 68; *Hunter* v. *Stewart* (1861), 31 L.J., Ch. 346 at p. 350; *Nelson* v. *Couch* (1863), 15 C.B. (N.S.) 99. In Seattle they only litigated as to the money in Court, *i.e.*, the $10,000 paid into the bank by the plaintiffs, and it was agreed that the case would be confined to this. We were allowed $2,000 for development but this is not sufficient as we spent over $4,000.

Maitland, and *Duncan,* replied.

Further argument was heard by the Court at Vancouver on the 4th of March, 1932, on the question of parties to the action.

Duncan (*Hutcheson,* with him), for appellants: Quickstad assigned certain interests to Wored and Johnson and they should be parties to the action: see *Durham Brothers* v. *Robertson* (1898), 1 Q.B. 765 at p. 769; *William Brandt's Sons & Co.* v. *Dunlop Rubber Company* (1905), A.C. 454 at p. 462; *Performing Right Society, Ld.* v. *London Theatre of Varieties, Ld.* (1924), A.C. 1 at p. 13; Halsbury's Laws of England, Vol. 7, pp. 436-7; *Roberts* v. *Holland* (1893), 1 Q.B. 665. In the case of joint promises both must be parties: see *Cullen* v. *Knowles* (1898), 2 Q.B. 380; *Wilson, Sons & Co.* v. *Balcarres Brook Steamship Company* (1893), 1 Q.B. 422 at pp. 426-7; *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504 at p. 534; *Hudson* v. *Ferneyhough* (1890), 34 Sol. Jo. 228; Daniell's Chancery Practice, 8th Ed., 151.

Argument

Tait, for respondent: Quickstad first came in as Johnson's principal. Later there were qualified assignments from Quickstad to Johnson and Wored of small interests of which no notice was given. They both verbally gave back their respective interests later. None of the cases referred to has any bearing on the facts here. That they are not necessary parties to the action see *Alexander* v. *Yorkshire Guarantee and Securities Corporation* (1916), 23 B.C. 1; *Jell* v. *Douglas* (1821), 4 B. & Ald. 374 at p. 375; *Heath* v. *Chilton* (1844), 12 M. & W. 632. The defendants have shewn no case where the assignees should be made parties. Non-joinder of these parties is no defence to the action: see *Abouloff* v. *Oppenheimer* (1882), 30 W.R. 429; *Smith* v. *Boyd* (1916), 10 W.W.R. 222; *Werder-*

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man v. *Societe Generale d'Electricite* (1881), 19 Ch. D. 246; Annual Practice, 1932, p. 255. The proper parties are before the Court.

Duncan, replied.

Cur. adv. vult.

11th March, 1932.

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

MARTIN, J.A.

MARTIN, J.A.: This is a difficult and complicated case and after giving it careful consideration in all its unusual aspects I find myself unable to say that the learned judge has not reached the right conclusion and therefore the appeal should be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal calls for consideration of all the facts attendant upon a contract for the acquisition of certain mining property in the Cassiar Mining District, Province of British Columbia. The transaction was entered into by an escrow agreement deposited with the Dexter Horton National Bank of Seattle, the purchase price to be $248,000 and a bill of sale of the mining property was executed by the appellants in favour of one David Johnson and the respondent claimed to be entitled to enforce the escrow agreement but in my opinion failed to establish at the trial that he was so entitled. However, I do not propose to wholly rely upon that point which, of course, would alone entitle the action being dismissed. To comply with the escrow agreement payments had to be made as follows: $10,000 on or before July 20th, 1925; $30,000 on or before July 20th, 1926; $40,000 on or before July 20th, 1927; $168,-000 on or before July 20th, 1928. Now the first payment of $10,000 was not paid on the due date but only paid into the bank on the 8th of August, 1925, by one Duthie alleged to have made the payment on account of the respondent and with reference to the escrow agreement. There was some evidence or a contention made that it was agreed that the appellants should have a telegram from the bank when the payments were made—the appellants received no such advice. On the 10th of August the respondent and Duthie at Stewart, B.C., in the neighbourhood of which town the mining property was, advised one of the

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appellants (McNeill) that the $10,000 was deposited to the appellants' account in the bank but did not support the statement by any proof and when the respondent arrived at the mining property, accompanied by Duthie, McNeill refused to allow the respondent and Duthie to inspect the mining property upon which work had been done. It would then seem that the respondent accepted this action as being a breach of the contract which it would not be at all in my opinion. The onus was upon the respondent to shew compliance with the escrow agreement by the due payment of the $10,000. This the respondent could have done but did not do, as although the July payment of $10,000 was not made until the 8th of August there is a provision in the escrow agreement that payment could be made at any time before the appellants withdrew the bill of sale from the bank. It is evident in my opinion that the respondent desired to put an end to the escrow agreement upon his part and his failure to satisfy the appellants is evidence of it as he caused Duthie who had accompanied him and who had really paid the money into the bank to wire the bank to stop payment of the $10,000 to the appellants—that is, in law, the respondent elected to treat the escrow agreement as at an end. One of the parties only to a contract cannot end it and it subsequently being established that the $10,000 was paid into the bank the situation was that the contract was still existent and the $10,000 was the property of the appellants. It was as easy for the respondent to wire the bank to apprize the appellants of the payment as to wire stopping payment of the cheques which it was well known would in due course go forward to the appellants. The explanation of all this was in my opinion the desire to end the escrow agreement and to in some way in fraud of the appellants prevent the $10,000 getting to the appellants. The cheques that did go forward from the bank to the appellants were cheques of the bank known as cashier's cheques and the $10,000 was represented by two of such cheques of equal amount making together $10,000 to the respective orders of the appellants in their individual names. Therefore, there was no breach of contract as I look at it on the part of the appellants—anything of that nature was wholly upon the part of the respondent. This conduct of the respondent fraudulent in its nature as it pre-

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vented the appellants getting money that was due to them is sufficient in itself to disentitle this Court, in my opinion, from giving any relief to the respondent even if in law he was entitled to any. It is within the power of the Court to *ex mero motu* find fraud and having found it the action should upon that ground alone stand dismissed. The result of the fraudulent act of the respondent in countermanding payment of the cheques was that the appellants were compelled to sue the bank in the Superior Court of the State of Washington for King County (at Seattle) upon the cheques. In the course of the proceedings the bank was dismissed out of the action and what is known as a stipulation was entered into which reads as follows: [After setting out the stipulation the learned judge continued].

Following the execution of this stipulation the action went to trial and it is only necessary to peruse the proceedings to have it made apparent that if the respondent ever had a cause of action that the judgment of the Court establishes beyond a doubt that the matter is *res judicata* and that there can be no reagitation of the matters in issue or which could have been agitated in the Superior Court of the State of Washington for King County. I would now refer to the judicial confirmation of the stipulation, the instructions given by the Court and the judgment: [After setting these out the learned judge continued].

MCPHILLIPS, J.A.

It is evident from the instructions of the Court given to the jury that the jury could only give the verdict they did by finding in answer to instruction No. 8 that the appellant McNeill's refusal to permit an inspection of the mine was made with the intent to cancel the contract. It naturally follows that the $9,974.50 allowed by the jury was damages for the wrongful refusal of McNeill to permit an inspection of the property and was made with the intent to cancel the contract and constituted a breach of the contract. Instructions Nos. 8 and 9 of the learned judge (Charles P. Moriarty) make his conclusion perfectly clear. In this Court we had the learned counsel for the respondent admit that he could not contend that the $10,000 paid into the bank was not the money of the appellants and as later represented by the cheques, therefore, the money in Court in Seattle being the money of the appellants was appropriated to pay the damages awarded by the jury for the breach of contract

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by the appellants. This in my opinion ends the matter and if the respondent had an enforceable claim it has been litigated and found by a competent Court and the judgment has been satisfied out of moneys of the appellants. It has been contended in this Court that the stipulation was in some way restrictive and was confined to whether the cheques were really representative of moneys of the appellants or the respondent. How can that be? It is only necessary to see the comprehensiveness of the points submitted to the jury by the learned judge and the very precise and able manner in which they were presented and with a true exposition and pronouncement of the law thereon.

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Further we have the admission made at this Bar that the cheques were representative of moneys of the appellants and the moneys of the appellants. This is incontestable that unless it was so then the escrow agreement was at an end and McNeill was perfectly entitled to refuse inspection of the mining property and the respondent could have recovered nothing in the Superior Court of Washington. How could there have been any breach of contract at all unless that at the time of the alleged breach the contract was in good standing? The only way that it could be said to be in good standing was for the respondent to prove the $10,000 was really paid to the appellants; therefore the admission was made and could not be contested that the $10,000 was paid into the bank to the credit of the appellants and afterwards the cashier's cheques went to them. That being the fact how idle to say that the real contest and what was fought out was—who was entitled to the cheques?

It was argued and pressed very strongly that the term of the stipulation was confining in its nature and that it could not be said that the judgment recovered in the Superior Court, Washington State, was in its nature a final judgment in relation to the matters in question in the present action and that the defence of *res judicata* is not a conclusive answer to the action. Mr. George W. Gregory an eminent member of the Bar of the State of Washington resident at Seattle was called as a witness on behalf of the appellants. Mr. Gregory was asked the following question and made his answer thereto:

Now in this stipulation is there any limitation of any kind that you find? Not that I find. The stipulation as I read it is nothing more nor less than

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to get the Dexter Horton National Bank out of the proceeding, let them pay the money into Court, and let the parties go ahead and fight out their differences.

Later when recalled, he said:

In this case the parties went in voluntarily, went in to settle the matter by giving the Court jurisdiction. It is my opinion that attorneys and litigants outside the Court cannot by stipulation confer jurisdiction upon a Court in addition to that which it has, or take away its jurisdiction. I had that matter up just a few days ago in Washington, where parties attempted to stipulate that such and such would be the evidence.

Once you are there you are in the hands of the Court? Once you are there you are in the hands of the Court, you cannot enlarge or take away from the jurisdiction of the Court. It is against public policy.

Then we have the following answers by Mr. Gregory:

How far could you go as to bringing actions or causes of action between those same two parties under that stipulation in the State of Washington? Well, my opinion is all, all of the rights; that they submitted themselves to the Court to determine all of the rights involved in this subject-matter.

THE COURT: What do you mean by this subject-matter? The contract and damages growing out of the contract.

Where do you get that idea? Well, I get that idea from the decisions of the Court all over the State, we have several in the district. In fact I differ from Mr. Griffith here, I don't think the service statute is involved in this case at all; I think that section 241 of Remington & Ballinger's Code—I think it is section 241 is the section that regulates and controls the parties in this action; because these parties—there was no attempt made to serve them in any way, they voluntarily submitted to the jurisdiction of the Court; and when people do that, our statute—it is statutory, section 241: "Appearance, What Constitutes.—A defendant appears in an action when he answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of his appearance. After appearance a defendant is entitled to notice of all subsequent proceedings; but when a defendant has not appeared, service of notice or papers in the ordinary proceedings in an action need not be made upon him. Every such appearance made in an action shall be deemed a general appearance, unless the defendant in making the same states that the same is a special appearance."

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All right; you have two kinds of appearance? Yes. There is a long line of decisions here—there have been Court decisions on the question. I think one of these volumes here Mr. Griffith had—I think there is a case in one of those volumes here in which the Court discusses what comes under a general appearance.

THE COURT: What do you call a general appearance there? The usual appearance is filing the answer and cross-complaint. There are only two parties in our practice, in so far as parties to an action are concerned, that is parties plaintiff and parties defendant.

The plaintiff here becomes Quickstad, doesn't he, when he intervenes? He is a defendant in so far as this case is concerned because he asserts an interest adverse to the plaintiff. And then he does, as all other defendants

do when they have any affirmative relief they want, they file a cross-complaint in addition to their answer.

And Quickstad did that? He did.

And what did Connors and McNeill do with that? They replied.

Did they file an answer to that counterclaim? Yes. They have a right to do.

Where is that? Look through the records and see; I have not seen that. I never paid so much attention to that pleading, your Lordship.

You say section 241 you are talking about is referring to a defendant, as I read it? Well, yes.

All right; we will treat Connors and McNeill as defendants to the cross-action brought by Quickstad.

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In my opinion it is quite unnecessary to make any further quotations from the evidence of Mr. Gregory. Unquestionably his evidence is and his statement of the law of the State of Washington is unqualifiedly that the stipulation as entered into was a submission by the parties to all matters in difference between them and the question of breach of contract or no breach and the damages that might be awarded were open to the Court for decision. I have, I think, well demonstrated that not only were they open but were submitted to the jury and with precise instructions upon the points of law. In my opinion it is impossible to contend otherwise and all the questions being presented to the jury the jury awarded damages to the amount of $9,974.50 against the appellants. Is it necessary to enquire what these damages were allowed for? The only answer reasonably possible is for breach of contract on the part of the appellants and there could be no breach of contract unless at the time of the breach the escrow agreement was in good standing. The $10,000 on deposit in the bank must be deemed to be payment to the appellants and as to this we have the admission of counsel for the respondent at this Bar that it was the money of the appellants. Only upon this premise was it possible for the respondent to be allowed any damages and in due course the damages awarded were directed by the Court to be paid out of the moneys in Court admittedly the money of the appellants. Upon this state of facts is it possible to arrive at any other conclusion than that the subject-matter of the present action is concluded by the result of the action in the Superior Court of Washington? There can be but the one answer and that is that the defence of *res judicata* has been amply established.

If it could be successfully contended that the cause of action

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here sued for was not tried out in the Superior Court of Washington which, of course, I am clear upon that it was then we have Mr. Gregory's evidence directed to that point *res judicata* would still be an insuperable barrier to the present action. The evidence given on this point was brought out in cross-examination. [After setting out the evidence at length the learned judge continued].

It is therefore evident as I view the law of Washington that whether all matters of difference between the parties relative to the cause of action litigated were or were not gone into or pressed it is not permissible for the parties to split their claims and later sue in respect thereof. In this respect the law of England, and as we have it, is not at variance.

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It being conceded at this Bar that the money covered by the cheques was the money of the appellants and counsel could not but concede it otherwise how could the respondent have any cause of action for breach of contract? Then it is apparent that what was litigated was not the money represented by the cheques but damages for breach of contract and that I think was what was litigated and the defence of *res judicata* constitutes a complete bar. In *Henderson* v. *Henderson* (1843), 3 Hare 100 (Piggott on Foreign Judgments, 3rd Ed., Part I., pp. 69-72), Wigram, V.C. at pp. 115-16 said:

> . . . where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. . . . Now, undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, and *prima facie*, therefore, the whole is settled.

Further the respondent's whole case was breach of contract. *Davis* v. *Street* (1823), 1 Car. & P. 18 was a case where it was held that

if a contract is broken, an action for money had and received will not lie for money paid under it; an action for the breach of contract is the proper remedy: but if the contract has been rescinded it is otherwise.

Here no question of rescission arises. There is seemingly attempted in this case to be argued that the action in the Superior Court of Washington was one for the money represented by the cheques. How fallacious that is! The money had to be paid to keep the contract alive, therefore it was and could only be an action for breach of contract and would be for damages. This Court in *Winter* v. *J. A. Dewar Co.* (1929), 41 B.C. 336 gave consideration to this question of *res judicata*. It is apparent that the present case as in that has relation to matters that were in existence at the time of the action in the Superior Court of Washington and which the respondent had an opportunity to bring before the Court as elements of damage. There cannot be two actions for damages for the same breach of contract; it was for the respondent to array all his elements of damage before the Superior Court of Washington and presumptively he did so. In any case, he cannot reagitate the matter now. As it is he had obtained the very substantial sum of $10,000 as damages for breach of contract receiving the amount, the money of the appellants, upon deposit in the Superior Court of Washington, yet comes to this jurisdiction and sues again. Of course he had not the temerity to sue again in Washington State but evidently was of the view that the Courts of this Province would be more tolerant and indulgent in the matter.

MCPHILLIPS, J.A.

I have at some length gone into the subject-matter of this appeal in that it has many phases requiring close attention and many authorities have been cited that need no particular attention as they are decisive of well-known principles of law and counsel upon both sides have very ably debated the salient points calling for decision. My conclusions as to the disposition of the appeal are as follows:

Firstly. The respondent has in my opinion failed to satisfactorily establish his right to enforce his alleged cause of action—that is, that there is no satisfactory evidence establishing that the proper parties are before the Court.

Secondly. That in any case the transaction throughout as to

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the right to sue for breach of contract is so infected with fraud (see *Campbell River Lumber Co.* v. *McKinnon* (1922), 64 S.C.R. 396) that the respondent cannot recover. Without the payment of $10,000 to the appellants the escrow agreement was at an end and the respondent fraudulently—although compelled to admit that the money represented by cashier's cheques from the bank were forwarded by the bank to the respondent—interposed himself and stopped payment by the bank of the cheques thereby creating a position of default in payment which would be that of a non-existent contract and has persisted in that position to the end.

Thirdly. When the learned counsel for the respondent is pressed by the point that unless this $10,000 is admitted to be the appellants' money—and he has admitted it—he persists in submitting that the decision of the Washington Court had relation only to the cheques and the money payable thereunder and that it was only determined by that Court that the money was the money of the respondent—a fallacious contention and against his own admission—a wholly untenable argument for if that be the case that in itself puts this action at an end as the escrow agreement would be at an end because of the default of payment of the $10,000, the appellants never having received payment thereof.

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Fourthly. Finally brushing away everything of a fraudulent and confusing nature the situation becomes a plain one indeed, That the action in the Superior Court of the State of Washington was an action for breach of contract, *i.e.*, of the escrow agreement and that the damages there awarded were damages for breach of contract, then what results? There has been one action, there cannot be another, the principle of *res judicata* applies and no further action at law is permissible.

In this most confusing and involved action which it would seem to me could have been presented in a clearer manner my only conclusion can be, with great respect to the learned trial judge, that the judgment must be set aside being convinced that, not only on the ground of fraud but upon the other stated grounds as well, no relief should be accorded the respondent, that is, in my opinion, the appeal should be allowed and the action dismissed.

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MACDONALD, J.A.: Appeal from a judgment awarding $10,000 damages against appellants for breach of an agreement dated May 25th, 1925, for the sale by appellants to one David Johnson (agent for respondent) of eleven mineral claims (known as the Red Top) in the Cassiar Mining District for $250,000 payable as follows: $2,000 on the execution of the agreement (an option); $10,000 on or before July 20th, 1925, and the balance in three consecutive years. This option or working bond was executed in quadruplicate and appellants submitted that seals were affixed to the original copy. The trial judge found otherwise, treating it as a simple contract and that finding should not be disturbed. The rule therefore, that a principal may not sue on an instrument under seal executed by his agent on his behalf, cannot be invoked. The evidence too supports the finding that Johnson was the agent of the respondent.

An escrow agreement signed by appellants and Johnson was deposited in the Dexter Horton National Bank of Seattle along with the records and an executed bill of sale of the mineral claims. The material clause therein follows:

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In the event any past due payment is tendered to you [the bank] before demand for the delivery of the said bill of sale to said Connors or McNeill [appellants] is made upon you, you are authorized and instructed to accept said past due payment, and the escrow shall be again considered in good standing to the extent of said payments made.

Appellants thereby made the bank their agent to accept payment of any instalment tendered after the time for payment provided in the original option passed, and unless prior thereto the bank received a demand for the bill of sale (or unless telegrams exchanged altered this situation) payment to the bank by respondent, without any notification to appellants, would be a payment under the working bond referred to.

Johnson executed an assignment of his interest in the agreement to the respondent and two Winlow brothers and appellants thereafter dealt with respondent and the said Winlows as principals. F. Winlow and respondent however executed the following document addressed to Johnson:

Subject to you paying $10 by way of wages or work in the development of Red Top mine purchased today we hereby assign to you one-tenth interest in said property. Sale is to be effected by us and any sale that we make you are to ratify and sign necessary papers or transfer on demand by us

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If sale is made the original amounts and all expenses are to be paid and a division of profits, if any, is to be made thereafter.

I assume that this interest is still held by Johnson. It was submitted that he should be a party to this action. I do not think so. He is not a joint covenantee with his principals, the respondent and the two Winlow brothers, nor is there any privity of contract between him and the appellants. As assignee under an equitable assignment (no notice given) he would in any event, in respect to his interest, have to sue in the name of the respondent. The same observations apply in respect to a fifteen per cent. interest later assigned to one Wored.

On the 4th of August, 1925, after the first instalment of $10,000 was past due (an extension being arranged in the meantime) the respondent and Wored entered into an agreement with a capitalist, one J. F. Duthie, who for certain considerations agreed to advance the money to develop the property. The material parts of that agreement follow:

WHEREAS said Quickstad and Wored are desirous of having J. F. Duthie become interested with them in the purchase of said mining group.

NOW THEREFORE, for and in consideration of said Duthie advancing the sum of $5,000 for the purpose of making payment on said option, said Quickstad and Wored agree to put up real estate security consisting of lots 7 & 8, block three Holbrook & Clise Addition West Seattle also lot 11, block 10 Baker Addition Seattle also 50,000 shares Barite Stock as security for said $5,000 payable in six months. Provided however that upon examination of said property by said Duthie or his representative, and upon his notification to said Quickstad and or said that he is desirous of becoming interested in said mining group then said Duthie shall immediately furnish $5,000 additional to pay on said option making a total of $10,000 and shall immediately release said securities deposited.

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Upon the payment of $10,000 by said Duthie said Quickstad and Wored agree to assign a 52 per cent. interest in and to said Red Top mining group and the properties shall be worked to the mutual advantage.

While respondent was arranging for this financial assistance the time for the first payment (July 20th, 1925) having expired (without demand by appellants for the bill of sale) telegrams were exchanged in reference thereto. Their only effect, apart from special terms, if any, introduced, is that the payment of this instalment is governed by the stipulations contained in the wires exchanged. Respondent wired appellant McNeill on July 21st:

Have $5,000 ready will have balance in 5 days. Answer.

On July 24th, appellant McNeill wired respondent:

Will extend time for $5,000 [*i.e.*, the balance] to August 8th subject to your paying $5,000 to bank on option immediately. When advised by bank that $5,000 is paid we will wire bank to extend time as above. Wire answer.

(The condition "when advised by bank" should be noted as one of the grounds later advanced for turning respondent off the property was the complaint that appellants did not receive notice from the bank when the full payment was made.) On July 29th respondent wired appellant McNeill:

Can pay $5,000 now and $5,000 in 60 days. Wire answer.

to which McNeill replied on July 30th:

Pay bank $5,000 on option immediately subject to Connors and I extending payment for $5,000 to August 8th. Have bank advise me when payment is made. I will wire bank immediately to extend time of payment of $5,000 as above and will advise Connors to wire bank immediately. Will expect reply tomorrow.

On August 1st Fred Winlow, one of the brothers referred to, who was on the property doing development work and in touch with McNeill, wired to respondent as follows:

Deposited $350 escrow bank cover part wages. McNeill takes possession Monday if $5,000 unpaid bank Monday but will give time balance to August 15th. Have bank wire McNeill Monday sure.

Following the arrangement made by appellants McNeill with F. Winlow the former on August 9th, 1925, wired to the bank as follows:

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If parties will deposit $5,000 on option next Tuesday I will extend other payment of $5,000 to August 15th. Please wire me if payment is made Tuesday.

This is appellant's final stipulation. While he requests the bank to advise him he does not make the extension of time conditional upon the bank advising him of the payment. We have here instructions by appellant to his agent and if the latter failed to notify him it could not affect the respondent.

On August 10th the bank wired to McNeill:

Ten thousand paid August 8th. Your share sent to Stewart.

This wire was not received until the 13th and in the meantime the breach occurred. The payment was therefore made seven days before the time mentioned in appellants' last telegram. Other wires exchanged are not material.

While the foregoing wires were being exchanged the respondent under the agreement with Duthie *ante* was endeavouring to provide securities for the conditional advance obtained from him. If respondent borrowed $10,000 from Duthie the payment to

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the bank would be a payment by respondent. On the other hand, if Duthie advanced it for a 52 per cent. interest in the Red Top mining group, other considerations would arise because it was submitted that respondent parted with a substantial part of his interest in the property. The agreement with Duthie provided that upon payment by him of $10,000 respondent and Wored would "assign a 52 per cent. interest in and to the said Red Top mining group" whereas for a breach occurring after its execution respondent alone sues as the sole party interested. Before action Fred Winlow died and Tom Winlow (who disclaimed any interest) was added as a party defendant. I think the sum of $10,000 advanced by Duthie must be treated as a loan to respondent to be converted into an interest when (and if) after examination of the property by Duthie he notified respondent that he was prepared to take the interest referred to and provide at least part of the working capital. The first $5,000 paid by Duthie was undoubtedly a loan. Securities were deposited by respondent and if Duthie decided after examination to withdraw he could, failing repayment, realize on the securities. The second advance was to be made after examination of the property. Duthie however waived that condition and advanced the remaining $5,000 without examination. Before doing so he received additional securities from respondent, the intention no doubt being that as time was passing—the 15th of August being the last day for payment—he would postpone examination with the right to demand return of the moneys advanced or failing that realize on the securities if the later examination did not satisfy him. It was only too when the securities were released and the final payment of $10,000 made that Duthie could demand an assignment of a 52 per cent. interest. He departed from the terms of the agreement for the reason mentioned but if no breach occurred and he finally after a later examination, decided to withdraw he could I think do so and realize on the securities if necessary. In any event, no interest was ever transferred to Duthie. Because of the breach and respondent's acquiescence it was impossible to transfer any interest to him. It was contemplated that a company should be formed in which Duthie would hold 52 per cent. of the stock. Before that time arrived the option was at an end.

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The agreement was drawn in contemplation of the Red Top remaining the property of the respondent under the option. Duthie therefore had no interest in the Red Top mine when respondent commenced this action. The agreement to assign a 52 per cent. interest could not be implemented.

The sum of $10,000 to provide for the payment due under the option on July 20th, 1925, having been paid, as outlined, Duthie and a mining engineer (Turner) arrived at Stewart, B.C., on the 10th of August to examine the claims. McNeill (who represented his partner (Connors) informed them that he had repossessed himself of the claims. He refused to allow them to enter for any purpose. On the following day he refused to allow an inspection and ordered them off the premises. They might have insisted that the option was in good standing but did not do so. The ground of interference was that appellant had no advice that the $10,000 had been deposited in the bank. He declined to accept their assurances. His position was wholly untenable. His latest wire did not make notice a condition precedent and in any event payment to the bank was equivalent to payment to him. The respondent was not affected by his agent's alleged failure to notify appellant. A further ground advanced for turning them off the property was that wages were not secured as provided for in the option agreement. This feature (without merit because wages were either paid or provided for) was in fact only advanced as a justification of appellant's action in insisting that he should have proof that the $10,000 was in the bank. It does not assist him; his complaint, if any, was against his agent. Upon this unwarranted stand being taken by appellant and upon his refusal to allow entry respondent could as stated either insist that the option was valid or submit to the ouster and claim damages. He chose the latter course.

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In the meantime the $10,000 referred to was in the mail on the way to appellants McNeill and Connors in the form of cashier's cheques. On being dispossessed Duthie, after consulting respondent (without authority) wired the bank to stop payment. The bank could only take instructions from its principal. It was nevertheless the natural course for laymen to adopt. They did not want to lose the property and the $10,000 paid and take their chance of recovering it as damages. The

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bank stopped payment. Appellants urged that in acting upon this wire it was Duthie's agent. I do not think so. The fact that he was a director of the bank is not material. There is no evidence to shew that the payment to the bank was conditional reserving to Duthie or respondent a right of withdrawal. The payments had to be made either to appellants direct or to their agent; no provision was made for direct payment. The bank therefore should not have heeded these instructions and appellants might complain of its action.

The next series of events raises the question of *res judicata*. Appellants after the breach sued the Dexter Horton National Bank in the State of Washington on the two cheques issued. They claimed to be holders thereof for value and entitled to payment. They, in effect, alleged that they were entitled to this $10,000 under the option whereas in the present action they take the position that because they were not advised of payment into the bank pursuant to alleged terms in telegrams exchanged no payment in fact was made. The respondent and Wored by intervention under a statute of the State of Washington became a party to that action and the bank upon payment of the amount into Court was dismissed therefrom. A contest therefore arose between appellants and respondent in the Seattle Courts in respect to this sum of $10,000. A stipulation, as it is called, afterwards ratified by the Court, was entered into by the attorneys for the present appellants (plaintiffs in that action) the attorneys for the bank and the present respondent and Wored. It recited the commencement of the action by the present appellants against the bank; the fact that the present respondent and Wored claimed to be entitled to receive from the bank a sum equal to that demanded by the present appellants; that the bank admitted its obligation to pay the amount to the parties entitled and provided:

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> It is the intention and purpose of this stipulation to permit the determination of the matters and things in controversy herein between the real parties interested without annoyance or prejudice to the Dexter Horton National Bank, but the rights of all of said parties, except the Dexter Horton National Bank, shall be in all respects settled, determined and adjusted as if said funds had not been paid into the registry of the Court, and as if The Dexter Horton National Bank had not been dismissed from said actions.

The present respondent, as intervener, filed a pleading therein

reciting the history of his relations with the present appellants and taking the ground in respect to the payment of the said $10,000:

That in accordance with said contract there became due on the 20th day of July, 1925, the sum of $10,000. That for the purpose of making said payment, the interveners deposited in the Dexter Horton National Bank under the escrow agreement hereinbefore mentioned, said sum of $10,000 to be paid to the said McNeill and Connors as directed by said escrow agreement. That at the time said money was so paid to the escrow holder the interveners did not know and had no reason to believe that McNeill and Connors had breached and violated the terms of said agreement and did not know that the said interveners had been ousted from the possession of the said property forcibly and did not know that said contract had been terminated by the said McNeill and Connors.

The prayer of their complaint is:

That said cheques be cancelled and held for naught, that said McNeill and Connors recover nothing by their complaint in this action. That the said money now in the registry of the Court be adjudged to be the money of the interveners and that judgment be entered herein against the said McNeill and Connors for the costs and disbursements and that the interveners and each of them have such other further, general, special or equitable relief as they may be entitled to in the premises.

It will be noted that the present respondent alleges, contrary to the facts, that the contract was cancelled before the cheques were issued.

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Both parties, wittingly or not, adopted a position in the Seattle action inconsistent with their present attitude. The action was tried by a jury in the Seattle Court and a verdict in favour of the interveners returned "in the sum of $9,974.50" finding that "the money belonged to the interveners." It is not recorded in the formal judgment that it was recovered as damages.

In the present action the claim for damages is in respect to an initial payment of $2,000, moneys expended in development, equipment purchased, etc., and general damages. Could this claim be litigated in the Seattle action? Experts testified on behalf of both parties and as their evidence differed we may inquire independently into the statute and case law of the State of Washington. Had the Seattle Court jurisdiction to award the damages now claimed (a) under the pleadings as framed (b) or as they might have been framed under the laws of that State? Damages resulting from one cause of action can be sued for and recovered only once. Difficulty arises in ascertaining

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the precise cause of action in the Seattle Courts. In *Callandar* v. *Dittrich* (1842), 4 Man. & G. 68 at p. 90 Coltman, J. said:

On the best consideration I have been able to give this case, it appears to me, that the suit in the Court of Commerce at Koenigsberg, was not brought for the same cause of action as the action now before this Court. The proceedings in the foreign Court appear to be either very imperfect in their nature, or not to be fully before us. The suit in the Prussian Court seems to be rather for the rescission of the contract; while the present action is for damages resulting from a breach of that contract. Now it seems clear that a party may not be entitled to rescind a contract, and yet may be entitled to an action for the breach of it. Upon this ground, therefore, I think the plea is no answer to this action.

This language might be applied to the proceedings in the Seattle Court. It is difficult to say that it was final and conclusive between the parties. And again:

The judgment of a Court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or as evidence, conclusive upon the same matter directly in question in another Court.

And,

One of the criteria of the identity of two suits in considering a plea of *res judicata* is the inquiry whether the same evidence would support both:

Hunter v. *Stewart* (1861), 31 L.J., Ch. 346 at 350.

If concerned with a former action in our Courts the law is that,—

where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time:

Henderson v. *Henderson* (1843), 3 Hare 110 at 115. If the present claim for damages "properly belonged to the subject of litigation" in the Seattle Court and the intervener by "exercising reasonable diligence" might have brought it forward the defence prevails. Matters once adjudicated cannot again be reasserted in another Court. The burden of proof, however, and the learned trial judge so found,—

is on the party setting up the estoppel of alleging and establishing this

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identity of subject-matter—that is to say, that his opponent is seeking to put in controversy and reagitate some question of law, or issue of fact, which is the very same question or issue which has already been finally decided between the same parties by a tribunal of competent jurisdiction:

Spencer Bower on Res Judicata, 115.

Obviously this defence cannot be raised if by the law of the State of Washington it was not possible to include the present claim; nor if, as contended, the intervener could only participate in that action on special terms confining him to the claim of the respective parties to the sum of money paid into Court by the bank. From the instructions to the jury it would appear that, the money was recovered on the ground that it was paid on a contract that was terminated. That was not in accordance with the facts. If, on the other hand, the interveners contended —as alleged in the present action—that the $10,000 was paid to appellants on August 8th whereas the breach occurred on the 11th, it could only be recovered as damages. No claim, in terms, for damages was made. They asked that "the said money be adjudged to be the money of the interveners" and "such other further, general, special or equitable relief as they may be entitled to." Both parties adopted positions inconsistent with the true facts and with their present attitude. That cannot enure to the benefit or detriment of either in this action.

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The attorney called for respondent (he acted for him in the Seattle action) testified that no question of damages was involved in that action—simply the ownership of the $10,000— and that the question of damages in any larger amount could not be involved therein. As appellants' attorney called as a witness combated this view I examine the question independently.

The view advanced on one hand was that the present appellants being in the Seattle Court only to prosecute an action could not be served by civil process at the instance of the present respondent with a claim for the special and general damages recovered in the present action.

State v. *Superior Court of King County* (1920), 189 Pac. 1016 was referred to. It decides that a non-resident party, who came into the State solely for the purpose of defending a suit was, while within the State for such purpose, exempt from service of summons in a new suit.

If the present appellants sued the respondent in Washington

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under the option the latter might counterclaim for damages but because respondent was not a party to the action as originally framed he could only become identified with it by reason of a section of a statute of the State of Washington permitting intervention in a pending suit by one who claims an interest in the subject-matter then in litigation. The material part of that Act (Remington & Ballinger's Code, Sec. 202) reads as follows:

> Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter of litigation, in the success of either party, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by a complaint setting forth the ground upon which the intervention rests, filed by leave of the Court or judge on the *ex parte* motion of the party desiring to intervene.

The only clause wide enough to admit a claim for general damages is,—

> Or by demanding anything adversely to both the plaintiff and the defendant.

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I think as this section has been construed the respective rights of the parties were limited to the sum of $10,000 originally claimed by appellants. This view, as to the limited rights of the intervener, is supported by the case of *State* v. *Superior Court* (1916), 157 Pac. 28 where in an action by a sub-contractor against the main contractor and a railway company another sub-contractor sought to intervene claiming a balance due from both of the other parties concerned in the litigation it was held that the interest which entitled a person to intervene must be in the matter in litigation and of a direct character. Main, J., at p. 29, quotes with approval Mr. Justice Field as follows:

> The interest mentioned in the statute, which entitles a person to intervene in a suit between other parties, must be in the matter in litigation, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment.

It follows that if respondent intervened in an action confined solely to a demand to enforce payment of two cheques and claimed that he was entitled to recover not only the proceeds of the cheques but money spent in development work and general damages for breach of contract he would be told that these matters were not "in litigation" in the action he sought to become a party to. Nor can it be said that once he becomes a

party in this special manner he can assert other claims. His right to become a party is statutory and he is bound by the terms of the Act and although the words "demanding anything adversely to both" appear to be wider than indicated our view should be governed by the American decisions on the construction of this section. The same principle is laid down in *Hindman* v. *Great Western Coal Development & Mining Co.* (1907), 92 Pac. 139 where Crow, J. says, at p. 140:

> To authorize an intervention, therefore, the interest must be that created by a claim to the demand, or some part thereof, . . . which is the subject of litigation.

We must also be guided by the stipulation already referred to and outlined in part. Both attorneys agree that it is proper practice to enter into an agreement of this sort. Mr. Gregory, appellant's expert, says:

> A stipulation is where the parties to an action stipulate certain things into the record; certain facts; or certain matters agreed upon and that is permissible under the practice.

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He maintains however that under it all the rights of the parties (including a claim for general damages) might have been asserted. I think Mr. Gregory's view is incorrect. The inquiry is limited to the matters and things in controversy, *viz.*, the right to the $10,000 referred to. It is not enlarged by reason of the words in the last paragraph:

> The rights of all of said parties [that is in respect to the matter in controversy] shall be in all respects settled, determined and adjusted as if such funds had not been paid into the registry, etc.

He said his view was supported by "the decisions of the Courts all over our State." After discussing the law governing appearances under section 241 of the Washington Code he asserted that:

> The Courts of our State will not entertain jurisdiction of a matter unless they can completely determine the rights of the parties.

It would follow, if this view is correct, that the matter involved in the present litigation properly belonged to the subject-matter in litigation in Seattle. He refers to *Woodland* v. *First National Bank* (1923), 214 Pac. 630. It is of no assistance. It deals only with the ordinary case of *res judicata*. The same remark applies to *Bruce* v. *Foley* (1897), 50 Pac. 935 and *Olson* v. *Title Trust Co.* (1910), 58 Wash. 59; 109 Pac. 49 also referred to. These are the only authorities cited by Mr.

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Gregory on this point if I may rely on a memorandum handed in by counsel and they are of no assistance on the vital point, *viz.*, whether or no when one from beyond the jurisdiction sues in the State of Washington, not the party he now asserts is estopped, but another (the bank) in respect to a particular transaction; one becoming a party thereto under an intervention statute may virtually control the proceedings and assert claims against the non-resident beyond the terms of the stipulation permitting him to intervene. The statement of Mr. Gregory in reference to different kinds of appearances, and his view that after the present appellants submitted themselves to the jurisdiction of the Court any and all claims arising under the breach of the option agreement might be pressed is not borne out by any cases cited.

There is another aspect to consider in respect to the stipulation. It was an agreement between the attorneys for the three parties originally concerned, later confirmed by the Court. Mr. Griffith for respondent, when asked why he did not provide for a claim for damages beyond the $10,000 referred to, said "I could not have had the stipulation to intervene if I did that," and further:

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> Why? Because the counsel would not let us intervene.
>
> Why would McNeill and Connors object to that? I don't know why they would, but they did, and refused absolutely to make any stipulation or terms of an intervention unless we would consent that the only thing to be considered would be the money of the bank.

The learned trial judge found that both Mr. Griffith and Mr Gregory "gave their evidence in a perfectly satisfactory manner." The evidence quoted could not of course be controverted by Mr. Gregory but it was, I assume, possible to call the attorneys who acted for appellants and the bank to contradict this evidence if possible. I think in any event, on all the facts, from the terms upon which the present respondent was permitted to intervene, even if it were legally possible in some manner to extend the scope of the action tried, we have at least those "special circumstances" referred to in the judgment quoted in *Henderson* v. *Henderson*, *supra*, to take it out of the general rule. I go further and say that by the case and statute law of the State of Washington, it was not possible with a foreign plaintiff resorting to the Courts of that State to enforce a claim,

not against respondent but against the bank in which the subject in controversy was defined, for respondent to intervene except on the basis of a claim to that particular fund although in asserting it he was permitted to traverse ground, part of it more fittingly applicable to the present action. The defence of *res judicata* therefore fails without resorting to the law applicable where a foreign judgment is under review raising further difficulties for the appellants.

We have therefore a breach of an existing contract on the 11th of August, 1925. Respondent could sue for specific performance but he accepted rescission and sued for damages. It was urged that the amount awarded was excessive. I do not think we can reduce it. An initial payment of $2,000 was made. A large sum was spent on development work, supplies, tools, packing and travelling expenses, etc., and over $2,000 paid in wages. There was evidence that there were "good showings" on the property. The value was enhanced by its proximity to another property in which respondent was interested. It was said that money derived from the sale of stock in a company owning the adjoining property was used in development work. The trial judge regarded this as immaterial. In any event the damages awarded may be justified apart from this special item. The property was sold before under option, first in 1900 for $150,000 in which $4,000 was paid and forfeited (under it about $12,000 was expended in development work) and again in 1928 on a bond for $300,000 of which $100,000 was to be paid in cash and $200,000 in shares. On this bond $5,000 was paid and forfeited and $6,000 expended in development. With the evidence of value afforded by these sales, the work done and ore bodies disclosed, while the damages might be estimated on a different basis the general result should not be disturbed.

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I would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant McNeill: *Maitland & Maitland.*

Solicitors for appellant Connors: *McPhillips, Duncan & McPhillips.*

Solicitors for respondent: *Tait & Marchant.*

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April 18.

MERRILL RING WILSON LTD. *v.* WORKMEN'S COMPENSATION BOARD

MERRILL RING WILSON LIMITED *ET AL.* v. WORKMEN'S COMPENSATION BOARD.

Workmen's Compensation Act—Assessments made under sub-class 2 of class 1—Assessments to defray expenses of previous years—Cost of medical aid—Administration expenses—Legality—R.S.B.C. 1924, Cap. 278, Secs. 28, 32 and 33.

The members of sub-class 2, class 1, under the Workmen's Compensation Act claiming that a large portion of the accident cost levied for their class by the Workmen's Compensation Board for 1931 was disbursed for accidents occurring in former years, brought action against the Board, *inter alia,* for a declaration that under section 32 of the Act a duty was cast on the Board to levy and collect from the employees in said sub-class sufficient money to provide for all accidents occurring in that year, and that the Board is not entitled to pay out of the moneys so collected in any year for accidents occurring in previous years, for a declaration that the Board was not entitled under section 33 of the Act to proportion the additional amounts required to meet the cost of medical aid according to the amounts actually collected from the plaintiffs but according to the pay-rolls of the plaintiffs, and that the Act does not specifically authorize levies for administration expenses. The Board, after making four assessments, purported to impose fifth and sixth assessments, and an *interim* injunction was granted restraining the Board from levying the assessments until the trial.

Held, that the Board is required by section 32 to make an estimate of the money necessary to make full provision for all accidents occurring in each year in the industry carried on by each class and to make a levy or levies upon each such class to obtain the requisite funds, and the chairman of the Board testified that this is what the Board actually did, although admitting a deficit in the class in question through error in judgment in making too low an estimate, owing to the rapid increase of accidents in this class. The Board did not finally adjust all claims within the year in which the accident occurred, but section 32 only requires that the Board shall make an estimate as already set out and levy in accordance with such estimate against each class, and not that it must finally adjust all claims. The testimony of the chairman of the Board is accepted and the contention that the Board acted on a wrong principle fails.

Held, further, that section 32 of the Act expressly empowers the Board to levy assessments, *inter alia,* to provide in connection with section 33 a special fund to meet the cost of medical aid and further empowers the Board to rate such assessments upon the pay-roll or in such other manner as the Board may deem proper. An assessment is none the less a general assessment when made on the basis used by the Board, and section 32 being the empowering section, it authorizes the course so taken.

Held, further, that the administration costs by necessary implication fall within the meaning of "sufficient funds" which the Board must estimate for and levy in order to carry out the objects set out in section 32.

CONSOLIDATED ACTIONS, the plaintiffs, suing on behalf of themselves as well as all other members of sub-class 2 of class 1, created by the Workmen's Compensation Act, being engaged in the industry of logging west of the Cascade Mountains, for certain declarations, *inter alia,* that under section 32 of the Act there was an imperative duty cast upon the Workmen's Compensation Board to levy and collect from the employers in the said sub-class sufficient money by an assessment upon the pay-roll to provide for all accidents occurring in that year; and for a declaration that the defendant was not entitled to pay out of the moneys so collected in any calendar year compensation for accidents occurring in previous years.

The plaintiffs alleged that a large deficit had accumulated in the funds of the said sub-class by reason of the failure to levy sufficient funds to meet the accident cost of each year.

Statement

It was further alleged that for a number of years it had been the practice of the Board to stand over for final award a certain number of the more serious accident cases and that when a final award was made in these cases, the cost thereof was levied in the assessment for the year in which the award was made instead of having provision made therefor in the year in which the accident occurred.

It was further alleged that the year 1931 was one of extreme depression in the lumber industry and at the instance of the members of sub-class 2 of class 1 an investigation was made by a chartered accountant approved by the Provincial Government into the affairs of the Board, whose report disclosed that about 70 per cent. of the accident cost levied for 1931 was attributable to accidents occurring in former years. The Board purported to impose two extra assessments on sub-class 2 of class 1 for the year 1931, and the plaintiffs then obtained an *interim* injunction restraining the Board from proceeding with such assessment until the trial of the action. It was further alleged that the Board failed to comply with section 33, subsection (2) of the Act, in that additional amounts required to meet the cost of medical

aid were provided by proportioning the additional amounts required against the moneys actually collected from the plaintiffs instead of proportioning such additional amounts according to the pay-rolls of the plaintiffs. Tried by MURPHY, J. at Vancouver on the 16th of March, 1932.

Mayers, K.C., and *O'Brian, K.C.*, for plaintiffs.
Craig, K.C., *J. W. deB. Farris, K.C.*, and *Carmichael*, for defendants.

18th April, 1932.

Judgment

MURPHY, J.: Section 74 of the Act gives the Board exclusive jurisdiction to determine all matters of fact and law arising under Part I., and provides that the decision of the Board shall be final and not open to review. No enquiry can be made into the material upon which the Board comes to a decision upon anything within the scope of the Act. *Peter* v. *Yorkshire Estate Co.* (1926), 95 L.J., P.C. 91. If, therefore, the existing injunction is to be continued it must be shewn that the Board in levying the fifth and sixth assessments is acting outside the scope of the Act. Exhibit 31 sets out the basis upon which these assessments were made. This exhibit shews that in assessing to cover cost of 1931 accidents the Board acted according to what is hereinafter held to be the correct principle. It shews further that even if these two assessments are collected there will still be a deficit and in addition that no provision will thereby be made for unknown 1931 claims which may be put forward in the future.

From what is set out above it follows that but two items in Exhibit 31 can be questioned, medical aid and administration costs. For plaintiffs it is contended that medical aid assessments are governed exclusively by section 33 and that said section requires that medical aid assessments must be assessed over the whole body of industry—exclusive of that portion operating under approved medical plans—and that the only way medical aid can be so assessed is by proportioning the amount to each industry according to the ratio which the pay-roll of such industry bears to the total pay-rolls of all industries—again exclusive of the pay-rolls of industries operating under approved medical plans. For the defence it is maintained that medical

aid is as much compensation as are the money payments, that medical aid assessments go into the Accident Fund which the Act makes one and indivisible and that the construction contended for by plaintiffs should not be adopted unless the language of the Act intractably demands that this be done since it would result both in a different method of assessment from that directed to be adopted in the case of the money payments and would be markedly inequitable.

Judgment

The Board has computed the medical aid amount set out in Exhibit 31 in the manner described at page 87 of the transcript by making assessments actually paid and not pay-rolls the basis of its calculations. Section 33 is not the only section dealing with medical aid assessments. Section 32 expressly empowers the Board to levy assessments, *inter alia,* to provide in connection with section 33 a special fund to meet the cost of medical aid. Section 32 further empowers the Board to rate such assessments upon the pay-roll or in such other manner as the Board may deem proper. Unless, therefore, the words in section 33 "by assessment upon employers generally," and the subsequent provision therein for annual adjustment to result in a general assessment are to be construed as cutting down the power of the Board given by section 32 it cannot be held that the Board in making the charge for medical aid in Exhibit 31 is acting without the scope of the Act. I do not think the language referred to intractably demands such a construction. An assessment is none the less a general assessment because it is made on the basis used by the Board instead of on the basis suggested on behalf of plaintiffs. Section 32 is the empowering section and it I think authorizes the course taken by the Board.

As stated the only other item in Exhibit 31 open to consideration by this Court is the charge for administration. It is urged that nowhere does the Act specifically authorize levies for administration expenses. But as counsel for defendant pointed out these administration costs are the costs of levying, collecting, and disbursing the assessments. I would say that by necessary implication they fall within the meaning of "sufficient funds" which the Board must estimate for and levy in order to carry out the objects set out in section 32. The Board has assessed these costs on the same principle upon which it has assessed the

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medical aid costs. If I am right in holding they have power to make these assessments then section 32 empowers them to do what they have done. If these views are correct then the Board has proceeded within the scope of the Act in levying the fifth and sixth assessments and the *interim* injunction obtained must be dissolved.

In my opinion the Board is required by section 32 to make an estimate of the amount of money necessary to make full provision for all accidents occurring in each and every year in the industry carried on by each class as enumerated in the Act and then to make a levy or levies upon each such class to obtain the requisite funds. The chairman Winn testified that this is what the Board actually did. He admits there is a deficit in sub-class 2 of class 1 but explains that this was occasioned by an error in judgment in making too low an estimate owing to the very rapid increase of accidents in this sub-class. He is the member of the Board who dealt with this feature of the Board's duties. He has been making these estimates for some 16 years and he must know on what principle he proceeded in reference thereto.

Judgment

It is urged that his testimony should be rejected. If so it must be because the Court is forced to disbelieve him. There can be no question of mistake on his part in giving this testimony. To put the matter bluntly the Court if it rejects his evidence must do so on the ground that he is deliberately trying to mislead it.

The reasons urged are first certain statements contained in the annual reports transmitted by the Board to the Legislature in accordance with provisions in the Act. As to this it is to be observed that some of these reports do set out that the Board acted on what I hold to be the correct principle. But the real answer I think is that the Board in that portion of the reports relied upon is not dealing with the principle it acted upon at all. It is concerned with a very different matter. It is trying to make clear that that portion of the accident fund which is invested in securities amounting to some millions of dollars is not a surplus but represents money which with the interest thereon will be needed as to every dollar thereof to carry out the duties imposed upon it by the Act. In consequence that

precision of language which would have been used were the Board concerned in stating the principle it acted upon was not always observed since that was not the subject under discussion.

Then it is urged that Gilmour in his discovery and particularly in his letter to the Attorney-General, Exhibit 34, admits that the Board has not been acting upon the correct principle as above set out. Gilmour, however, was not the member of the Board who attended to this matter. Winn was the man who did so. Doubtless Gilmour as a member concurred in the making of the levies but he may have done so as seems indeed to have been the case, without knowing on what exact principle they were imposed. The same reasoning applies with much greater force to letters written by employees of the Board which are also relied upon as reasons for rejecting Winn's evidence.

I accept Winn's testimony and it follows that the contention that the Board acted on a wrong principle fails.

Admittedly the Board did not finally adjust all claims within the year in which the accident occurred, nor did it do so before March 1st of the ensuing year. But in my view of section 32 what is thereby required is that the Board shall make an estimate as already set out and levy in accordance with such estimate against each class not that it must finally adjust all claims. It must also endeavour to collect the levies so made and this the Board has done and over a course of years has done quite successfully. But it is said this is to ignore section 43.

I had prepared a draft judgment dealing with this contention and with the other prayers for a declaratory judgment contained in the statement of claim but the amendments to the Act which became law at the session of the Legislature just closed have rendered it unnecessary to revise and hand it down, since no attempt to collect the existing deficit is in question in these proceedings and the amendments settle that and the other features discussed for the future.

The *interim* injunction is dissolved and the actions dismissed.

Actions dismissed.

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June 7.

LITERARY RECREATIONS LTD. v. SAUVE

LITERARY RECREATIONS LIMITED v. SAUVE AND MURRAY.

Post office—Order refusing use of mails—Cross-word competition—Game of chance—Tort by Government officials—Sued individually—R.S.C. 1927, Cap. 161, Sec. 7—Postal regulation 219.

The plaintiff carried on cross-word puzzle competitions necessitating considerable mail matter passing through the mails. The Postmaster General, concluding there was an element of chance in obtaining correct answers to the puzzles and that the contest might be considered as tending to deceive or defraud the public, declared it not to be "mailable matter" within the Post Office Act and regulations and issued a prohibitory order refusing the use of the mails to the plaintiff, and thereafter all mail matter sent to the plaintiff through the mails was returned to the senders. An action against the Postmaster General and the District Superintendent of Postal Service in their individual capacities for damages for wrongful interference with the plaintiff's business and for an injunction was dismissed.

Held, on appeal, affirming the decision of MORRISON, C.J.S.C. that clause (*d*) of section 7 of the Post Office Act declares what shall not be "mailable matter" and regulation 219 gives the Postmaster General discretion, if the offence be established to his satisfaction, to declare what shall be "mailable matter." Acting on that discretion the Postmaster General declared the matter in question not to be "mailable matter." The Postmaster General having authority to prohibit the use of the mails to the plaintiff, being a matter in his entire discretion, it is not open to review by a Court. Even if it were open to review this discretion was properly exercised, as the "contest" as shewn by the evidence is open to many apparent solutions and therefore a game partly of chance.

Statement

APPEAL by plaintiff from the decision of MORRISON, C.J.S.C. in an action tried by him at Vancouver on the 23rd of February, 1932, against the Postmaster-General and the District Superintendent of Postal Service in their individual capacity for damages for wrongful interference with the plaintiff's business, for an injunction preventing the defendants from interfering with mail matter either addressed to or sent by the plaintiff, and for a declaration that the plaintiff's use of the mails is lawful. The plaintiff is an incorporated company doing business in Vancouver and carries on what is popularly known as "cross-word puzzle" competitions, and in connection with it a large amount

of mail matter passes to and fro through the mails. The Postmaster General decided there was an element of chance in crossword puzzles, that the correspondence carried on between the plaintiff and the public was not "mail matter" within the Post Office Act and the regulations, and the plaintiff was advised by letter to discontinue the use of the mails with respect thereto. Some correspondence between the parties ensued, but the plaintiff continued to use the mails in his operations, which resulted in a prohibitory order being issued refusing the plaintiff the use of the mails and the mail sent to the plaintiff was returned to the senders marked "Mail for this address prohibited."

Mayers, K.C., and *E. I. Bird*, for plaintiff.
O'Brian, K.C., for defendants.

4th March, 1932.

MORRISON, C.J.S.C.: Making due allowance for the paucity of the English language and not ignoring gossamery refinements of construction, I find the provisions of the Post Office Act and the particular regulation applicable to the point in issue herein rather easy to understand. I have not a copy of the Act in French at hand. That which the plaintiff complains of as having suffered at the hands of the Postmaster General was done in the course of his duties as such. They were done as the cases put it *qua* Postmaster General—a high Minister of State. He is empowered and indeed bound in behalf of the public to exercise his sound discretion in the matter. That, in my opinion, he has done. Were it not for the closely reasoned submission of Mr. *Mayers* and the time taken to peruse the numerous authorities cited by himself and Mr. *O'Brian*, I would have sooner handed down by decision. It would not serve any useful purpose if I elaborated my bare opinion just stated which is supported by an unbroken line of authority.

MORRISON, C.J.S.C.

The action stands dismissed.

From this decision the plaintiff appealed. The appeal was argued at Vancouver on the 1st and 4th of April, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

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Argument

Mayers, K.C. (*E. I. Bird,* with him), for appellant: This appeal requires consideration of the Post Office Act and the regulations, and there are two questions, first whether the Postmaster General had the right to prohibit our use of the post office and second, whether a subject can sue two Crown officers in an action for tort. The plaintiff conducts cross-word puzzle competitions and the postmaster took the view that they are games of chance or illegal lotteries. We submit that regulation 219 is in excess of the statute: see *McGee* v. *Pooley* (1931), 44 B.C. 338 at p. 349; *Minister of Health* v. *Regem* (1931), 100 L.J., K.B. 306 at p. 310. Crown servants cannot shelter themselves under the plea that it is an act of State: see *Musgrave* v. *Pulido* (1879), 49 L.J., P.C. 20; *The Devonian* (1901), 70 L.J., P. 66 at p. 71; *Johnstone* v. *Pedlar* (1921), 90 L.J., P.C. 181 at p. 185; *Baker* v. *Ranney* (1866), 12 Gr. 228 at p. 234. As to the Attorney-General being a party see *China Mutual Steam Navigation Co.* v. *Maclay* (1917), 87 L.J., K.B. 95 at p. 101; *Mackenzie-Kennedy* v. *Air Council* (1927), 96 L.J., K.B. 1145 at p. 1153; *Rattenbury* v. *Land Settlement Board* (1929), S.C.R. 52 at pp. 63-4. Respondents say we have suffered no wrong because we had no right: see *Rogers* v. *Rajendro Dutt* (1860), 13 Moore, P.C. 209 at p. 241.

O'Brian, K.C., for respondents: Regulation 219 is authorized by section 7 (*d*) of the Post Office Act and has the same force as a statute: see *Institute of Patent Agents* v. *Lockwood* (1894), A.C. 347 at p. 354. An action will not lie for a tort by an officer of the Crown: see Robertson's Civil Procedure by and against the Crown, pp. 638 and 640; *Gilleghan* v. *Minister of Health* (1932), 1 Ch. 86 at p. 92; *Raleigh* v. *Goschen* (1898), 1 Ch. 73 at p. 80; *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord, ib.* 190 at pp. 192 and 194; *Wheeler* v. *Commissioners of Public Works* (1903), 2 I.R. 202 at p. 214; *Bainbridge* v. *The Postmaster-General* (1906), 1 K.B. 178 at pp. 190-1; *Gidley* v. *Lord Palmerston* (1822), 3 Br. & B. 275 at p. 291; *Sullivan* v. *Earl Spencer* (1872), 6 Ir. R. C.L. 173; *Luby* v. *Wodehouse* (1865), 17 Ir. C.L.R. 618; *The Queen* v. *Secretary of State for War* (1891), 2 Q.B. 326 at p. 338; *Dyson* v. *Attorney-General* (1911), 1 K.B. 410. The Crown cannot be impleaded without its con-

sent: see *Hosier Brothers* v. *Derby* (*Earl*) (1918), 2 K.B. 671 at p. 673; *Roper* v. *Public Works Commissioners* (1915), 1 K.B. 45 at p. 50; *In re Fenton* (1931), 1 Ch. 85 at p. 92; *Vanderpant* v. *Mayfair Hotel Co.* (1930), 1 Ch. 138 at p. 158; *Wigg* v. *Attorney-General for the Irish Free State* (1927), A.C. 674; *Markwald* v. *Attorney-General* (1920), 1 Ch. 348; *Smith* v. *Attorney-General for Ontario* (1922), 52 O.L.R. 469 at pp. 473-4; (1924), S.C.R. 331 at p. 338; *Mackenzie-Kennedy* v. *Air Council* (1927), 2 K.B. 517.

Mayers, in reply, referred to Halsbury's Laws of England, Vol. 23, p. 327, sec. 673.

Cur. adv. vult.

7th June, 1932.

MACDONALD, C.J.B.C.: This is an action against the Postmaster General and the District Superintendent of Postal Service for a tort alleged to have been committed against the plaintiff. The plaintiff is an incorporated company doing business in British Columbia at the City of Vancouver and was at the time of the commission of the alleged tort using the Canadian Post Office for the purposes of advertising a competition or contest known as a "cross-word puzzle" and the communications to their clients were circular letters setting out the terms of the contest, the amount to be paid for the privilege of competing, and the prizes that might be won.

MACDONALD, C.J.B.C.

The plaintiff denies the defendant Sauve's authority as Postmaster General to so prohibit the use of the mail, and it therefore becomes necessary to inquire what his powers are under the Post Office Act. The only section to which we were referred, and I presume the only one relevant to this appeal, is section 7 of the Post Office Act, R.S.C. 1927, Cap. 161, from which I shall make excerpts dealing with the question of the Postmaster General's powers.

7. The Postmaster General may, subject to the provisions of this Act,

(*a*) establish and close post offices and post routes;

(*d*) make regulations declaring what shall and what shall not be deemed to be mailable matter for the purposes of this Act, and for restricting within reasonable limits the sending of [certain substances and communications] . . .; and for marking on the covering of letters, . . . offering prizes, or concerning schemes devised or intended to deceive or defraud the public, for the purpose of obtaining money under false pretences. . . .

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a warning that they are suspected to be of a fraudulent character and for returning [them] to the senders.

(*x*) make such regulations as he deems necessary for the due and effective working of the post office and postal business and arrangements, and for carrying this Act fully into effect.

Subsection 2 of section 7 provides that:

Every such regulation shall have force and effect as if it formed part of the provisions of this Act.

We have, also, a regulation, 219, which is part of the Act: *Per* Lord Russell in *Chartered Institute of Patent Agents* v. *Lockwood* (1894), 63 L.J., P.C. 74 at p. 85.

Now the Postmaster General has power to make regulations declaring what shall and what shall not be deemed to be "mailable matter" for the purpose of the Act and by said regulation No. 219, it is declared that:

If it be established to the satisfaction of the Postmaster General that any persons are using, or endeavouring to use the post office for any fraudulent or illegal purpose, then in any such case it is hereby declared that no letter, packet, parcel, newspaper, book, or other thing sent or sought to be sent through the post office, by or on behalf of or to or on behalf of such person shall be deemed "mailable matter."

MACDONALD, C.J.B.C.

The Postmaster General and the plaintiff carried on an extensive correspondence relating to the offence of which the defendant was accused, and the position was fully ventilated and discussed, and the plaintiff was warned that unless it discontinued its alleged wrongful acts the privileges of the post office would be withdrawn from it. The plaintiff, however, stuck to its guns which resulted in a prohibitory order refusing the use of the mails, see statement of claim, paragraph 12, where it is alleged that mail sent to the plaintiff was returned to the senders marked "mail for this address prohibited." Now it will be noticed that clause (*d*) declares what shall not be "mailable matter," and that the Postmaster General is authorized to declare that, and that regulation 219 (to be deemed part of the Act) gives the Postmaster General discretion, if the offence be established, to his satisfaction to declare what shall not be "mailable matter." Acting on that discretion the Postmaster General declared, the matter in question in this action, not mailable matter. If, therefore, the Postmaster General had authority to prohibit the use of the mails to the plaintiff that was a matter in his entire discretion and is not open to review by a Court. If, however, it were open to review, I think I

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should have to come to the conclusion that his descretion was properly exercised, since the said "contest" as shewn by the evidence is open to a great many apparent solutions, and therefore a game partly of chance. This is stated by the plaintiff's principal witness Pirie who said that contest No.7 was capable of some 7,680 apparently correct solutions. He says: "Yes, always, bearing in mind the words 'appeared to be' yes" and that contest No. 13 appeared to be open to 49,152 apparently correct solutions. This is said to be verified in Exhibit 16—the last item in the exhibit. But I have already said I do not think it necessary to consider whether the Postmaster General was right or wrong in coming to the conclusion that the matter in question was not "mailable matter." Clause (*d*) of section 7 is a long clause dealing with many different kinds of matters, which might be sent through the mails, but I think the excerpts which I have selected above may be regarded as a fair synopsis of that clause, and I think that a fair inference may be drawn from that clause and regulation No. 219 that the Postmaster General was authorized in his discretion to exclude from the mail whatever he thought was not mailable matter.

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Having come to this conclusion it becomes unnecessary to decide several other submissions made at our Bar because if the Postmaster General was right then no tort has been committed and the question of whether the plaintiff could sue the defendants individually or not for tort is immaterial. That subject is dealt with and authorities cited in Robertson's Civil Proceedings by and against the Crown, at pp. 639 and 350 *et seq.*

In my opinion unless the Postmaster General was authorized by said section 7, he would be liable personally for the tort, if it were one, which without such authority I think it would be.

Another question was as to whether in any case the Postmaster General owed a duty to the plaintiff or persons in their position. It was argued at considerable length that he owed no such duty and therefore could not be sued for tort for breach of duty. I am inclined to think that this submission is not well founded. The Post Office Act was enacted by the Dominion Parliament for the benefit of the public. It is true that it was not bound to pass a post office Act, but having done so those who use the post office, I think, have the right to expect that it will

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be conducted in a way which will not unreasonably interfere with the rights of those who use it. The principle I think is the same as that which governs companies such as railway companies who while not bound to furnish all conveniences for their passengers yet if they do furnish one they are bound to use it in such a way as not to injure their passengers. The post office is in reality a public utility erected for the convenience of the public at their expense, thereby giving those who use it the right to demand immunity from torts such as the one which was alleged to have been committed here.

I would dismiss the appeal.

MARTIN, J.A.: Having regard to the history of the establishment of the General Post Office, particularly by Cap. 35 of 12 Car. II. (1660) "sometimes called the Post Office Charter" (*cf*. Encyclopædia of the Laws of England, Vol. 10, p. 251; and 173 L.T. Jo. 306, April 23rd, 1932) and the general recitals and provisions as set forth in its preamble and sections 1, 20, 10-11, 15 and 16, and the extension thereof by 9 Anne, c. 10 (1710)

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> throughout . . . [the] Colonies and Plantations in North America, and the West Indies, and all other her Majesty's Dominions and Territories, in such manner as may be most beneficial to the People of these Kingdoms, . . .

and to our National Post Office Act, R.S.C. 1927, Cap. 161, it is now long too late to deny the right of all members of the public in Canada to make use of the public postal service in accordance with said Post Office Act. Nor is there sound support for the submission that in the discharge of their statutory duties the Postmaster General and other lesser executive officers acting under him can escape the usual personal consequences for acts done in excess of the powers conferred by Parliament, and if those powers are exceeded they will be in no better position than were former representatives of the Crown in what is now Canada and must likewise protect themselves by an Act of indemnity, if they can fortunately secure one, as was done, *e.g.*, in 1838 in the case of Lord Durham, the Governor of Lower Canada, by the Indemnity Act of that year, 1 Vict., Cap. 9, respecting his illegal action in sending Canadian prisoners from the Papineau rebellion to the Bermudas (Houston's Constitutional Documents of Canada, 1891, pp. 140, 148), and in the

case of James Douglas, the Governor of Vancouver Island, for illegal acts done outside his jurisdiction on the Mainland, by the Indemnity Proclamation of 19th November, 1858; a recent illustration of the same kind in England is the Restoration of Order in Ireland (Indemnity Act, 1923, Cap. 12), arising out of illegal deportations to Ireland.

This subject has been lately considered by this Court in *McGee* v. *Pooley* (1931), 44 B.C. 338, and I shall only add *the cases of *China Navigation Co.* v. *Attorney-General* (1932), 2 K.B. 197 at 211, *per* Scrutton, L.J., and *Boyd & Company* v. *Smith* (1894), 4 Ex. C.R. 116, wherein that very sound judge, Mr. Justice Burbidge, well summarizes the law on the point at p. 127, thus:

For acting without authority of law, or in excess of the authority conferred upon him, or in breach of the duty imposed upon him, by law, a public officer is personally responsible to any person who sustains damage thereby. The officer may also, it seems, be liable though there be no excess of authority or breach of duty if in the exercise of his powers he is guilty of harsh and oppressive conduct.

MARTIN, J.A.

Turning then to the section of the said Post Office Act immediately in question, 7, and to regulation 219, I can only reach the conclusion, after a very careful consideration of them, that apart from all other specified powers there is bestowed upon the Postmaster General under (*d*) the primary and general one to make regulations declaring what shall and what shall not be deemed to be mailable matter for the purposes of this Act.

This express power of further defining (by regulations having the same force as if part of the Act Sec. 7 (2)) the inclusions of "mailable matter" under section 2 (*h*) is, in my opinion, independent of those further powers which follow it in the same subsection, beginning with fixing the weights and dimensions of letters and packets, and prohibition of explosives, etc., and ending with the marking of a warning "on the covering of letters, circulars or other mailable matter suspected to concern illegal lotteries, etc. . . . or concerning schemes devised or intended to deceive or defraud the public . . . ."

This last power of warning is not a limitation upon the right to define the mailable matter which alone can be "sent by post" (section 2 (*h*)) but confers the additional right of marking a

* NOTE. *Cf.* also the decision on 21st June, 1932, of the Privy Council in *James* v. *Cowan*, 48 T.L.R. 564.—A.M.

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warning upon "matter" even though it is "mailable" ordinarily and also, if deemed advisable, for returning such matter to the senders instead of impounding or destroying it, as could be done in the case of certain prohibited matter at least.

By regulation 219 it is provided that

If it be established to the satisfaction of the Postmaster General that any persons are using, or endeavouring to use the Post Office for any fraudulent or illegal purpose, then, in any such case, it is hereby declared that no letter, packet, parcel, newspaper, book, or other thing sent or sought to be sent through the Post Office by or on behalf of or to or on behalf of such person shall be deemed mailable matter.

MARTIN, J.A.

In the present case the Postmaster General after an extended inquiry and correspondence with the appellants satisfied himself that the post office was being used for a "fraudulent or illegal purpose" in the "$500 Prize Puzzle Contest" and "$700 Cross-word Competition" that they were carrying on through the mail, and prohibited that illegal use, and therefore this Court has no jurisdiction to interfere with an adjudication so made within the ambit of the statute.

This view of the case disposes of it in the main and therefore it becomes unnecessary to consider its other aspects, and so the appeal should be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal is one from the judgment of the learned Chief Justice of the Supreme Court who dismissed the action. The action was brought against the defendants in their individual capacity not against the Postmaster General (The Honourable Arthur Sauve) and the District Superintendent of Postal Service (J. F. Murray). The relief asked was general and special damages for wrongful interference with the business of the appellant—an injunction preventing the interference with mail matter either addressed to or sent by the appellant and a declaration that the use of the mail by the appellant is lawful. The appellant was carrying on what is popularly known as cross-word puzzles and in connection therewith a great amount of claimed legal mail matter was passing to and fro in mails and the Postmaster General in due course and in the exercise of claimed statutory authority refused the privileges of the post office to the appellant in that the tendered mail matter was not in law mailable matter and was in contra-

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vention of the Post Office Act (R.S.C. 1927, Cap. 161 and regulation 219 made in pursuance of section 7 (*d*),(*e*), (*x*), (2) of the Post Office Act. Regulation 219 is in the following terms:

219. If it be established to the satisfaction of the Postmaster General that any person is engaged or represents himself as engaged in the business of publishing any obscene or immoral books, pamphlets, pictures, prints, engravings, lithographs, photographs or other publications, matter or thing of an indecent, immoral, seditious, disloyal, scurrilous or libellous character, or in the business of an illegal lottery, so called gift concerts, or other similar enterprise offering prizes or concerning schemes devised or intended to deceive or defraud the public for the purpose of obtaining money under false pretences, or in the business of selling or in any wise disposing of counterfeit money or what is commonly called "Green Goods," or of drugs, medicines, instruments, books, papers, pamphlets, receipts, prescriptions, or other things with the object or with the pretended object of preventing conception or procuring abortion, and if such person shall, in the opinion of the Postmaster General, endeavour to use the post office for the promotion of such business, or if it be established to the satisfaction of the Postmaster General that any persons are using, or endeavouring to use the post office for any fraudulent or illegal purpose, then, in any such case, it is hereby declared that no letter, packet, parcel, newspaper, book, or other thing sent or sought to be sent through the post office by or on behalf of or to or on behalf of such person shall be deemed mailable matter.

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Section 7 and subsections (*d*), (*e*), (*x*), (2) read as follows:

7. The Postmaster General may, subject to the provisions of this Act,

(*d*) make regulations declaring what shall and what shall not be deemed to be mailable matter for the purposes of this Act, and for restricting within reasonable limits the weight and dimensions of letters and packets and other articles sent by post, and for prohibiting and preventing the sending of explosive, dangerous, contraband or improper articles, obscene or immoral publications, prints or photographs, or obscene or immoral post-cards, or letters or post-cards having printed, stamped, or written on the outside thereof any words or devices which, in the opinion of the Postmaster General, tend to injuriously affect the commercial or social standing of the persons to whom they are addressed; and for marking on the covering of letters, circulars or other mailable matter suspected to concern illegal lotteries, so-called gift concerts, or other illegal enterprises of like character, offering prizes, or concerning schemes devised or intended to deceive or defraud the public, for the purpose of obtaining money under false pretences, whether such letters, circulars or other mailable matter are addressed to or received by mail from places within or without Canada, a warning that they are suspected to be of a fraudulent character and for returning such letters, circulars or other mailable matter to the senders;

(*e*) establish the rates of postage on all mailable matter, not being letters, newspapers or other things hereinafter specially provided for, and prescribe the terms and conditions on which all mailable matter other than

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letters shall, in each case or class of cases, be permitted to pass by post, and authorize the opening thereof, for the purpose of ascertaining whether such conditions have been complied with;

(x) make such regulations as he deems necessary for the due and effective working of the post office and postal business and arrangements, and for carrying this Act fully into effect.

2. Every such regulation shall have force and effect as if it formed part of the provisions of this Act.

Now it would appear that the Postmaster General acting within his powers given to him by statute and regulation 219, which has the force of statute law—see section 7 (2) as above set forth—determined that the mail matter the appellant is insisting upon sending and receiving through His Majesty's mails is not mailable matter for the purposes of the Post Office Act and in contravention of regulation 219; that is to say, the Postmaster General held that it had been established to his satisfaction and within the purview of the Post Office Act and regulation 219, that the appellant was endeavouring to use the post office and send and receive letters, etc., which to his—the Postmaster General's—satisfaction was not mailable matter and which in fact was declared by him not to be mailable matter. It is clear that the Postmaster General by virtue of the Post Office Act and regulation 219 which has the same force and effect as the other portions of the Act has an absolute discretion and sovereign right to determine what is and what is not mailable matter. This being so how idle it is for the appellant to bring an action against the respondents when all that has been done is in plain pursuance of the authority conferred upon the Postmaster General by statute and regulation having the force of statute law, in fact, that which the Legislature has authorized the Postmaster General to do (*Hawley* v. *Steele* (1877), 46 L.J., Ch. 782, Jessel M.R., at p. 784).

The Legislature having clothed the Postmaster General with these extreme powers—but I have no doubt proper powers considering the question of peace order and good government—it is not within the province of a Court of Justice to say what is the reasonable use of the conferred powers granted by statute. That is to say the discretion given by statute to the Postmaster General is an unfettered discretion to determine what shall and what shall not be deemed to be mailable matter. How is it possible for the Court to say that the Postmaster General has

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exercised a wrong discretion here? The language of the Legislature is " . . . if it be established to the satisfaction of the Postmaster General . . . no letter . . . or other thing sent or sought to be sent through the post office . . . shall be deemed mailable matter." (Regulation 219). That the Postmaster General having pursued the statutory authority vested in him and having arrived at the conclusion that the appellant was using or endeavouring to use the post office for a fraudulent or illegal purpose—declared against the attempted user—something he was authorized to do and having exercised the power it is not for the Court to say that he has come to a wrong conclusion—he has acted and made his declaration all within the conferred powers granted to him by the Legislature. I cannot see that there is any right in the Court to invade the authority of the Postmaster General so clearly and pronouncedly granted by the statute law. Now the respondents are being sued in their individual capacity as and for an actionable wrong which is permissible as I view it. *Raleigh* v. *Goschen* (1897), 67 L.J., Ch. 59 was a case where Romer, J. so held even although such acts being actionable wrongs were done by the authority of the Government. But the present case presents no features of that character. No actionable wrong could be said to have been threatened here or took place—the respondents in all that they did were acting in accordance with the provisions of the Post Office Act and regulation 219, which must be read as the statute reads "as if it formed part of the provisions of this Act" (R.S.C. 1927, Cap. 161, Sec. 7 (2)).

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In *Bainbridge* v. *Postmaster General* (1905), 75 L.J., K.B. 366, Collins, M.R., at p. 372, said, speaking of individual liability, "so is the Postmaster for any fault of his own." But again neither of the respondents has been shewn to have been guilty of any actionable wrong in the present case—all that has been done is clearly referable to statutory authority and steps taken in pursuance thereof and not otherwise. It is interesting to note the language of Jessel, M.R., in *Hawley* v. *Steele, supra,* as reported in 6 Ch. D. 521, at p. 530, and apply the language on the principle that it enunciated to the actions of the respondents in the present case, notably under regulation 219:

It appears to me, therefore, that here you have a legislative recognition

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of the rightfulness of the discretion exercised by the War Department, in preferring this land for the purpose; and without intending, as I said before, finally to decide the question, it seems to me it would be a very strange exercise of authority for me to hold that such a user of the land so authorized by the Legislature is a common nuisance which ought to be restrained by injunction.

In the present case by virtue of the Post Office Act the Postmaster General has an absolute power authorized in no uncertain language to make regulations declaring "what shall and what shall not be deemed mailable matter" (R.S.C. 1927, Cap. 161, Sec. 7 (*d*)) and regulation 219 which forms part of the provisions of the Post Office Act specifically covers and supports all the actions of the respondents complained of at this Bar and in the Court below.

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I do not propose to deal any further with the question as to whether the present action is properly constituted and as to whether the respondents were capable of being sued in their individual capacities save to refer to the judgment of Newcombe, J. in *Rattenbury* v. *Land Settlement Board* (1929), S.C.R. 52 at pp. 56-64. At p. 56 "The judgment of Mignault, Newcombe and Rinfret, JJ. was delivered by Newcombe, J.," and at p. 64 we have this language:

It is not necessary for me to consider the position of the individual members of the Board, because I hold that, as such, they are not before the Court; but, upon the authorities, it seems to be established that the doer of a wrongful act cannot escape liability by setting up the authority of the Crown, unless in proceedings by a foreigner against a British subject, in which case an exception is introduced, as appears by *Feather* v. *The Queen* (1865), 6 B. & S. 257, at pp. 279, 295, 296, in which Baron Parke's charge in *Buron* v. *Denman* (1848), 2 Ex. 167, was explained. It seems to be only in such a case that it is of any use to justify upon the authority of an act of State:

Walker v. *Baird* (1892), A.C. 491.

In the present case the respondents are entitled to justify under the Post Office Act and regulation 219 and there is in my opinion clear and unmistakable authority written into the statute law for all the acts alleged against the respondents being acts supported by statute law and there is no action known to the law which can be postulated or founded upon conduct in conformity with and authorized by statute and that is the present case.

The learned Chief Justice, in my opinion, in the Court below

arrived at a proper conclusion in dismissing the action. Therefore, it follows that my opinion is that this appeal should be dismissed.

MACDONALD, J.A.: Appellant company promoted cross-word puzzle contests and offered the public for a consideration prizes for correct solutions. It sent through the post office mail matter advertising the competition with the rules governing the contest. Solutions, correct or otherwise, were returned to appellant through the same agency. The respondents are respectively His Majesty's Postmaster General for Canada and the District Superintendent of Postal Service in British Columbia. Respondent Murray, acting on instructions from the Postmaster General, wrote appellant on December 15th, 1931, as follows:

> The Postmaster General has decided that as there is distinctly an element of chance in obtaining the correct answers selected by the promoters of the puzzles the contest may be considered as tending to deceive or defraud the public and that in the circumstances the use of the mails cannot be sanctioned.
>
> I am, therefore, requested by the Secretary of the Post Office Department at Ottawa to inform you to this effect and to call upon you to furnish an assurance that you will discontinue your activities in connection with these puzzle contests in so far as the mails are concerned and I am also instructed to say that in the event of your failure to comply the usual prohibitory order will be issued denying you mailing privileges in Canada.

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This ruling or order was later issued and implemented.

Appellant during the course of the correspondence between the parties, was prosecuted in the police Court at Vancouver for "unlawfully advertising an offer to the public to foretell the result of a contest." The charge was dismissed on the ground that the problem involved skill and by diligence a correct solution was possible. I refer to this only to say that it has not, as submitted, any bearing on the point in issue. Authority may be given by statute to prohibit the use of the mails in connection with a business held by the Courts to be legal. It is solely a question of statutory authority.

Appellant brought this action for damages for wrongful interference with the operation of its business, for an injunction, and a declaration that its use of postal facilities was lawful. It was conceded that the acts of the respondents amounted to a prohibition of the use of the mails.

Respondents' counsel submitted that appellant had no right

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of action based on tort on the ground that while the post office affords public facilities appellant was not affected in the exercise of a legal right; in other words that the use of the post office is a concession or privilege and may be withdrawn. *Rogers* v. *Rajendro Dutt* (1860), 13 Moore, P.C. 209 particularly at p. 241 does not support this view. It merely decides that a lawful exercise of a right is not actionable although detrimental to the party complaining. If the right to use a commercial agency maintained by the public for many years is denied to a citizen a legal right is invaded. Further a mere threat to interfere with this right is actionable. As stated by Lord Davey in *Nireaha Tamaki* v. *Baker* (1901), 70 L.J., P.C. 66 at p. 72:

> Their Lordships hold that an aggrieved person may sue an officer of the Crown to restrain a threatened act purporting to be done in supposed pursuance of an Act of Parliament, but really outside the statutory authority.

He refers, at p. 71, to a fallacy submitted on behalf of the respondents in this appeal, *viz.*, "to treat the respondent as if he were the Crown or acting under the authority of the Crown." Respondents act under the authority of a statute.

Counsel also urged that respondents are agents of the Crown and responsible only to His Majesty and to Parliament; that the Attorney-General of Canada should be a party defendant; that the matter complained of was the performance of an Act of State and the remedy, if any, by petition of right. The case last referred to disposes of these contentions.

The point turns solely on the construction of the Post Office Act and the regulations. Unless the act complained of, *viz.*, prohibition of the use of the mails can be justified by the statute (R.S.C. 1927, Cap. 161) respondents are liable in damages as two individuals who stepped outside the ambit of their official duties to commit a tort, one for ordering the commission of the act, the other for implementing it. The interests of the Crown are not affected; nor the public revenues placed in jeopardy and it is not necessary that the Attorney-General should be a party. We are not concerned with a high officer of State from or through whom appellant seeks to recover moneys under public control. It follows that the procedure is not by Petition of Right.

Nor is it a defence to say that whether acting within or

beyond the scope of the Act, if the Postmaster General, in fact purported to act as such, he is not subject to an action in the Courts. In *Musgrave* v. *Pulido* (1879), 49 L.J., P.C. 20, it was held that the authority of the Governor of a Colony was derived only from his commission and limited to the powers expressly or impliedly entrusted to him. At p. 24, Sir Montague E. Smith said:

> Let it be granted that for acts of power done by a Governor under and within the limits of his commission, he is protected, because in doing them he is the servant of the Crown, and is exercising its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of State.

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If we had no statute limiting authority and the act complained of was a political act of State performed pursuant to sovereign authority other considerations would arise. Where, however, authority is defined by statute or by a commission we must look in that quarter for justification for the act attempted or performed. Even if acting for the Crown the agent would be responsible for tortuous acts. He might be indemnified but the right to compensation by the party injured is beyond question (*Rogers* v. *Rajendro Dutt* (1860), 13 Moore, P.C. 209 at 236. The sanction of the State will not protect the agent for the commission of a tort.

> The doer of a wrongful act cannot escape liability by setting up the authority of the Crown:

Newcombe, J. in *Rattenbury* v. *Land Settlement Board* (1929), S.C.R. 52 at 64).

To hold otherwise would be to seriously interfere with the rights and liberty of the subject.

On the point that an action will lie against an officer of the State for a declaration that an act done by him cannot be supported by any Act of Parliament or State authority, I also refer to *China Mutual Steam Navigation Co.* v. *Maclay* (1917), 87 L.J., K.B. 95. All difficulties disappear when it is borne in mind that this action is against individuals in their private capacity for the commission of unauthorized acts, *viz.*, presuming to act under a statute but really, as alleged, outside the authority conferred. The principle that an action for a tort will not lie against the Crown or against any body representing the

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Crown, not in its private but in its official capacity, is not relevant. (*Mackenzie-Kennedy* v. *Air Council* (1927), 96 L.J., K.B. 1145). True a minister or a departmental head as the servant of the Crown cannot be sued in his official capacity and thus subject the public funds to a levy. (*Palmer* v. *Hutchinson* (1881), 6 App. Cas. 619). That is not this case. "The King can do no wrong" and therefore cannot authorize a wrongful act. It follows that the King's authority cannot be invoked as a defence to an action brought in respect to an illegal act committed by an officer of the Crown (Robertson's Civil Proceedings by and against the Crown, 638). It is, therefore, no answer to say that the Postmaster General in any event presumed to act officially or that want of authority—if it existed—was due to mistake.

The same result would follow even if respondents acted in obedience to the order of the Executive or of any officer of State, assuming of course, that the act complained of was not authorized by statute. (*Raleigh* v. *Goschen* (1898), 1 Ch. 73 at p. 77).

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We were referred to *Luby* v. *Wodehouse* (1865), 17 Ir. C.L.R. 618, to support the proposition that the act was done *qua* Postmaster General and that with or without legislative sanction it is not actionable. The ground of the decision is shewn however by a true appreciation of the following extract at pp. 639-40:

Well, the point decided by the Court in this case was this—that, if an action be brought against the Lord Lieutenant of the day, for an act done by him in his capacity of Lord Lieutenant (and there was no pretence for saying that the acts were done here in his individual capacity as contradistinguished from his capacity of Lord Lieutenant), such an action is not maintainable.

Also:

We entertain no doubt whatever that it would be contrary to the principles of all law, and contrary to reason, to hold that, while the Governor of a country is discharging the high duty that he is entrusted with by the Crown, even though there may be a private wrong, that can be redressed by an action such as this.

And again as to the facts it was disclosed,—

upon the plaintiff's own shewing, and his own affidavits, that this act complained of is an act coming within that rule.

This was followed in *Sullivan* v. *Earl Spencer* (1872), 6 Ir. R.C.L. 173, where it is clear from the judgment of Whiteside,

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C.J., at p. 177, that the Viceroy was exercising "the supreme authority vested in him by the Crown." True the act may be wrongful for as Fitzgerald, J. points out at p. 179 the legality of the acts may be open to question and it is because of this aspect that these cases were cited for our consideration but the illegality referred to is of the same character as an act or order made by a judge in his judicial capacity not in accordance with law. In such a case no action "for acts done in that capacity lies against a judge" (p. 177). If, however, a judge steps outside his judicial functions and commits an illegal act he is answerable in law and it is no defence to say that when the tort was committed he was in fact a judge nor yet that he erroneously thought he was acting in that capacity. In the case referred to the act complained of, *viz.,* preventing a public meeting likely to cause mischief, was an act conducive to the peace and safety of the public and therefore within the Viceroy's authority.

As stated the case turns solely on the construction of the statute and regulations, and I only referred briefly to the points outlined because we were urged to give effect to them. It is important too that private rights should be protected against assumed authority.

MACDONALD, J.A.

I find, however, that respondents are protected by the statute. The material section, *viz.,* 7 (*d*) and (*e*) reads as follows: [Already set out in the judgment of McPhillips, J.A.].

"Mailable matter" as referred to is thus defined by section 2 (*h*) of the Act:

"mailable matter" includes any letter, packet, parcel, newspaper, book or other thing which, by this Act, or by any regulation made in pursuance of it, may be sent by post.

The latter part of the material regulation, number 219 (the first part is also pertinent) passed pursuant to the Act (and it is not *ultra vires*) reads thus:

If it be established to the satisfaction of the Postmaster General that any persons are using, or endeavouring to use the post office for any fraudulent or illegal purpose, then in any such case it is hereby declared that no letter, packet, parcel, newspaper, book, or other thing sent or sought to be sent through the post office, by or on behalf of or to or on behalf of such person shall be deemed mailable matter.

Section 7 (*d*) *ante* authorizes the Postmaster General (subject to the provisions of the Act) to make regulations under (it was submitted) four heads. In my view there are five headings

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in the subsection. Mr. *Mayers* treated the first five lines as one group and submitted that it referred only to the physical nature of matter that might be sent by post. I find two headings in these five lines: 1. Regulations as to "what shall and what shall not be deemed to be mailable matter" and 2. "for restricting . . . the weight and dimensions of letters and packets . . . sent by post." The subsequent headings provide for: 3. Prohibiting and preventing the mailing of dangerous or contraband articles and prohibiting and preventing the sending of obscene publications. 4. Prohibiting and preventing the sending of letters having stamped or written on the outside words or devices that would in the opinion of the Postmaster General tend to injuriously affect the person addressed. 5. Make regulations for marking (*i.e.*, by the postal authorities) on the covering of letters circulars, etc., suspected "to concern illegal lotteries so-called gift concerts, or other illegal enterprises of like character offering prizes or concerning schemes devised or intended to deceive or defraud the public for the purpose of obtaining money under false pretences . . . a warning that they are suspected to be of a fraudulent character and for returning such letters circulars or other mailable matter to the senders."

The acts complained of were authorized under the first heading outlined. It was submitted that only under heading number 5 could the Postmaster General act in the case at Bar and that far from conferring a right to prohibit or prevent the use of the mails in the cases referred to authority only is given to stamp on the outside of the offending missives (no power even to open them) a "warning" and to return them to the senders. It was also urged that as the subject-matter involved in this action is specifically dealt with under this heading and only a limited power conferred we cannot resort to the first heading, *viz.*, to make regulations declaring "what shall and what shall not be deemed to be mailable matter," and find in these general words authority for the action taken. It must be conceded that if the clause last referred to stood alone the appellant must fail as only "mailable matter" may pass through the post, and under that heading the Postmaster General has arbitrary power by the Act and the regulation quoted—if established to his satisfaction to

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say that the letters in question are not mailable. The Courts might regard it in another light: that is not material. Parliament conferred discretion on the minister to form his own opinion on the question of fraud or illegality.

Does it follow that where we find an express power only "to stamp on the outside a warning and to return to the sender" admittedly covering the case at Bar—because appellant was "suspected of engaging in an illegal enterprise"—that the point is there fully dealt with excluding the possibility of finding implied powers elsewhere? I do not think so. First because the power given under heading (1) *ante* to make regulations as to what may be treated as "mailable matter" is in itself direct and explicit, inserted no doubt for a useful purpose. One can call to mind cases where in the interest of public health and safety, as my brother MARTIN pointed out during the argument, letters perfectly legitimate should be regarded as non-mailable for a time. The words, however, are not necessarily restricted to exceptional situations: they are of general import. "Mailable matter" by the interpretation section includes all letters. In this case the regulations provide, as quoted, that the letters in question are not "mailable matter" if it is established to the satisfaction of the Postmaster General (and he so decided) that the purpose in view was illegal. Secondly as to heading number (5) preventing resort to number (1) the principle invoked must be applied with care. In *Colquhoun* v. *Brooks* (1888), 57 L.J., Q.B. 70 at p. 73 Wills, J. said:

MACDONALD, J.A.

I may observe that the method of construction summarized in the maxim "*Expressio unius exclusio alterius*" is one that certainly requires to be watched. . . . The failure to make the "*expressio*" complete very often arises from accident, very often from the fact that it never struck the draughtsman that the thing supposed to be excluded needed specific mention of any kind.

Lopes, L.J., in the Court of Appeal, said in *Colquhoun* v. *Brooks* (1888), 57 L.J., Q.B. 439 at p. 446:

The maxim [referred to] has been pressed upon us. I agree with what is said in the Court below by Mr. Justice Wills about this maxim. It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The *exclusio* is often the result of inadvertence or accident, and the maxim ought not to be applied when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice.

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Of course if it is clear that the Legislature expressly authorized a special method for dealing with a condition any other mode is excluded unless authorized. But two courses of action may be provided for, as for example in the case at Bar, *viz.*, a prohibition or a warning, the latter a subordinate remedy.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Bird & Bird.*
Solicitor for respondents: *C. M. O'Brian.*

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REX v. FERRIER.

Criminal law — Theft with violence — Jury — Crown counsel's address— Indirect comment on accused's failure to testify—Misdirection—R.S.C. 1927, Cap. 59, Sec. 4, Subsec. (5).

Counsel for the Crown in a criminal prosecution, after dealing with the evidence for the prosecution, said: "I think there should be some explanation."

"THE COURT: Be careful, Mr. *MacNeill.*

"*MacNeill*: Should there not be some explanation on the part of the defence?

"THE COURT: Mr. *MacNeill*, be careful."

Counsel for the accused then asked that the jury be dismissed and that there be a new trial. This application was refused and the case proceeding to its termination, the accused was convicted.

Held, on appeal, affirming the decision of FISHER, J., that the remarks by Crown counsel in no way indicated what it was that needed explanation or who the person was who could give it, and cannot be distorted into "comment" within the meaning of subsection (5) of section 4 of the Canada Evidence Act.

Statement

APPEAL by accused from his conviction by FISHER, J. on the 23rd of March, 1932, for stealing by means of violence and when armed with an offensive weapon, a pencil from one Joseph Wright on the 19th of February, 1932. No evidence was called for the defence and the main ground of appeal was that counsel

for the Crown made improper comments to the jury which influenced them against the accused by referring to the failure of the accused to testify.

The appeal was argued at Vancouver on the 7th of April, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Cahan, Jr., for appellant: Wright was held up by two men and $1.75 in cash, a milk ticket and a small lead pencil were forcibly taken from him. Three days later the accused was arrested and the lead pencil was found on his person. He was not identified by Wright. There was no evidence submitted for the defence and Crown counsel made comments in his address contrary to the provisions of section 4, subsection (5) of the Canada Evidence Act, and there should be a new trial: see *Rex* v. *Morton* (1928), 51 Can. C.C. 96; *Bigaouette* v. *The King* (1927), S.C.R. 112; *Rex* v. *Gallagher* (1922), 37 Can. C.C. 83; *Caron* v. *Regem* (1930), 49 Que. K.B. 299; *Rex* v. *King* (1905), 9 Can. C.C. 426 at p. 437; *Rex* v. *Coppen* (1920), 33 Can. C.C. 264 at p. 269.

Christopher Morrison, for the Crown: The whole question is whether the words used by Crown counsel in his address so influenced the jury that there should be a new trial. What was said is not a breach of subsection (5) of section 4 of the Act. In the case of being in possession of stolen property the onus is on him to explain how he got it, and if he fails the presumption is that he is the thief: see Roscoe's Criminal Evidence, 15th Ed., 22. That there was no violation of the Act see *Rex* v. *Portigal* (1923), 2 W.W.R. 289; *Rex* v. *Aho* (1904), 11 B.C. 114; *Rex* v. *Skelly* (1928), 1 D.L.R. 619; *Rex* v. *Burdell* (1906), 11 O.L.R. 440; *Rex* v. *Kaplansky* (1922), 51 O.L.R. 587; *Rex* v. *Brayden* (1926), 4 D.L.R. 765 at p. 770.

Cur. adv. vult.

7th June, 1932.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: This is an appeal under section 4, subsection (5) of the Canada Evidence Act, complaining of a reference by the Crown counsel which was supposed to intimate that the prisoner had failed to give evidence on his own behalf.

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The only facts we have before us is a copy of the words used by him which are as follows:

Mr. *MacNeill,* Crown counsel, in his address to the jury, said:

> I think there should be some explanation.
>
> THE COURT: Be careful, Mr. *MacNeill.*
>
> *MacNeill*: Should there not be some explanation on the part of the defence?
>
> THE COURT: Mr. *MacNeill,* be careful."

MACDONALD, C.J.B.C.

That is all we have before us to guide us in our conclusion. What it was that needed explanation or who was the person or only person who could give it is in no way indicated. The cases in which a reference of this sort alleged to be obnoxious to the accused usually shew such circumstances as are an indication that the reference is to the accused and that the explanation should be given in the witness box by the accused. Here we have nothing of the kind.

The most authoritative case on the meaning of section 4, subsection (5) is *Bigaouette* v. *The King* (1927), S.C.R. 112, where Mr. Justice Duff states the rule that ought to govern. Also *Rex* v. *Aho* (1904), 11 B.C. 114, where the full Court of this Province declined to interfere in a much stronger case for the accused; also on the same subject *Rex* v. *Coppen* (1920), 33 Can. C.C. 264.

I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: By this appeal from the conviction of the appellant for stealing a pencil from the person of one Joseph Wright by means of violence, "then being armed with an offensive weapon, to wit, a pistol," two questions were raised in argument, but the first, a motion for leave to appeal on questions of fact, was unanimously refused, leaving only the second, *viz.,* that:

> Counsel for the Crown in his address to the jury improperly referred to the failure of the accused to testify.

Section 4 of the Canada Evidence Act, Cap. 59, R.S.C. 1927, relied on provides that:

> (5.) The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the judge, or by counsel for the prosecution.

In support of the prosecution two police officers were called

who testified to the arrest of the accused at about midnight two days after the robbery and finding upon his person, in his vest pocket, the pencil that had been stolen from Wright. The accused's counsel did not call any witness in defence, and the Crown counsel in his address to the jury said:

MacNeill: I think there should be some explanation—

THE COURT: Be careful, Mr. *MacNeill*.

MacNeill: Should not there be some explanation on the part of the defence—

THE COURT: Mr. *MacNeill*, be careful.

The official report proceeds:

Cahan: At this point I will enter an objection, and would ask that the jury be dismissed, and would ask for a new trial of the prisoner.

THE COURT: Mr. *MacNeill*, what have you to say? I refuse the application. You may go on.

MacNeill: Yes, my lord, I will.

[*MacNeill* concludes address to jury.]

In his charge to the jury the learned judge, referring to the finding of the pencil, said:

. . . .if it is proved to your satisfaction beyond reasonable doubt to which I will refer later—if the prosecution have proved recent possession of stolen goods, then in the absence of any explanation which may reasonably be true, the jury may find a prisoner guilty, but are not bound to do so.

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No objection was taken here or below to this instruction of the learned judge (though he used the same word, "explanation," the use of which by counsel is objected to) nor could it properly be taken having regard to high and unquestioned authority upon the point, particularly the unanimous decision of the five judges of the Court for Crown Cases Reserved in the leading case of *Reg.* v. *Langmead* (1864), Le. & Ca. 427, wherein Chief Baron Pollock said, 438:

If a man is found in possession of stolen goods shortly after they are stolen, he must give some account of them; and the rule is the same, whether the person in whose possession they are found is the thief or the receiver.

And Mr. Justice Blackburn said, p. 441:

When it has been shewn that property has been stolen, and has been found recently after its loss in the possession of the prisoner, he is called upon to account for having it, and, on his failing to do so, the jury may very well infer that his possession was dishonest, and that he was either the thief or the receiver according to the circumstances.

This last passage was accepted as the exposition of the law by Mr. Justice O'Connor in the High Court of Australia in *Trainer* v. *The King* (1906), 4 C.L.R. 126, at 139; and Chief

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Justice Griffith spoke to identical effect at p. 132 (after the case had been cited, p. 130) that:

It is a well-known rule that recent possession of stolen property is evidence, either that the person in possession of it stole the property, or received it knowing it to have been stolen, according to the circumstances of the case. *Prima facie*, the presumption is that he stole it himself, but if the circumstances are such as to shew it to be impossible that he stole it, it may be inferred that he received it, knowing that someone else had stolen it.

In the Irish Court for Crown Cases Reserved, in *Reg.* v. *McMahon* (1875), 13 Cox, C.C. 275, Chief Justice Whiteside said, p. 281, that "it is the duty of the judge who tries the case to point out the difference between the different offences" and it is beyond question that the learned trial judge in this case properly discharged the duty incumbent upon him when he told the jury that the circumstances of the case required the accused to give an "explanation" of them, which is a milder way of saying, in the said language of *Reg.* v. *Langmead,* that he was "called upon to account for having possession" of the stolen property. Now if that is so in the case of one who occupies the commanding and impartial position of the presiding Judge of Assize, much more is it so in the case of counsel to whose similar expressions the jury would properly attach less weight, and it would be putting an unwarrantable strain upon the said section of the Evidence Act to hold that a direction or observation "by judge or by counsel" essential to justice in the proper understanding of the case constituted a "comment" upon "the failure of the person charged . . . to testify."

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This view of the matter was, in principle, taken unanimously by four judges of the old Full Court of this Province, including Mr. Justice Duff now of the Supreme Court of Canada, and myself, nearly 28 years ago in the leading case of *Rex* v. *Aho* (1904), 11 B.C. 114 wherein the Chief Justice said, *per curiam,* at pp. 116-7:

. . . To hold that a direction to the jury that the accused has failed to account for a particular occurrence, when the onus has been cast upon him to do so, amounts to a comment on the failure to testify, would paralyze the action of the Court in the discharge of its most essential function, *viz.*: to charge the jury on all questions of law which have any relevant bearing on the case including the question as to when the onus shifts.

This decision has not only never been questioned in this Province but approved and followed more than once in cases

reported and otherwise, *e.g.*, by this Court in *Rex* v. *May* (1915), 21 B.C. 23, wherein (p. 24) the trial judge had commented on the fact that the accused had failed to account for a particular occurrence to which, by reason of the testimony adduced against him, the onus was cast upon him to answer.

All the five judges were of opinion that this did not constitute an infraction of the said section.

In *Rex* v. *Burdell* (1906), 11 O.L.R. 440 (a case of a tobacco pouch being found upon the prisoner) the five judges of the Court of Appeal of Ontario unanimously decided that the trial judge had given a proper direction to the jury when he told them, p. 441:

. . . if a man is found in possession of goods which were shewn to have been stolen, and is found in possession of them shortly after they were stolen, then he is expected to be able to tell how he came by them, and if he gives a satisfactory account of how he came by them, or satisfies the jury in any way by the evidence of other people how he came by them, then he goes free. But if he is unable to satisfy a jury, or to tell how he came by them, then it is not unreasonable to suppose that he came by them by having stolen them.

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In delivering the judgment of the Court of Appeal Mr. Justice Osler said, p. 448:

. . . after a careful consideration of the charge I am quite satisfied that the trial judge did not suggest or intend to suggest to the jury that the prisoner might have given evidence in his own behalf, or that an inference unfavourable to him might be drawn from the fact that he had not done so. The learned judge merely told the jury of the presumption which might, under all the circumstances of the case, be drawn from the fact of his not having given an account of how the stolen property came into his possession, an account and presumption entirely unconnected with his not giving evidence on his own behalf as a witness at the trial: *Kops* v. *The Queen* (1894), A.C. 650, 651.

This is in accord with the instruction to the jury given by Mr. Justice Duff in *Rex* v. *Theriault* (1904), 11 B.C. 117 at 120, *viz.*:

. . . I told the jury that if they were satisfied on the evidence that exhibits 1 and 2 had been stolen from the prosecutors' shop by somebody and if they were satisfied, from the place in which the goods were found, that the goods had been placed there by the prisoner and that his personal possession of them was the only reasonable explanation of their being found there, then the onus was on the accused to account for his possession of them; and, in the absence of some reasonable explanation of his possession they might find him guilty of theft.

This direction was unanimously upheld by the Full Court, sitting for Crown Cases Reserved, including Mr. Justice Duff

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and myself, and we said that "there was an onus cast upon him [the accused] to account for the possession," and that, p. 121: "it was not necessary for the Crown to negative such hypotheses as that the owner had not given them away, or that some child might have taken them," etc.

And in the leading case of *Rex* v. *Schama* (1914), 84 L.J., K.B. 396, the Court of Criminal Appeal in England, on that rare occasion composed of five judges, said, *per* Lord Reading, C.J. (p. 398):

> In a case, such as the present, where a charge is made against a person of receiving stolen goods well knowing the same to have been stolen, when the prosecution have proved that the person charged was in possession of the goods, and that they had been recently stolen, the jury should then be told that they may, not that they must, in the absence of any explanation which may reasonably be true, convict the prisoner. But if an explanation has been given by the accused, then it is for the jury to say whether upon the whole of the evidence they are satisfied that the prisoner is guilty. If the jury think that the explanation given may reasonably be true, although they are not convinced that it is true, the prisoner is entitled to be acquitted, inasmuch as the Crown would then have failed to discharge the burden imposed on it by our law of satisfying the jury beyond reasonable doubt of the guilt of the prisoner. The onus of proof is never changed in these cases: it always remains on the prosecution. That is the law.

The *Aho* case has often been cited and relied upon by the Courts of Canada, *e.g.*, in *Rex* v. *Skelly* (1927), 61 O.L.R. 497, 501 (C.A.); in *Rex* v. *King* (1905), 6 Terr. L.R. 139 (*en banc*); in *Rex* v. *Romano* (1915), 24 Can. C.C. 30, 33 (K.B. Que.); *Rex* v. *Kaplansky* (1922), 51 O.L.R. 587, 590, and in *Caron* v. *Regem* (1930), 49 Que. K.B. 299, 303; the only instance in which I can find any doubt ever having been expressed regarding it is by Mr. Justice Stewart in *Rex* v. *Gallagher* (1922), 17 Alta. L.R. 519; 1 W.W.R. 1183, wherein he said that "he was rather inclined to the opinion that the Court went too far," but his solitary views in that respect were not shared by the other members of the Bench and they were really *obiter* because the case before him turned precisely upon the point that though the possibility of explanation or denial of statements made by the accused to the police respecting his possession of firearms rested solely upon his testimony yet the judge instructed the jury, *"that is not denied by the defendant"* and, *"there is no suggestion from the defence or any other person* that he could have gone any other way" which instruc-

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tions are thus emphasized by italics in the leading judgment of Mr. Justice Beck. These marked references to the accused's personal capacity to testify were construed by the Court as "referring to the opportunity of the accused to give evidence at the trial," and therefore constituting "indirect and covert allusion to defendant's silence."

Upon this ground alone, in my opinion, and with all respect, can that judgment be supported, and it is decidedly not an authority for the further and general proposition that it is "comment" for the judge merely to tell the jury that a statement of fact is uncontradicted even when the defendant is the only person who can contradict it, and in that respect the unanimous decision of the Manitoba Court of Appeal in *Rex* v. *Portigal* (1923), 33 Man. L.R. 46, correctly states the law in the language of Chief Justice Perdue at p. 47, and of Mr. Justice Fullerton at p. 49, and of Mr. Justice Dennistoun at p. 53, wherein the *Gallagher* case is distinguished and confined to its proper limits and the error in the head-note corrected. The Chief Justice said, pp. 47-8:

> What is forbidden is comment by the judge, or the counsel for the prosecution, on the failure of the person charged to testify in his own behalf. The alleged comment complained of in the present case is that counsel for the Crown in his address to the jury twice referred to the fact that important evidence for the prosecution had not been contradicted. This, it appears to me, was merely a statement as to the evidence before the jury and was not a comment upon the failure of the accused to testify.

Fullerton, J.A., at p. 49, referring to counsel's submission that the Crown's witnesses could only be contradicted by the accused and therefore indirect comment had resulted, said:

> One answer to this contention is that the evidence in the case is not before us and we do not know that it can only be contradicted by the accused. Assuming, however, such to be the case, I would still be of the opinion, in the circumstances of the present case, that the contention is unsound.

And after considering and restricting the *Gallagher* case he proceeded, p. 50:

> One can easily understand that when a judge is dealing with a specific piece of evidence which obviously can only be contradicted by the accused he may very easily use language which will contravene the statute, but each case must depend on its own circumstances and no general rule can be laid down applicable to all cases.

Dennistoun, J.A., after citing with approval some of the valuable extended observations of Mr. Justice Riddell in *Rex*

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v. *Kaplansky, supra* (to which I refer without citation) at 589-90, adhering to his former ruling in *Rex* v. *Guerin* (1909), 18 O.L.R. 425, went on to say, pp. 53-4:

Similarly a general remark by Crown counsel to the jury that the case for the Crown has not been contradicted is surely permissible. To hold otherwise would, to my mind, unduly hamper the presentation of the case for the prosecution, and it is not in the interests of justice, nor was it the intention of the Legislature, that the Courts should strain the language used to afford an escape to an accused person who has otherwise been fairly tried and convicted.

These views are also supported by, *e.g., Rex* v. *Coppen* (1920), 33 Can. C.C. 264; *Rex* v. *Brayden* (1926), 4 D.L.R. 765, 770; and, particularly, *Rex* v. *Skelly* (1927), *supra.*

It is, with respect, unfortunate, in my opinion, that the Court in the *Gallagher* case founded its judgment upon the Texas case of *Dawson* v. *State* (1893), 24 S.W. 414, when that case (which was peculiar in the graphic and pointed way that the prosecuting attorney referred to the lack of denial) had been unanimously rejected as bad law by the Supreme Court of Iowa in *State* v. *Hasty* (1903), 96 N.W. 1115, at 1119, the head-note of which correctly gives the decision of that Court, *viz.*:

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12. A statement by attorney for the State that the testimony of an alleged eyewitness of the crime was uncontradicted was not a comment on failure of accused to testify in his own behalf, contrary to Code, § 5484, though defendant was the only person who was in a position to contradict such testimony.

Moreover, the ostensible citation of the "view expressed in" the *Dawson* case that the Alberta Court relied upon, 522, does not at all appear in that case, but is merely an editorial annotation to *Reg.* v. *Corby* (1898), 1 Can. C.C. 457, 466, adopted without verification.

If resort is to be had to American decisions upon our criminal law, a leading case on this aspect of it is the well-known one of *Commonwealth* v. *Webster* (1850), 59 Mass. 295 and 386, which is remarkable in that it was of a nature corresponding to our trial at Bar, and held before four judges of the Supreme Court of that State (the "full Court in the first instance," 394) wherein the accused, a professor of chemistry in the medical college in Boston, was charged with murder under extraordinary circumstances. The case is of unusual interest because it contains the unusually fine and instructive charge to the jury

delivered on behalf of the Court by that eminent jurist Chief Justice Shaw* and in the course of it the Court, p. 316, directed the jury in a well-known passage (cited, *e.g.*, by Wigmore on Evidence, Vol. 3, Can. Ed., sec. 2273):

> A few other general remarks occur to me upon this subject, which I will submit to your consideration. Where, for instance, probable proof is brought of a state of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered,—though not alone entitled to much weight; because the burden of proof lies on the accuser to make out the whole case by substantive evidence. But when pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and shew, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is, that the proof, if produced, instead of rebutting, would tend to sustain the charge. But this is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused, not accessible to the prosecution.

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It remains to consider the decision of the Supreme Court of Canada in *Bigaouette* v. *The King* (1927), S.C.R. 112, which was much relied upon by the appellant. In that case it was held that comment could fairly be implied from the emphasized language in the passage from the judge's charge cited in the judgment, the Court, *per* Mr. Justice Duff, said (p. 114):

> It seems to be reasonably clear that, according to the interpretation which would appear to the jury as the more natural and probable one, the comment implied in this passage upon the failure of *la defense* to explain who committed the murder would, having regard to the circumstances emphasized by the learned trial judge, be this, namely, that it related to the failure of the accused to testify upon that subject at the trial.

That language, doubtless appropriate to those particular facts, could not fairly be applied to these.

His Lordship then proceeded to a general principle:

> The law, in our opinion, is correctly stated in the judgment of Mr. Justice Stuart in *Rex* v. *Gallagher* [*supra*], in these words:
> . . . "It is not what the judge intended but what his words as uttered would convey to the minds of the jury which is the decisive matter. Even if the matter were evenly balanced, which I think it is not, and the lan-

* NOTE: His "very able and elaborate judgment" in *Farwell* v. *The Boston and Worcester Rail Road Corporation* (1842), 4 Metc. 49, on common employment, was adopted by the House of Lords in *Bartonshill Coal Company* v. *Reid* (1858), 3 Macq. H.L. 266, 297, and received the unusual distinction of being printed in that volume at p. 316: *cf.* also Beven on Negligence, 4th Ed., 819, and *Fanton* v. *Denville* (1932), 48 T.L.R. 433, *per* Scrutton, L.J., at p. 435.—A.M.

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guage used were merely just as capable of the one meaning as the other, the position would be that the jury would be as likely to take the words in the sense in which it was forbidden to use them as in the innocuous sense and in such circumstances I think the error would be fatal."

That equally unexceptional language is also not applicable to this case because it is not one of an "even balance" of meaning, but one wherein the jury could not in reason, having regard to its nature and circumstances "take the words in the sense in which it was forbidden to use them."

It should be noted that there is no indication of any doubt on the part of the Supreme Court of the correctness of the decision in the *Aho* case, wherein Mr. Justice Duff had taken part as already mentioned. In the case at Bar there were several obvious ways in which the accused, if innocent, could have "explained" or "accounted for" his recent possession of the stolen article by calling witnesses other than himself to prove, if possible, *e.g.*:

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(1) That he was not present at the time of the theft, which *alibi* would be his best defence, *Commonwealth* v. *Webster, supra,* p. 319, because it would establish that at worst he was a receiver and not the thief as charged; (2) that he had been in possession of the property before the theft; (3) that John Doe had found the property and given it to him; (4) that he had found it when in John Doe's company; (5) that it had been sold to him by Richard Roe, etc., etc.

Whatever, therefore, might be said in other cases the language used by counsel in this one cannot be distorted into "comment" within the meaning of the said Act.

There are many cases, in their ever varying circumstances, in which it was held, and properly so, it may respectfully be said, that the statute had been infringed, but they are all, when examined, clearly distinguishable from the case at Bar, *e.g.*, our own decision in *Rex* v. *Mah Hon Hing* (1920), 28 B.C. 431; *Reg.* v. *Coleman* (1898), 2 Can. C.C. 523; *Reg.* v. *Corby* (1898), 30 N.S.R. 330; *Rex* v. *McGuire* (1904), 36 N.B.R. 609; *Rex* v. *King* (1905), *supra; Rex* v. *Romano* (1915), *supra;* and *Caron* v. *Regem* (1930), *supra,* which last turned upon the judge's reference to *"l'accuse,"* pp. 302-3.

It follows from all the foregoing that the statutory prohibition has not been violated by what occurred herein and the ruling of

the learned trial judge was sound in law, and therefore the appeal should be dismissed.

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McPhillips and Macdonald, JJ.A. agreed for the reasons given by Martin, J.A.

Appeal dismissed.

Solicitor for appellant: *C. H. Cahan, Jr.*
Solicitors for respondent: *MacNeill, Pratt & MacDougall.*

AGNEW AND AGNEW v. HAMILTON.

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AGNEW v. HAMILTON

Landlord and tenant—Suite above a store—Defective premises—Personal injuries to tenant's wife—Demised premises—Liability of landlord.

The defendant, who was the owner of a store building containing two suites above the store, rented one of the suites to the plaintiff R. J. Agnew. There was access to the suites by stairs both at the front and the back, and at the back was a porch which was common to the two suites. The tenant's wife, who lived in the suite, leaned against the railing on the porch when cleaning a rug and the railing giving way, she fell to the ground below sustaining injuries.

Held, that a finding in the plaintiff's favour as to the railing being a trap would not avail them unless it was found that it existed with respect to a portion of the building which the defendant had not demised and which was under his control as landlord, but the railing formed a portion of this so-called porch and the porch was a part of the demised premises and so treated by the tenants in their joint user, the plaintiffs therefore have no redress.

Statement

ACTION for damages for injuries sustained by the plaintiff, Lyla Stein Agnew, in falling from a porch in the rear of the premises in which she lived with her husband. The railing on the outside of the porch gave way as she leaned against it. The defendant was owner of the premises, being a store building, the floor above the store consisting of two suites, one of which

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was rented to plaintiff R. J. Agnew and occupied by himself and his wife. The porch at the rear was common to the two suites and used by both tenants. While Mrs. Agnew was shaking a rug on the porch she leaned against the railing which gave way and she fell a considerable distance to the ground, sustaining severe injuries. The relevant facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 13th of June, 1932.

Grossman, for plaintiffs.
O'Brian, K.C., and *A. C. DesBrisay*, for defendant.

Judgment

MACDONALD, J.: The plaintiff seeks to recover damages from the defendant through a regrettable accident which occurred on the 9th of January, 1932, and from which the plaintiff Lyla S. Agnew sustained serious injuries. It appears that the defendant gave the plaintiff R. J. Agnew possession of a suite, consisting of one-half the upper part of a store building owned by the defendant on Broadway West, Vancouver. There was an understanding at the time when such possession was given, that rent should not be payable by the tenant until such tenant was earning wages, and thus in a position to make payment. After a time, in pursuance of this arrangement, rent was paid by the plaintiff R. J. Agnew, but at the time of the accident such rent was considerably in arrears. However, the plaintiff R. J. Agnew was still a tenant at the time, and the defendant as a landlord, was responsible to him and his family. The plaintiff, Lyla S. Agnew, the wife of the said plaintiff R. J. Agnew, while in pursuance of her household duties and shaking dust from a rug or piece of carpet, on what has been termed a porch, in the rear of the demised premises, must according to my view of the matter, have pressed so heavily against the railing at that point that it gave way and she fell a considerable distance to the ground, and suffered the injuries to which I have referred. Reference is made to this railing in the plaintiff's statement of claim, and it is alleged that it appeared to be in a good and solid condition for the purpose for which it was to be used, but it is then stated that it was actually out of repair and dangerous to persons lawfully using the same.

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Several defects are outlined in the pleadings as to this railing, but the situation is summed up in the close of the paragraph relating thereto, by a statement that the railing or fence constituted a trap or hidden danger. It was submitted that if it should be held that the condition of the railing was such as to be a trap, causing the accident, that the defendant was liable to the plaintiffs on the ground of negligence, it being contended that there was a breach of duty on the part of the defendant which created the liability, even though he was unaware of the existence of such a trap.

Numerous authorities were cited upon this and other points which arose during the trial, but no good purpose would be served by my attempting to discuss these authorities at any length, or reserve my judgment for that purpose. I intimated to counsel for plaintiffs during the argument that a finding in their favour as to the railing being a trap, would not avail them unless I first found that it existed with respect to a portion of the building, which the defendant had not demised and which was under his control as landlord. In other words, that if the railing was upon the demised premises, that the plaintiffs had no redress. Plaintiffs relied upon the law as shortly stated in the Canadian edition of Williams on Landlord and Tenant, at p. 575:

> If the landlord permits access to the demised premises through entrances or over passages or stairways retained in his possession and control, the extent of his liability is that he is bound not to create a trap or concealed danger. In other words the means of access must be what it appears to be; if he provides a stairway it must be a proper stairway—one defective step renders it an improper stairway—if he provides a balustrade it must be sufficient to withstand reasonable pressure.

The correctness of my view, that a finding to this effect was essential in order that the plaintiffs should succeed, is borne out by numerous authorities. I need only refer to the leading case in the House of Lords, of *Cavalier* v. *Pope* (1906), A.C. 428, at p. 430, where the law as laid down by the Court of Common Pleas, in *Robbins* v. *Jones* (1863), 15 C.B. (N.S.) 221, was approved of to the following effect:

> "A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term: for, fraud apart, there is no law against letting a tumble-down house; and the tenant's remedy is upon his contract, if any."

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Without further dealing with the law on the subject, in my opinion the situation is narrowed to the extent, to which I will shortly refer. While to some extent the happening of the accident might cast some burden upon the owner of the premises, still the situation is such that if that portion of the demised premises has been leased to these plaintiffs, then they have no complaint or right of recovery as against the defendant. Then was the railing a portion of the demised premises? It is alleged in the statement of claim that the access to these demised premises from the street was by a common staircase, and there was a common staircase from the rear of the demised premises, also that there was a common hallway and a common rear porch, all of which it was alleged being under the control or possession of the defendant, and not coming, as it were, under the control and possession of the plaintiff R. J. Agnew, as a tenant. I had the opportunity, with the approval of counsel, of viewing the premises, and while not disagreeing with that statement as to the situation, I think I prefer to put it in my own way, and it is this: The entrance to these two sets of premises, or suites, was from the street by a broad staircase, with swinging doors. Then at the top of the staircase, there was an open space which would be useful for both tenants and their families. From that open space there was a narrow hallway with swinging doors to the rear of the building. On the way to the right there was a laundry room which was provided for the use of both tenants. Then this area, or porch, as it has been described, was in the rear. It has been termed a "porch," and for the sake of a better term I will apply it, to that portion of the building. It was not a mere landing. It was of considerable size. It was utilized by the tenants jointly, there being a set of shelves or lockers and Mrs. Matthison, the other tenant, used a portion for her refrigerator. Then as you went to the rear of this porch, on the right you encountered a staircase which afforded access to the yard in the rear, and thence to the coal and wood-shed provided by the landlord for the use of his tenants. It was not an open portion of the building except at the rear. In other words, it was covered in and became a useful part of the demised premises.

I was concerned at first with the case of *McPherson* v. *Credit Foncier Franco Canadien* (1929), 2 W.W.R. 623. It seemed

to me unless the facts differed from those here presented, that this would be an authority which I should, in deference to the Court of Appeal of Alberta, follow. I found there that the facts, on closer perusal, are altogether different, or are so different as to create in my mind a conclusion that this case is not an authority which should be followed. Returning, then, to a consideration of this so-called porch, the evidence shewed user by both tenants jointly. It is true that the defendant had paid for the lighting, but the details of that payment are not present for the moment to my mind. Beyond this he in no way exercised any control or supervision of that portion of his building. In renting to his tenants he did not reserve any portion of the upper part of the building, and if my recollection serves me right, there was some discussion as to how the hallways might be kept clean, and this matter of cleanliness was left to be determined and arranged between the two tenants. The defendant did not supply any janitor service, nor in any way, to my mind, shewed that he was exercising any rights over the upper portion of the building leased to two tenants. I think that the railing formed a portion of this so-called porch, and that such porch was a part of the demised premises, that it was so considered and treated by the tenants in their joint user. They could have excluded anyone from occupying it, just as they could have done with the laundry room provided for their joint benefit.

Judgment

Having reached this conclusion, and bearing in mind the law with respect to the obligations of a landlord, to the extent even of renting tumbledown houses, I do not consider that the defendant was liable to the plaintiff in connection with this accident. I do not think any liability can be created by the conduct of the defendant after the accident, and certainly not by his actions in making payment to the doctor, and paying some of the expenses attendant upon the nursing. If he is not already liable, those actions should not create a liability. They were in accord with his treatment of his tenant before the tenant became in a position to pay rent. The result is that the action is dismissed.

Action dismissed.

FISHER, J.

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July 12.

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v.
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Excise Act—Seizure of foreign vessel within territorial waters—Alcohol on board—Conviction of owner—Habeas corpus—Certiorari—Vessel bound from Seattle, U.S.A. to Alaska—Jurisdiction—R.S.C. 1927, Cap. 42, Sec. 111—Can. Stats. 1930, Cap. 18, Sec. 9.

The accused, a foreigner, owned a foreign vessel that cleared from Seattle, U.S.A., bound for Alaska. The vessel was seized in the territorial waters of British Columbia and accused was convicted on a charge with respect to alcohol found on board, under section 181 of the Excise Act. On *habeas corpus* proceedings with *certiorari* in aid:—

Held, that assuming the waters in question are territorial waters, they are so placed that passage over them is necessary or at least convenient, and generally used for the navigation of open seas and should be deemed international in that sense. The accused is a foreigner sailing a foreign vessel from a foreign port bound on a foreign voyage, passing through territorial waters, so placed that passage over them is convenient and generally used as the most direct route for vessels such as the accused's *en route* from Seattle to Alaska. Jurisdiction must be given by express and specific legislation, and there being the absence of such, want of jurisdiction has been established by the accused and he is entitled to his discharge.

Statement

APPLICATION for a writ of *habeas corpus* with *certiorari* in aid. The accused was convicted by a magistrate of having in his possession 375 gallons of alcohol in tidal waters within the boundaries of the County of Victoria, under section 181 of the Excise Act. The accused, an American, was the owner of a foreign vessel, the "Advance," which had cleared from Seattle, Wash., U.S.A., bound for Ketchikan, Alaska. The vessel was seized in the waters of Trincomali Channel between Salt Spring Island and Galiano Island on the course which is the most convenient and direct route from Seattle to Alaska for small vessels, and the alcohol was found on board. The further relevant facts are set out in the reasons for judgment. Heard by FISHER, J. at New Westminster on the 28th of June, 1932.

L. H. Jackson, for applicant.
Gilchrist, for the Crown.

12th July, 1932.

FISHER, J.: This is an application on behalf of one John Lester Hardy for his discharge on *habeas corpus* proceedings. It would appear that the applicant was convicted the 22nd day of April, 1932, on the charge

that he did, on or about the 8th day of April, 1932, in the waters of Trincomali Channel, being tidal waters within the boundaries of the County of Victoria, Province of British Columbia, as defined by the Counties Definition Act, Revised Statutes of British Columbia, chapter 50 and amendments thereto, unlawfully, whether the owner thereof or not, without lawful excuse have in his possession a quantity of spirits, unlawfully imported, namely approximately 375 gallons of alcohol, contrary to the form of statute in such case made and provided.

It is first contended by counsel on behalf of the prosecution that in view of the wording of sections 122 and 181 of the Excise Act the onus was on the accused to prove that he had lawful possession of the alcohol. The question of the jurisdiction of the magistrate, however, is raised on the threshold on behalf of the accused and in such case unless and until the jurisdiction of the Court to try the accused for the offence charged is established I cannot see that the burden of proof rule can be invoked. Want of such jurisdiction may be proved by evidence *dehors* the record—see *Rex* v. *Montemurro* (1924), 2 W.W.R. 250. An affidavit by the accused has been read on the application and I have also before me, pursuant to the writ of *certiorari* issued, the information, conviction and other proceedings before the magistrate.

Judgment

It is quite apparent that the accused here is a foreigner charged with respect to alcohol on board a foreign vessel "Advance" which had cleared from Seattle, Wash., U.S.A., bound to Ketchikan, Alaska, and was at the time in question in the waters of Trincomali Channel between Salt Spring and Galiano Islands on the course which is, according to the said affidavit, the "most convenient and direct route" from Seattle to Alaska and admittedly so on the evidence for small boats on such a voyage. Under such circumstances the offence, if any, would appear to have been committed by a foreigner on a foreign ship in such waters bound from one foreign port to another. Counsel on behalf of the prosecution, however, relies on the contention that such waters are territorial waters of Canada or waters within three miles of the coasts or shores of Canada and not

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international waters. It may be noted that section 181 of the Excise Act creating the offence alleged reads in part as follows:

Every person, whether the owner thereof or not, who, without lawful excuse, the proof whereof shall be upon the person accused, . . . has in his possession any spirits unlawfully manufactured or imported, . . .

and the prosecution refers to and relies upon section 111 of the Customs Act, reading in part as follows:

For the purpose of the levying of any duty, or for any other purpose of this Act or any other law relating to the Customs,

(a) the importation of any goods, if made by sea, coastwise or by inland navigation, in any vessel, shall be deemed to have been completed from the time such goods were brought within the limits of Canada, meaning when the waters are not international, within three miles of the coasts or shores of Canada, and if made by land, then from the time such goods were brought within the limits of Canada.

Counsel on behalf of the accused agrees that the vessel was at the time in question within three miles of the coast or shores of Canada on waters that might be called territorial but cites *The Queen* v. *Keyn—The Franconia* (1876), 46 L.J., M.C. 17 where the judgment of the majority of the Court quashing the conviction was rested on the ground of there having been no jurisdiction in former times in the Admiral to try offences by foreigners on board foreign ships whether within or without the limit of three miles from the shore. At pp. 63-4 and 70 Cockburn, C.J. says in part as follows:

That the negligence of which the accused was thus guilty, having resulted in the death of the deceased, amounts according to English law to manslaughter can admit of no doubt. The question is, whether the accused is amenable to our law, and whether there was jurisdiction to try him?

The legality of the conviction is contested, on the ground that the accused is a foreigner; that the Franconia, the ship he commanded, was a foreign vessel, sailing from a foreign port, bound on a foreign voyage; that the alleged offence was committed on the high seas. Under these circumstances, it is contended that the accused, though he may be amenable to the law of his own country, is not capable of being tried and punished by the law of England.

The facts on which this defence is based are not capable of being disputed; but a two-fold answer is given on the part of the prosecution:—first, that . . . it occurred within three miles of the English coast; that, by the law of nations, the sea, for a space of three miles from the coast, is part of the territory of the country to which the coast belongs; that, consequently, the Franconia, at the time the offence was committed, was in English waters, and those on board were therefore subject to English law. . . .

These decisions are conclusive in favour of the accused in the present case, unless the contention, on the part of the Crown, either that the place

at which the occurrence, out of which the present enquiry has arisen, was, though on the high seas, yet within British waters, by reason of its having been within three miles of the English shore, or that, the death of the deceased having occurred in a British ship, the offence must be taken to have been there committed, so as in either case to give jurisdiction to the Admiralty, or the Courts substituted for it, shall prevail. These questions it becomes, therefore, necessary carefully to consider.

On entering on the first, it is material to have a clear conception of what the matter in controversy is. The jurisdiction of the Admiral, so largely asserted in theory in ancient times, being abandoned as untenable, it becomes necessary for the counsel for the Crown to have recourse to a doctrine of comparatively modern growth, namely, that a belt of sea, to a distance of three miles from the coast, though so far a portion of the high seas as to be still within the jurisdiction of the Admiral, is part of the territory of the realm, so as to make a foreigner in a foreign ship, within such belt, though on a voyage to a foreign port, subject to our law, which it is clear he would not be on the high seas beyond such limit. It is necessary to keep the old assertion of jurisdiction and that of today essentially distinct; and it should be borne in mind that it is because all proof of the actual exercise of any jurisdiction by the Admiral over foreigners in the narrow seas totally fails, that it becomes necessary to give to the three-miles zone the character of territory, in order to make good the assertion of jurisdiction over the foreigner therein.

Now, it may be asserted without fear of contradiction that the position that the sea within a belt or zone of three miles from the shore, as distinguished from the rest of the open sea, forms part of the realm or territory of the Crown, is a doctrine unknown to the ancient law of England, and which has never yet received the sanction of an English criminal court of justice. . . .

Judgment

Referring to the *Keyn* decision it may be noted that Tremeear in his notes to section 591 of the Criminal Code, 4th Ed., pp. 773-4 says:

In consequence of this decision the Territorial Waters Jurisdiction Act, 1878, was passed; and it dealt and dealt only with offences committed on board foreign ships, whether by foreigners or by British subjects on board such ships, within the territorial waters of Her Majesty's dominions, that is, within one marine league of the coast measured from low water mark. Parliament in passing this Act was assuming a new jurisdiction; that over foreigners on foreign ships in territorial waters, a claim of jurisdiction to which other nations might not assent.

With respect to the Territorial Waters Jurisdiction Act, counsel for the accused has pointed out that the new jurisdiction asserted was definitely restricted to offences "punishable on indictment." In the present case the information was laid and proceeded with as being one with respect to an offence punishable on summary conviction without the consent of the accused and, in my opinion, the offence so charged and dealt with sum-

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marily cannot be considered as one included in the Territorial Waters Jurisdiction Act so as to give jurisdiction merely because it might also be punishable on indictment. I pause here to point out, however, that though Tremeear in the passage cited says that Parliament in passing said Act "was assuming a new jurisdiction—that over foreigners on foreign ships in territorial waters, to which other nations might not assent," it would appear even from the judgment in the *Keyn* case that it was generally conceded that Parliament had undoubtedly the right to legislate over an area of three miles from its shores for the purpose of prevention of "frauds on customs laws" which stood on a different footing from the ordinary criminal laws but such legislation must be express and specific if intended to apply to foreigners on foreign ships. It seems to me therefore that the question to be determined here is whether or not the said Excise and Customs Acts or sections in question were meant to operate with respect to any and all persons and ships over the whole of that territory within which there is the right to legislate. Perhaps the real issue is better stated as being whether or not there is express and specific legislation to be applied to the existing case or whether in order to meet the exigency thereof there has been what has been elsewhere termed "usurpation of a jurisdiction which without legislation we do not judicially possess." The rights of a foreigner on a foreign ship, under the circumstances recited, must be carefully considered. Hall in his International Law, 7th Ed., pp. 162-3 says:

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In all cases in which territorial waters are so placed that passage over them is either necessary or convenient for the navigation of open seas, as in that of marginal waters, or of an appropriated strait connecting unappropriated waters, they are subject to a right of innocent use by all mankind for the purposes of commercial navigation. (The case of gulfs or other inlets would seem to be upon a different footing, except in so far as they are used for purposes of refuge. Any right to their navigation must be founded on a right of access to the state itself.) The general consent of nations, which was seen to be wanting to the alleged right of navigation of rivers, may fairly be said to have been given to that of the sea. Even the earlier and more uncompromising advocates of the right of appropriation reserved a general right of innocent navigation; for more than two hundred and fifty years no European territorial marine waters which could be used as a thoroughfare, or into which vessels could accidentally stray or be driven, have been closed to commercial navigation; and since the beginning of the nineteenth century no such waters have been closed in any part of the

civilized world. The right therefore must be considered to be established in the most complete manner. . . .

Counsel for the accused insists that the Excise Act was never intended to and does not apply to vessels but counsel for the prosecution invokes section 111 of the Customs Act (as set out in part above) obviously referring to goods imported by sea and providing when the importation of such goods shall be deemed to have been completed and contends that the waters in question here are "not international" waters but territorial waters. In this connection however it should be noted that in sections 151 and 207 of the Customs Act where Parliament is apparently dealing expressly and specifically with the seizure of any "hovering" vessel whether registered in Canada or not it expressly uses the words "Territorial waters of Canada" and specifically defines "Territorial waters of Canada," said sections reading in part as follows:

151. (1) If any vessel is hovering in territorial waters of Canada, any officer may go on board such vessel and examine her cargo and may also examine the master or person in command upon oath touching the cargo and voyage and may bring the vessel into port.

(7) For the purposes of this section and section two hundred and seven of this Act, "Territorial waters of Canada" shall mean the waters forming part of the territory of the Dominion of Canada and the waters adjacent to the Dominion within three marine miles thereof, in the case of any vessel, and within twelve marine miles thereof, in the case of any vessel registered in Canada, or any other vessel which is owned by any person domiciled in Canada.

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By section 207, as enacted by Cap. 16 of the Act of 1928, it is provided that:

If upon examination by any officer of the cargo of any vessel hovering in territorial waters of Canada, any dutiable goods or any goods the importation of which into Canada is prohibited are found on board, such vessel with her apparel, rigging, tackle, furniture, stores and cargo shall be seized and forfeited. . .

On the other hand, a perusal of section 111 of the Customs Act as aforesaid shews that when Parliament was dealing with the question of when the importation of goods by sea should be deemed to have been completed, it did not state that it should be deemed to be completed in all cases where the goods were brought within the territorial waters of Canada or within three miles of the coasts or shores of Canada but only in cases "when the waters are not international." The latter expression seems hard to interpret but I think a fair interpretation or inference is that

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Parliament in the Act was safeguarding the right of commercial navigation and recognizing the distinction between ships hovering on territorial waters and ships merely passing through them. Counsel for the prosecution however strenuously contends that in any event it is only innocent passage that is not interfered with and that as the alcohol was not shewn on what is called the ship's manifest jurisdiction could be asserted. In addition to said section 151 counsel for the prosecution refers to sections 10-23, 143 and 146 of the Customs Act providing that vessels may be boarded when within three miles by a customs officer who is also authorized in certain cases to seize goods on board or search and detain vessels for the prevention of smuggling. As has been pointed out however these sections refer to ships "bound for" or "arriving at" a Canadian seaport and I do not think that they should be strained or misapplied to a case such as this where the ship is a foreign one bound from one foreign port to another and the charge is not with respect to hovering or smuggling. That the sections must be strictly interpreted is apparent from one of the cases cited on the argument *Rex* v. *Langille* (1932), 57 Can. C.C. 151 in which it was held that despite section 203 (4) of the Customs Act, which declares that the offence of smuggling shall be complete when any vessel containing goods not reported pursuant to section 11 of the Act arrives within three miles of the coast of Canada, the offence is not complete until the master of the vessel has had an opportunity of complying with the conditions laid down in section 11, *i.e.*, of reporting to the Customs House after the vessel is anchored or moored.

As to what would not be considered "innocent passage" it might be observed that Hall in his book on International Law, *supra*, says at p. 163:

This right of innocent passage does not extend to vessels of war. Its possession by them could not be explained upon the grounds by which commercial passage is justified. The interests of the whole world are concerned in the possession of the utmost liberty of navigation for the purposes of trade by the vessels of all states. But no general interests are necessarily or commonly involved in the possession by a state of a right to navigate the waters of other states with its ships of war.

It would seem as though the principle of "the utmost liberty of navigation for the purposes of trade by the vessels of all

states" would be in peril if the cargo of a foreign vessel not bound for or arriving at a Canadian seaport but bound on a foreign voyage and merely passing through Canadian territorial waters can be seized along with the vessel and its possessor charged in the local Courts with unlawful possession of goods "unlawfully imported" and an otherwise innocent passage cease to be so merely by reason of the nature of the cargo on board without any more offence being suggested than that part of the cargo was simply mentioned as stores and not more particularly described in what is called the ship's manifest at the time it left a foreign port. Such manifest was apparently part of what are called the clearance documents from the port of Seattle and any offence in connection therewith would appear to have been committed in such foreign port. In this connection reference might be made to the case of *The Ship "D. C. Whitney"* v. *St. Clair Navigation Co.* (1907), 38 S.C.R. 303 where at pp. 309-11 Davies, J. says:

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> 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. . . . The wrongdoing for which she was arrested took place (if at all) in a foreign port a year previously, and the ship's arrest while exercising her right of innocent passage in Canadian waters in accordance with the treaty rights of her nation from one foreign port to another cannot, of itself, justify the attempted exercise of jurisdiction. . . .
>
> I do not think that that is the law. 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.

My conclusion on the whole matter is that even on the assumption that the waters in question here are Canadian territorial waters they are so placed that passage over them is necessary or at least convenient and generally used for the navigation of open seas and that they should be deemed international waters in that

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sense and for the purpose of said section 111 of the Customs Act. I am satisfied that said section 181 of the Excise Act, when read with said section 111 and also the other sections of the Customs or Excise Act referred to, clearly recognizes the principle of the freedom of even territorial waters for commercial passage by foreign ships and that if any offence has been committed by the accused the circumstances are not such that he may be tried for the offence charged before the convicting magistrate here. I do not think the statutory provisions relied upon by the prosecution were intended by Parliament to assert or confer jurisdiction upon the local magistrate to convict the accused of unlawful possession of unlawfully imported goods as charged under the circumstances here when the accused is a foreigner sailing on a foreign vessel from a foreign port bound on a foreign voyage and merely passing through territorial waters which are so placed that passage over them is convenient and admittedly generally used as the most convenient and direct route by vessels such as the accused was on when *en route* from Seattle to Alaska. If Parliament had so intended it would have been a simple matter to have manifested the intention in express words. In any event I hold that such jurisdiction must be given by express and specific legislation and in the absence of such I hold that want of jurisdiction has been established by the accused and he is entitled to be discharged from custody.

The conclusion I have just indicated renders it unnecessary for me to deal specifically with the second objection raised by the applicant to the effect that forfeiture of the vessel "Advance" would necessarily follow or be implied as part of the penalty and that therefore in any event the summary jurisdiction would not exist.

Order accordingly.

Application granted.

"COURT RULES OF PRACTICE ACT."

HIS HONOUR the Lieutenant-Governor in Council has been pleased to order that, in pursuance of the "Court Rules of Practice Act," being chapter 224 of the "Revised Statutes of British Columbia, 1924," and all other powers thereunto enabling, Schedule No. 2 of Appendix "M" of the "Supreme Court Rules, 1925," as amended, be further amended by striking out Item 1 and Item 2 and substituting therefor the following:—

"1. To witnesses, being Chinese or Indians, their reasonable expenses actually incurred in travelling, in lieu of mileage, and a sum not exceeding, per diem.........$1.50

"2. To witnesses, other than Police Officers and those mentioned in Item 1, per diem...................... 3.00

R. H. POOLEY,
Attorney-General.

Attorney-General's Department,
Victoria, B. C., January 26th, 1933.

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Mechanics' liens — Lease of arena for six-day bicycle race — Race-track installed by lessee — Track to be removed after race — Right to lien thereon—R.S.B.C. 1924, Cap. 156, Sec. 6.

The Canadian Cycle Race Association obtained a lease from the Vancouver Arena Company for its arena for the purpose of holding a six-day bicycle race, the association to have the exclusive use of the arena for the six days and two full working days without charge immediately prior to the race for the purpose of erecting and installing a race-track and necessary equipment, and the same time after the race to remove the same. Portions of the race-track along the fence of the arena at the sides were fixed to the freehold in a slight way but the ends were built up and fixed in a substantial way to the arena structure, and solidly nailed wherever the special nature of the track demanded for safety. The track was removed immediately after the race, but the bicycle race proved a financial failure and the workmen and those supplying material for building the track recovered judgment in a mechanic's lien action for a lien on the premises.

Held, on appeal, affirming the decision of CAYLEY, Co. J. (MACDONALD, C.J.B.C. dissenting), that the defendant is the owner of the land with knowledge of the construction of the race-track and the building in which it was installed is admittedly part of the land. Upon the true construction of the statute, temporary alterations and changes in or additions to a building which are essential to the use and purpose for which it was designed, are a proper foundation for a mechanic's lien for the work done and material furnished thereupon, and this is particularly so as to property employed in the production of shows and entertainments, the alterations and additions to the buildings and land of which would of necessity be continuous and relatively frequent, and the judgment establishing the liens should be affirmed.

Statement

APPEAL by defendants from the decision of CAYLEY, Co. J. in consolidated actions by workmen and material supply men against the Vancouver Arena Company, Limited, under the Mechanics' Lien Act, for a lien on the premises on which the work was done and material supplied, tried by him at Vancouver on the 9th of November and 3rd of December, 1931. On the 10th of July, 1931, the Canadian Cycle Race Association Limited represented by one Peck, a promoter, leased the Vancouver Arena near Stanley Park in Vancouver from the Van-

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couver Arena Company represented by one Patrick, for six days, in order to carry on a six-day bicycle race, commencing on the 13th of July, 1931. The lease provided that the lessees should have two full working days free of charge in order to install a race-track and two days at the end of the race to remove it. Peck contracted with the defendant Lewis for the construction of the track and installing the necessary equipment. The track was built on the floor of the arena and in order to keep it firm, especially at the ends, it was nailed firmly to the building. Immediately after the race was over the track was removed. The race proved a failure financially, the workmen only receiving a small portion of their wages, and the lumber supply was not paid for. By an order in Chambers the Stirn action was consolidated with fifteen others.

H. C. Green, and *Swencisky,* for plaintiff.
Grossman, and *A. H. Miller,* for defendants.

12th December, 1931.

CAYLEY, Co. J.: By an order in Chambers the present action has been consolidated with fifteen others, making sixteen actions by workmen and material supply men against the parties who employed them and bought the goods, and against the Vancouver Arena Company Limited, under the Mechanics' Lien Act, for a lien on the premises on which the work was done and material supplied.

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It appears by the evidence that in July, 1931, a promoter named Peck, who has since left the country, entered into an arrangement with Patrick, manager of the Arena Company, to hold a bicycle race meeting in the arena. Patrick was to be paid for the company $1,000 by Peck, and additional funds during the course of the contest. Patrick also had to guarantee the expenses of bringing bicycle riders from other parts of the country to Vancouver, to take part in the contest. The amount which he so guaranteed was $2,694. A race-track was constructed, being the race-track in question, on the floor of the arena. The arena, as is well known, is a place for holding shows of various kinds, and the holding of a bicycle race would be well within the kind of show which they would offer to the public. Peck paid Patrick $700 in cash and gave him a promis-

sory note of $300, which was paid out of gate receipts. In order to protect the Arena Company Patrick took in the gate receipts. In this way all the money that was taken in for the contest was in his hands as manager for the Arena Company. The contest was not a success. The workmen, the present plaintiffs, received very little on their wages. The lumber supply was not paid for. Patrick gave Peck $300 and Peck left the country. It comes out in the evidence that Patrick was one of the provisional directors or incorporators of the Peck company, although this I do not think affects the case. The total amount taken in from gate receipts seems to have been in the neighbourhood of $9,000 out of which Patrick also paid the prize money to the contestants, and other expenses.

The question is does a mechanic's lien lie against the property?

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The contention here of the Arena Company was that the erection of the race-track on the premises known as the Arena, was for temporary purposes only; that it was specified in the contract between the Arena Company and the Canadian Cycle Race Association, represented by Peck, that after the race meeting was over the track should be removed, and therefore under the decision given by the Supreme Court of Canada in *Haggert* v. *The Town of Brampton* (1897), 28 S.C.R. 174:

> The purposes to which premises have been applied should be regarded in deciding what may have been the object of the annexation of moveable articles in permanent structures with a view to ascertaining whether or not they thereby became fixtures incorporated with the freehold, and where articles have been only slightly affixed but in a manner appropriate to their use, and shewing an intention of permanently affixing them with the object of enhancing the value of mortgaged premises or of improving their usefulness for the purposes to which they have been applied, there would be sufficient ground, in a dispute between a mortgagor and his mortgagee, for concluding that both as to the degree and object of the annexation, they became parts of the realty.

and that by parity of reasoning, the race-track here was not a part of the realty, not being affixed even in a slight manner to the other structure of the arena.

A number of cases were cited by the plaintiffs; particularly *Limoges* v. *Scratch* (1910), 44 S.C.R. 86 which was cited in support of the contention that section 10 of the Mechanics' Lien Act provides that works or improvements mentioned in section

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6 constructed upon any lands with the knowledge, but not at the request, of the owner, etc., shall be held to have been constructed at the instance and request of the owner, etc., unless such owner has posted a notice in writing that he will not be responsible for such works or improvements. The Chief Justice at p. 88 says:

> I would dismiss this appeal for the reason that, as the trial judge found, the appellant, owner of the property, allowed the improvements in connection with which the mechanic's lien arises to be made without notice or protest.

To shew how broadly the interpretation of improving a property is construed from affixing chattels to a property, *Dobey* v. *Gray* (1906), 42 N.S.R. 259 is cited; where storm windows were held by Longley, J. as passing for fixtures.

King, J., in the previously recited case, *Haggert* v. *The Town of Brampton,* at p. 182, says:

> In passing upon the object of the annexation, the purposes to which the premises are applied may be regarded; and if the object of setting up the articles is to enhance the value of the premises, or to improve its usefulness for the purposes for which it is used, and if they are affixed to the freehold even in a slight way, but such as is appropriate to the use of the articles, and shewing an intention not of occasional but of permanent affixing, then both as to the degree of annexation and as to the object of it, it may very well be concluded that the articles are become part of the realty, at least in questions as between mortgagor and mortgagee.

This case was cited by counsel for the defence, contending that the object of the annexation should be the ruling feature in coming to a decision. I find the case rather favourable to the plaintiff, inasmuch as the putting in of the race-track in question was to improve the usefulness of the arena for the purposes for which the arena is used. The arena is a structure in which shows of different kinds are exhibited. Undoubtedly the holding of a bicycle race largely advertised, and with riders brought from a distance is such a show. Therefore the words of King, J., "to enhance the value of the premises or improve its usefulness for the purposes for which it is used" are directly applicable to the erection of a bicycle race-track. Also in regard to the annexing of the race-track to the structure of the arena. Admitting that the structure was fixed to the freehold only in a slight way, directly applies to the present case where the evidence was that in order to keep the race-track steady the race-track was nailed to the arena structure. After the race-track meeting had been concluded, Patrick, manager for the Arena Company, and

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his foreman, went over the race-track for the purpose of drawing out the nails that had been affixed for that purpose, and the foreman stated that he drew out about 100 nails. The race-track comes well within the definition of an article annexed slightly to a structure for the purpose of improving its usefulness and thereby becomes, in the words of King, J., "an improvement." This would bring the race-track under the terms of section 6 of the Mechanics' Lien Act.

But I do not think it is a proper interpretation of the decisions to say that a purpose which is unknown to the parties who supply the labour, or supply the materials becomes an element in the decision. The race-track was to be a temporary structure according to the contract between Patrick for the Arena Company, and Peck, for the Bicycle Race Association. This was a private arrangement between those parties, and what their intentions were is not a matter of concern to those who were not a party to the contract. King, J. in the case cited says that is more applicable to questions as between mortgagor and mortgagee, a purpose known to a mortgagor and mortgagee would be known to the parties to a contract signed by both, in which case a common purpose may properly be imputed to the parties, but no common purpose can be imputed to the workmen, and supply men in the case before me; that is a purpose in common with the arena and the Canadian Cycle Race Association Limited.

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It was acknowledged by the defence that the Arena Company did not post a notice on the premises as they might have done under section 10 of the Mechanics' Lien Act. Not having done so it seems to me that that fault on their part, together with the fact that I must hold the affixing of the race-track to the arena to have been a matter which comes within the meaning of the words "improving its usefulness for the purposes for which it is used"; and its not being disputed that the lien was filed in time and on properly described premises and premises owned by the Arena Company, I must come to the conclusion that the plaintiffs are entitled to a lien in the premises on which the work was done.

From this decision the defendants appealed. The appeal was

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argued at Vancouver on the 24th of March, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Grossman, for appellants: We are only appealing in two of the actions, first as to the claim of Lewis who was the contractor who built the track, and the building company that supplied the material. The lease was for six days with an option for further leases within one year. We submit that the claims do not come within section 6 of the Mechanics' Lien Act as this was a special structure for a special purpose and was only attached to the building by nails sufficiently to keep it firm. Under the agreement the structure had to be moved immediately after the race and it was so removed: see *Haggert* v. *The Town of Brampton* (1897), 28 S.C.R. 174; Wallace on Mechanics' Liens, 3rd Ed., 63; *Beaver Lumber Co., Ltd.* v. *Saskatchewan General Trusts Corporation Ltd.* (1922), 3 W.W.R. 1061. This was a temporary structure: *Dobey* v. *Gray* (1906), 42 N.S.R. 259.

Swencisky, for respondent: The terms of the lease with the Arena Company do not affect us. The erection was attached to the premises and its purpose was patent to all interested: see *Haggert* v. *The Town of Brampton* (1897), 28 S.C.R. 174 at p. 182; *Stack* v. *Eaton* (1902), 4 O.L.R. 335 at p. 338.

Grossman, replied.

Cur. adv. vult.

7th June, 1932.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The trend of opinion appears to be in favour of the idea that a mechanic's lien such as the one in question here cannot attach to chattel interests unconnected with land. This idea appears, however, to have been broken in upon by the Saskatchewan case of *Galvin Lumber Yards, Ltd.* v. *Ensor* (1922), 2 W.W.R. 15, in which the Court of Appeal of that Province decided that a lien on a building erected by a lessee of land who had the right to remove it, the building being unattached to the soil, was a good lien on the lessee's interest in the lease and attached upon the building and the said interest. The lease expired before the action to enforce it was taken and it was admitted that it no longer was affected by the lien. Our Act is not *pari materia* with the Saskatchewan Act but is not essentially different in effect so far as this case is concerned.

Here the lien is claimed on the fee simple and is sought to be enforced against the owner of the property on which the erection in question was built and the case was argued on the footing that the lien attached to the fee simple. The building is a skating and hockey rink and the change made in it was the installation of a bicycle-track for the temporary purpose of a six days' lease for the holding of races by the lessee. At the end of the lease he was to remove the track. It is true there was also a term in the lease that it might be used again within one year. That term was subject to certain contingencies mentioned in the lease. It was not in fact used during that period and the material erected was removed. The structure was erected in the building and rested by its own weight on the floor, except for some nails driven into the building to steady it which, in my opinion, did not constitute a sufficient attachment to affect this case.

It is clear to me that the structure on which the work was done and material supplied was a temporary one and was never intended to be anything else. The facts above recited are cogent proof of this. The owner did not post notices enabling him to avoid liability but if the structure did not in fact become a part of the land this precaution was unnecessary.

MACDONALD, C.J.B.C.

Referring again to *Galvin Lumber Yards, Ltd.* v. *Ensor, supra,* I think it must be conceded that the lien if it attached at all was confined to the building only after the lease expired. The learned judge who delivered the judgment of the majority of the Court stated that since the Lien Act invades the common law its terms must be strictly construed when dealing with attachments of it to the property but I understand him to hold that with respect to the enforcement of the lien it ought to be construed liberally. If I read the judgment aright it is a strict construction that a lien did attach to the leasehold interest because at the time of attachment it was supported by the leasehold interest but that when subsequently it came up for enforcement after the lien had expired he was at liberty to give the Act a liberal construction. In the end, I think, it came to this that in the opinion of the Court the lien subsisted upon a chattel only. At that time it was a lien upon a chattel resting upon no interest in land to support it, and, I think, with deference, it could not be supported in law upon the authorities to which we

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were referred, or on any which I have been able to find. In Wallace on Mechanic's Liens, 3rd Ed., the Canadian and American cases on this point are fully considered, and I can find nothing in them to support the proposal that a mechanic's lien under the Act can attach upon a chattel. (See Phillips on Mechanics' Liens, 3rd Ed., secs. 176 and 177).

The judgment in *Galvin Lumber Yards, Ltd.* v. *Ensor, supra*, is opposed to the judgment of the same Court in an earlier case, *The Galvin Watson Lumber Co.* v. *McKinnon et al.* (1911), 4 Sask. L.R. 68, where the only distinction in the facts is that in the latter case the building was erected by a squatter and the Court held that the lien had never attached on the land.

MACDONALD, C.J.B.C.

The two principal factors to be considered in a case of this kind are the attachment of the erection to the land and the intention of the parties in relation to that attachment. It is said in the cases that a slight attachment to the land will help to support a finding that the chattel has become part of the land, yet when the intention is clear that it shall not as is the case here then I think we should have no hesitation in finding that no mechanic's lien attached in this case and that the appeal should be allowed.

MARTIN, J.A.: This case raises a question of importance on the construction of section 6 of the Mechanics' Lien Act, Cap. 156, R.S.B.C. 1924, which provides that:

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Every person:—(*a.*) Who does work or service or causes work or service to be done upon, or places or furnishes any material to be used in the making, constructing, erecting, altering, or repairing, either in whole or in part, of, or adding to, any erection, building, railway, tramway, road, bridge, trestle-work, wharf, pier, mine, quarry, well, excavation, embankment, sidewalk, sewer, drain, ditch, flume, tunnel, aqueduct, dyke, or other work, or the appurtenances to any of them, or improving any street, road, or sidewalk adjacent thereto, for any owner, contractor, or sub-contractor, or who does such work, or causes such work to be done, and places or furnishes any such material; or

(*b.*) Who does such work or service, or causes work or service to be done, or places or furnishes any material for or in respect of clearing, excavating, filling, grading, or ditching any land for any owner, contractor, or sub-contractor, or who does such work, or causes such work to be done, and places or furnishes any such material,—shall, by virtue thereof, have a lien for the price of such work, service, or material, or work, service, and material, upon:—

(*c.*) Said erection, building, railway, tramway, road, bridge, trestle-work, wharf, pier, mine, quarry, well, excavation, embankment, sidewalk,

sewer, drain, ditch, flume, tunnel, aqueduct, dyke, or other work, and the appurtenances to any of them:

(*d*.) The material so placed or furnished for said works or improvements:

(*e*.) The lands occupied or benefited thereby or enjoyed therewith, or upon or in respect of which such work or service is done, or upon which such material is placed or furnished to be used.

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Under this section the respondents claim liens for "work or service" and for "material" used in the construction of a special type of bicycle-track in the defendant's large building, a sports arena, used as a skating-rink and for shows of "various different amusements . . . requiring constant alteration," as the defendant put it.

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The track was primarily built for the purpose of holding a six-day bicycle race, beginning on the 13th of July, 1931, under a contract for lease between the defendant and the Canadian Cycle Race Association Limited which recited that during the said six days said company was to have "exclusive use" of the arena for said race

together with an option to conduct further bicycle races at any time when the said building is available during the ensuing year, but it is agreed and understood that the arena shall be available at least twice during the year commencing the 20th day of July, 1931.

The company was allowed "two full working days without charge immediately prior to the starting of any race for the purpose of erecting and installing tracks and necessary equipment" and the same time after any race to remove the same. On the 7th of July the City of Vancouver granted a permit to the defendant (*per* Guy W. Patrick owner or agent") "to alter the following building (arena)" and the "special details" of the alteration authorized are described as "Temporary Ramp," Arena, class of construction B, value $1,000. It is admitted that the track would have to be and was of solid construction particularly at the ends where the riders would turn at a 45 degrees slope and where as many as twelve riders would sometimes be expected to take the turn at the same time at high speed and that such a great strain would have to be safeguarded against. The track was built in that central portion of the building used during the winter months as a skating-rink and was about 220 feet long and fifteen feet wide on each side with sleeping accommodation for the riders in the centre and at the said turning ends it was "banked up" fourteen feet high.

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The learned judge below has found as a fact that "in order to keep the race-track steady [it] was nailed to the arena structure," and there is abundant evidence, including defendant's admissions on discovery, to support that finding not only in those portions of the evidence to which our attention was directed but in other portions thereof, all of which I have read with care, with the result that the learned judge has, if anything understated the case, and that while portions of the track along the fence of the arena at the sides were "fixed to the freehold in a slight way" yet other and considerable portions, the ramps, were built up and fixed in a substantial way to the arena structure as the special nature of the track demanded for safety aforesaid: "solidly nailed wherever it was necessary. . . . It would stay in there forever as well as the time it was needed," as one of the carpenters who built it describes it.

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The main submission of appellant's counsel was based upon the fact that this large track structure was for an alleged "temporary" purpose and that a lien attaches only where it is a permanent fixture to the land, and cases bearing upon the question of fixtures as between landlord and tenant, mortgagor and mortgagee, and vendor and purchaser, etc., were cited, *e.g.*, *Haggert* v. *The Town of Brampton* (1897), 28 S.C.R. 174, at 179; *Stack* v. *Eaton* (1902), 4 O.L.R. 335, and *Dobey* v. *Gray* (1906), 42 N.S.R. 259; but these, and several other similar reported cases based on the common law which have come before us, afford inadequate assistance in the consideration of cases in general, and the present in particular, under the sweeping language of Mechanics' Lien Acts like this one which are in derogation of the common law, as was pointed out by the Supreme Court of the United States in a leading case on the subject, *Canal Company* v. *Gordon* (1867), 6 Wall. 561 at 571, *viz.*:

Liens of this kind were unknown in the common law and equity jurisprudence both of England and of this country. They were clearly defined and regulated in the civil law (Domat, secs. 1742, 1744). Where they exist in this country they are the creatures of local legislation. They are governed in everything by the statutes under which they arise. These statutes vary widely in different States. Hence we have found no adjudication in any other State which throws any light upon the question before us, and there has been none in California. We are, therefore, compelled to meet the case as one of the first impression.

The same tribunal later said in *Springer Land Association* v. *Ford* (1897), 168 U.S. 513, at 524:

Although mechanics' liens are the creation of statute, the legislation being remedial should be so construed as to effectuate its object. *Davis* v. *Alvord* [(1876)], 94 U.S. 545; *Mining Co.* v. *Cullins* [1881)], 104 U.S. 176.

Substantial compliance, in good faith, with the requirements of the particular law is sufficient, and the test of such compliance is to be found in the statute itself.

These enactments vary in the different States and Territories, and to the variance in their terms, judicial decisions necessarily conform.

And at p. 530:

The truth is that what area of land is subject to lien in a given case largely depends on the character of the improvement. The extent of ground proper and necessary to the enjoyment of a building, a wall, or a fence, would not be the same as that required for or appertaining to an irrigation system, but the principle of determination is the same.

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This is in accord with the leading judgment of the Court of Appeal (Exchequer Chamber) in *Holland* v. *Hodgson* (1872), 41 L.J., C.P. 146 (*per* Blackburn, J., afterwards Lord Blackburn) (approved by the Supreme Court in *Haggert's* case, *supra*) wherein is to be found his oft-cited "classic illustration" (*per* Sargant, J. in *Vaudeville Electric Cinema Ld.* v. *Muriset* (1923), 2 Ch. 74, 83) of an anchor as being a part of the land or not according to circumstances, and also of blocks of stone placed one on the top of another in different circumstances: the Court said:

"There is no doubt that the general maxim of law is, that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances as indicating the intention, *viz.*, the degree of annexation and the object of the annexation. Where the article in question is no further attached to the land, than by its own weight it is generally to be considered a mere chattel: see *Wiltshear* v. *Cottrell* (1853), 1 E. & B. 674; [s.c. 22 L.J., Q.B. 177], and the cases there cited. But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land: see *D'Eyncourt* v. *Gregory* (1866), L.R. 3 Eq. 382."

And again, p. 150, as to "temporary purpose":

. . . trade or tenant fixtures might in one sense be said to be fixed merely for a temporary purpose, but we connot suppose the Court of Exchequer meant to decide that they were not part of the land, though liable to be severed by the tenant. The words "merely for a temporary purpose" must be understood as applying to such a case as we have supposed of the anchor dropped for the temporary purpose of mooring the ship, or the instance immediately afterwards given by Parke, B., of a carpet

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tacked to the floor for the purpose of keeping it stretched whilst it was there used, and not to a case such as that of a tenant, who, for example, affixes a shop-counter for the purpose (in one sense temporary) of more effectually enjoying the shop whilst he continued to sell his wares there. Subject to this observation, we think that the passage in the judgment of *Hellawell* v. *Eastwood* [(1851)], 6 Ex. 295; s.c. 20 L.J., Ex. 154, does state the true principles, though it may be questioned if they were in that case correctly applied to the facts.

The first of the two quoted "considerations" of attachment to the soil laid down by the *Hellawell* case (which it is now thought should have been decided in favour of the fixture—*e.g., Haggert's* case, *supra,* p. 18), was, p. 149:

The mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed *integre salve et commode,* or not, without injury to itself or the fabric of the building.

This "consideration" is of much importance here because it is admitted by the defendants' witnesses that the large end ramps had to be destroyed in removing them but the side "bents" and "decking" were stored in the basement of the arena after removal and are still there. This removal was completed about the 5th of September, so as to have the arena ready for a labour meeting on the 6th, and was done by the defendant's engineer with a gang of five men, who began the dismantling on or about the 28th of August, and the engineer said also:

I suppose it is quite a common thing to change the arena about in that way? Oh, yes.

In changing it for exhibitions and skating and prize fights? Yes.

And that is in the ordinary course of business that the arena should be changed about? Yes.

This considerable delay in removal was doubtless because the original contract had contemplated further races as aforesaid, and during the construction of the track its use for the Canadian Olympic trials in August and also for another six-day race about the end of September was discussed and contemplated, but the first one proved to be a financial loss and so those races were not held, doubtless for that reason, but these intentions of further use of the track have a weighty bearing on the meaning of "temporary" use, if that element is of substance.

The said *Vaudeville* case, in applying the decision in *Holland's* case, *supra,* is also a remarkable instance of the way in which things change with circumstances, there fixed seats in a cinema hall being held to be part of the land (p. 85) though in

Lyon & Co. v. *London City and Midland Bank* (1903), 2 K.B. 135 similar chairs in a hippodrome screwed to the floor in "substantially the same manner" were held not to be so, for reasons explained "upon the special facts" by Lords James and Lindley in *Reynolds* v. *Ashly & Son* (1904), A.C. 466.

The section before us is a very wide one in its scope, more so than most and not exceeded, indeed equalled, by any one that I have found. It extends not only to work or service . . . done but to "cause" them to be done, and to "placing or furnishing any material to be used" not only in the making, constructing, or erecting of any of the many specified classes of work, "either in whole or in part" but to alterations additions and repairs thereof and covers every field of "work" from that upon "any erection, building, railway . . . road . . . wharf . . . mine, quarry, well, excavation, embankment, sewer . . . tunnel, aqueduct, dyke, or other work or the appurtenances to any of them" to "clearing, excavating, filling, grading, or ditching any land for any owner, contractor or sub-contractor . . ."

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There is no requirement therein, it is important to note, in view of certain decisions, that the work should be an improvement (save as regards the "improving" of "adjacent streets, roads and sidewalks") or add to the value of the premises, and so the lien attaches (with that one exception) even if the work is or should turn out to be a detriment to the property, and the word "improvements" is only added in (d) alternatively to "work" so as to cover, apparently, the said exception of adjacent streets.

By (c) the lien is given upon "said erection, building . . . or other work and the appurtenances to any of them"; by (d) upon the material so placed or furnished for such works and by (e) upon "the lands occupied or benefited or enjoyed therewith . . ."

It is only under section 9 and in favour of mortgagees that the "increase in value of the mortgaged premises by reason of the works or improvements" comes into consideration, but that section has no application to this case wherein the "works or improvements" were "constructed upon the lands with the knowledge . . . of the owner" within section 10.

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By interpretation section 2,—

"Owner" includes a person having any estate or interest, legal or equitable, in the lands upon or in respect of which the work or service is done, or material is placed or furnished, at whose request and upon whose credit, or on whose behalf, or with whose privity or consent, or for whose direct benefit any such work or service is done, or material is placed or furnished, and all persons claiming under him whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the material placed or furnished have been commenced to be furnished.

It was pointed out by the Court of Appeal of Saskatchewan, in an instructive judgment *per* Lamont, J.A. in *Galvin Lumber Yards, Ltd.* v. *Ensor et al.* (1922), 15 Sask. L.R. 349; 2 W.W.R. 15; that the lien attaches to the building and also to the "land occupied . . . thereby," saying, p. 352:

. . . I do not agree that the building must be attached to the soil so as to become part of the land itself before a mechanics' lien can attach thereto. And that for two reasons: (1) Because the statute has not made the affixing of the building to the soil a condition precedent to a right of lien; (2) Because, neither the object of the Act nor the evil it sought to remedy requires that it should be so affixed. Where a statutory right is given upon the performance of certain conditions precedent, or the existence of certain prerequisites, that right may be claimed the moment that the statutory requirements have been complied with, unless the object of the legislation shews that it could not have been intended that such right should be exercised without something further being done. Here, the plaintiffs have established the fulfilment of every condition required by the statute to entitle them to a lien. That lien, by sec. 7, attaches to the "building and the lands occupied thereby and enjoyed therewith." It will be observed that it does not say that the lien shall attach to the building and the land to which it is "affixed." A building placed on sills sitting on the top of the land "occupies" the land on which it is placed just as much as if it were affixed to the soil.

And after quoting from Phillips on Mechanics' Liens, 3rd Ed., p. 309, that:

The whole object under this Act is to prevent the owner of lands, whatever his estate in them, from getting the labour and capital of others without compensation.

and from Wallace on Mechanics' Liens, 3rd Ed., p. 10, he proceeds:

To hold, therefore, that a right of lien can only be exercised where the building is affixed to the soil, would, in my opinion, be to impose a condition which neither the object of the legislation nor the language of the Act requires. The right of the lienholder is to sell the owner's interest in the building and the lands occupied thereby and enjoyed therewith. In the case of a leasehold interest, that right is to sell the term for which the tenant holds the lands and his interest in the building. If the building is to become the property of the landlord at the expiration of the lease, the

purchaser would be entitled to have possession of the land and building for the term of the lease, but subject to its provisions. If the building is to remain the property of the tenant with a right of removal, the purchaser, in addition to the term, acquires the tenant's property in the building and his right to remove it.

He cites in approval the appellate decision of the Supreme Court of Nebraska in *Zabriskie* v. *Greater America Exposition Co.* (1903), 93 N.W. 958; 62 L.R.A. 369; that leasehold interests and tenant's buildings are subject to these liens, and continues, p. 354:

In my opinion the right of the tenant to remove the structure at the expiration of his term is not the test by which to determine whether or not the lien can attach. The test under our Act is: Were the materials furnished "to be used in the making, constructing, erecting, fitting, altering, improving or repairing of any erection, building, land, wharf, pier, bulkhead, bridge, trestle-work, or mine, or the appurtenances to any of them, for any owner, contractor or subcontractor (sec. 4)" and did the owner have an interest or estate in land which was to be occupied by the building, etc., or enjoyed therewith? If these are answered in the affirmative, it does not seem to me to be material whether at the expiration of the term the building is to belong to the landlord or to the tenant with a right of removal.

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In the case at Bar the test is the same—*viz.*, putting it briefly, was the work done upon the building and were the materials furnished therefor?

In the *Galvin* case the lease was for a year, and therefore if that decision is sound, and I have no doubt it is, then in the case at Bar if the lease had been for the same period, or say for six months for the summer period, between skating seasons, or even for three months, or less, the plaintiffs could have filed their liens for the construction of the race-track within 31 days after its completion, pursuant to section 19 because the said definition of "owner" includes a leasehold interest as in *Galvin's* case; and though the shorter the lease the less the interest yet the principle is the same. But the case at Bar is on a higher ground because the defendant is the owner with knowledge of the "work" as aforesaid and the building upon which it was done is admittedly part of the land.

The importance of the *Galvin* decision, however, is that it shews the question of "temporary" or "permanent" use or attachment, which is of such consequence in ordinary cases of fixtures, is not the test under this statute, because the "occupa-

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tion" of the lands by the lessee might be of a very short—"temporary"—duration.

There is, moreover, in property of the present public "show and entertainment" kind the additional element that from its very nature and object continuous structural changes and alterations in it, small or great in extent as may be necessary, must or may be made at varying intervals to attract and satisfy the fickle public taste for amusement or exercise, and this was admitted by the defendant's evidence above quoted. The peculiarity of "show" buildings is generally recognized by the Courts of the United States to which we must largely turn for precedents because our legislation of this kind originated therein and is unknown in England. Many illustrations could be cited but three will suffice, *viz.*:

Tuec Co. v. *McKnight* (1918), 203 S.W. 338, a unanimous decision of the Supreme Court of Tennessee wherein the numerous loose detachable parts of a vacuum-cleaner system in a theatre were held to be subject to a mechanic's lien, the Court saying:

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> We consider the question to have been settled in the case of *Halley* v. *Alloway*, 10 Lea, 523. In that case it was said, in substance, that the old idea as to fixtures, which was whether the thing was permanently attached and fixed in and to the freehold, has given way in cases of this kind to the nature of the thing done, the character of the house repaired, or constructed, and for which the materials were furnished, as well as the intention of the parties constructing the building.

In *Waycross Opera-House Co.* v. *Sossman* (1894), 20 S.E. 252, the Supreme Court of Georgia unanimously held that loose stage furnishings and fittings of opera houses were subject to such a lien, saying:

> In a strict sense, these articles, or some of them, may not be fixtures, but they are nevertheless essential to the completeness of a building of that kind. They necessarily form a part and parcel of the edifice itself. . . . No one would ordinarily consider household furniture and belongings as a part of the premises, but every one would naturally regard the drop curtain, wings, borders, set houses, set trees, balustrades, etc., as being parts of an opera house edifice. These things usually remain permanently in the house where they are first set up, and are not moved about, as furniture is, from house to house, when the owners change their places of abode. It is true, perhaps, that some traveling theatrical companies carry with them special scenery to more properly and advantageously set off particular plays; but this is the exception to the general rule, and in such instances the permanent outfit of the house is only temporarily displaced.

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In *Hardwood Interior Co.* v. *Bull* (1914), 140 Pac. 702, a unanimous decision of the Supreme Court of California in which it was held that smoothing and waxing the floor of a dance pavilion was an alteration to a building which created a mechanic's lien, the Court saying:

> Having in mind matters of alteration, we can readily imagine instances where a change in a part of a building would be a detriment to the property, and yet be so unquestionably an alteration as to come clearly within the language of section 1183, Code of Civil Procedure, and be lienable. In the present case, while we think that the question is a close one, we are of the opinion that the work done upon the building was a more substantial character than the mere cleaning or polishing of the floor, or superficial work of that character, and was in fact an alteration of the floor as the word "alteration" is defined by the standard lexicographers (*Sessions* v. *State* [(1902)], 115 Ga. 18, 41 S.E. 259, 260), and that consequently the contractor doing or furnishing the same is entitled to a lien under the section of the Code mentioned, notwithstanding that the record fails to shew that the work was of any benefit to the owner of the building on which it was bestowed. If this work had been done for the owner of a building after it was a completed structure, we have no doubt it would be considered lienable. If lienable in such a case, it is lienable in this case also.

It is to my mind clear upon the true construction of the statute before us in the light of the authorities cited that temporary alterations and changes in, or additions to a building which are essential to the use and purpose for which it was designed are a proper foundation for a mechanic's lien for the work done and materials furnished thereupon, and this is particularly so as to property employed in the production of shows and entertainments the alterations and additions to the buildings and land of which would, of necessity, be in, *e.g.*, the case of a general amusement or exhibition park, continuous and relatively frequent, and so the question of temporary or permanent use would not apply to such alterations or additions, though it might to the original building in or to which they were made: that piece of land which, *e.g.*, might this month be laid out for racing and other track events might next month be excavated and used for aquatic events, swimming and diving, and the month thereafter filled in and levelled for tennis, basketball, badminton, bowling, or dancing, etc., all of which necessitated alterations in the land itself, but it would not be seriously suggested, I apprehend, that these activities would not also of necessity constitute the doing of work and the furnishing of materials upon the land itself.

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It is not to be overlooked that the statute covers great and every-day operations of labour, such as clearing and levelling land, that have nothing to do with fixtures at all, and if an owner of land hires men to clear his property from a grove of big trees, or to blast off an outcrop of rock, or remove a hillock therefrom, there is no doubt about their right to a lien for their work in so doing even if it was most detrimental to the property and in no sense a fixture. And, furthermore, if, *e.g.*, a builder made a contract with a rich property owner to build sleeping-porches and sun-rooms as substantial additions to the bedrooms of his mansion and make a bathing pool in his garden all for only two months', or less, summer accommodation of certain distinguished visitors that he wished to honour, and thereafter to remove the porches and sun-rooms and fill up the pool and restore everything to its original state, then in such case I have no doubt that under our statute the contractor would have his lien despite the fact that the temporary nature of the work was the basis of the entire contract.

It follows that in my opinion the judgment herein establishing the liens should be affirmed and the appeal dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: Upon the argument of this appeal I was of the opinion that the learned trial judge had arrived at the proper conclusion so well set forth in that learned judge's reasons for judgment. However, we had the benefit of able arguments upon both sides in this appeal and as it is a branch of the law purely statutory, and very important cases arise from time to time in relation to the extent to which the Mechanics' Lien Act (Cap. 156, R.S.B.C. 1924) may be carried, judgment was reserved. Since then careful consideration of the matter has not led me to any change of mind and I have been very greatly strengthened in my view by the reading of the reasons for judgment of my learned brother MARTIN—an advantage I have had—and if I may be permitted to say so, my learned brother has in such an illuminative way and so completely traversed the facts of the present case and the relevant law in a manner so convincing that I find it quite unnecessary to add anything thereto; in truth, the reasons supported by the cita-

tion of authorities from the highest Courts is so borne out that nothing further need be added.

I would dismiss the appeal.

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

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

Solicitors for appellants: *Grossman, Holland & Co.*
Solicitor for respondent: *A. H. J. Swencisky.*

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Negligence — Damages — Physicians and surgeons — Injured shoulder— Erroneous diagnosis—Failure to advise X-ray—Evidence of care taken.

The plaintiff fell on the pavement, and injuring her shoulder consulted the defendant, a practising physician and surgeon, who after examination concluded she only had a bad sprain. The doctor advised her to massage the shoulder and report in four or five days. She did not see the doctor again but her shoulder did not improve, and three months after the last interview with the defendant she consulted another doctor, who on taking an X-ray examination found her shoulder was dislocated, the lateness of the discovery necessitating a major operation. The plaintiff recovered judgment in an action for damages.

Held, on appeal, reversing the decision of MACDONALD, J., *per* MACDONALD, C.J.B.C. and MACDONALD, J.A., that where a shoulder is injured and dislocation is suspected, the fact that the surgeon consulted does not advise the taking of an X-ray after applying the recognized tests and giving the usual instructions, does not necessarily constitute negligence on his part, even where it is subsequently disclosed that his diagnosis was erroneous.

Per MARTIN, J.A.: That the appeal should be allowed on the ground that the trial judge had not passed upon an important, if not the most important piece of evidence upon which the question of the defendant surgeon's alleged negligence turned, namely, that after the second visit he gave her instructions to report to him in four or five days, but with this she did not comply. To send the case back for a new trial would not be justified in the circumstances, the defendant's evidence supported as it is by other evidence, should be believed and the action fails.

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Statement

APPEAL by defendant from the decision of MACDONALD, J. of the 31st of December, 1931 (reported, 45 B.C. 43) in an action for damages for negligence in treating Mrs. Moore, who consulted him as a surgeon in relation to an injured shoulder. On the 18th of December, 1930, Mrs. Moore fell on the pavement in Vancouver, injuring her shoulder, and she consulted the defendant the same evening. He examined her and on the following morning concluding that she had a bad sprain with bruises, instructed her as to massaging the arm and told her to report in four or five days, but she did not report and he did not see her again. Her shoulder did not improve and three months later she consulted another doctor who found there was a dislocation which, owing to the lateness of its discovery, necessitated a severe operation. The plaintiff recovered judgment for $1,800.

The appeal was argued at Vancouver on the 18th to the 22nd of March, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Wood, K.C., for appellant: The evidence shews that the defendant tried the usual methods of testing whether there was dislocation, and it must be shewn there was want of competent and ordinary care and skill to such a degree as to leave bad results: see *Rich et uxor* v. *Pierpont* (1862), 3 F. & F. 35 at p. 40; *Hancke* v. *Hooper* (1835), 7 Car. & P. 81 at p. 83; *Town* v. *Archer* (1902), 4 O.L.R. 383 at pp. 388-9; *Jarvis* v. *International Nickel Co.* (1929), 2 D.L.R. 842.

Burns, K.C., for respondent: The methods of moving the arm about are not conclusive in disclosing a dislocation as this case shews on its face. The doctor should have suggested an X-ray in order to be sure. He knew what the result would be in case of delay in treating a dislocation, and the learned judge below having found negligence in not suggesting an X-ray, his finding should not be disturbed.

Wood, replied.

Cur. adv. vult.

7th June, 1932.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: This is an action against a surgeon

for malpractice. The situation is this—the plaintiff fell on the street injuring her shoulder. She called in the defendant, a well-known practitioner of Vancouver, who made a thorough examination at which he applied the usual and proper tests for the discovery of dislocation and came to the conclusion after careful re-examination and consideration that there was no dislocation; that it was a case of a severe sprain and bruises. During this time a friend of the plaintiff who was present, Mrs. Hamar, suggested an X-ray photograph. The defendant did not advise that course on account of the expense, the plaintiff not being a person of means. He felt that after the complete examination he had made and the application of the usual tests for dislocation approved of by the profession and finding none of the reactions usually found in dislocations, it was not necessary to put his patient to the expense of an X-ray. He says he advised her to call him in if the remedies to be applied effected no improvement in her condition. The shoulder got no better but instead of calling him in she applied liniments and other remedies to it of her own. This went on for three months during which time her shoulder not only did not improve but became more painful. The defendant remained in entire ignorance of her condition. After three months she visited her son-in-law, a Dr. Lyons, at the town of Powell River who examined her and advised an X-ray. He had an X-ray machine of his own with which he took the picture. That shewed that the shoulder had been dislocated and owing to the lapse of time since the dislocation a serious surgical operation was necessary which was afterwards performed by Dr. Patterson of Vancouver, a noted specialist. Before Dr. Patterson operated he saw the X-ray picture and knew that the shoulder was dislocated. He, however, before operating applied the usual tests which surgeons apply independently of X-ray and could find no indication of dislocation. The shoulder did not react to the usual and ordinary tests which were applied by him and which had been applied by the defendant. In operating on her shoulder he discovered that the rim of the socket had a gap in it which he says he believes was congenital since there were no signs of a fracture and no fragments of the bone to be found. This, in his

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opinion, explained the reasons why the usual tests failed to disclose the dislocation.

The judge has not founded his judgment on the want of skill of the defendant. He founds it entirely upon what he considered the negligence of the defendant in not having an X-ray picture taken. The skill and care required of a physician in like circumstances is ordinary care and skill, not the highest possible degree of both. *Lanphier* v. *Phipos* (1838), 8 Car. & P. 475; *Armand* v. *Carr* (1926), S.C.R. 575. It is not the latest and best appliances available but what are recognized as the usual and efficient appliances then in use which are required. In *Jarvis* v. *International Nickel Co.* (1929), 2 D.L.R. 842, Wright, J. at p. 847 said (a dislocation case):

. . . that the statements of law in 20 Hals., p. 332, para. 815, are particularly apt in defining the degree of skill. There it is stated that all the practitioner is required to bring to the performance of his duty is reasonable care and average skill and that he is not responsible merely because some other practitioner of greater skill and greater knowledge might have prescribed a different treatment.

And in the same case on p. 848, the same learned judge, after referring to the fact that the defendant in that case was unable to diagnose the trouble, said:

The only other negligence alleged is that the defendant McCauley, being unable to diagnose the trouble, should have called in a specialist. I have failed to find in any of the authorities any support for the proposition that if a physician in charge of a case is unable to diagnose the trouble he is under legal obligation so to inform the patient and to advise the calling in of a specialist.

See also *Fields* v. *Rutherford et al.* (1878), 29 U.C.C.P. 113 and *Town* v. *Archer* (1902), 4 O.L.R. 383.

Unlike the *Jarvis* case, *supra,* the defendant came to a firm decision as to the condition of the shoulder. He was not in doubt; had he been there might have been some reason for an X-ray, but he was not in doubt and although, as it afterwards turned out, he was mistaken in his diagnosis as the result shews, there is no suggestion of any unskilfulness or want of care on his part except that of his failure to advise an X-ray. The two eminent specialists called for the defendant at the trial approved of the defendant's diagnosis and stated that X-ray ought not to be advised in cases where the surgeon is convinced by the use of the usual tests that that course was unnecessary. It has not

surely come to this that if the cause of the trouble is not apparent to the eye of the surgeon or physician he must advise an X-ray or take the consequences to his reputation and to his pocket for not having done so. Is the X-ray to be the only arbitrator in such a case and are years of study and experience to be cast aside as negligible?

Therefore with due respect to the learned trial judge I think that the defendant was guilty of no negligence whatever in this case.

MACDONALD, C.J.B.C.

In this conclusion it is not necessary to enquire whether the plaintiff was guilty of negligence for not informing the defendant of her failure to improve; but lest the case should go higher I think I should express my opinion upon that point. I think she ought to have advised the defendant even if she were not asked to do so. It is not the practice of medical men nowadays to continue visits unless the case clearly demands it or unless the patient requests it. Her failure to do this is the most probable cause of her subsequent suffering and expense. In fact, I think, it may be said to be the undoubted cause and on this ground alone she has herself been the cause of her suffering and loss and the appeal should be allowed.

MARTIN, J.A.

MARTIN, J.A.: This appeal should, in my opinion, be allowed because it is, to me at least, apparent that the learned judge below has not taken into consideration an important, if not the most important, fact upon which the question of the defendant's negligence turns, *viz.*, that after his second visit to the female plaintiff he gave her instructions which she failed to comply with, as he states:

I told her to continue on with her massage and rest, and before I left her I told her to report to me in a matter of four or five days, those bruises should be well in from seven to ten days. She left, and I never heard anything more from her.

You heard nothing more from her? No, not for four months.

And again, in answer to the question of Court:

On the day you saw Smith (plaintiff's son-in-law) did you use the expression "trivial?" Yes, if she had carried out my orders I would have seen it was not a trivial matter, or a sprain, or a bruise, and would have had an X-ray.

The plaintiff denied this, saying in answer to her counsel:

The doctor suggests, I may tell you here, that he told you, on leaving

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the next morning, that if you were not much better in from seven to ten days, you were to see him again? Oh, no, he didn't say that, no.

Or anything indicating to you that you should see him again? No, not at all.

On cross-examination she said:

And did he say anything to you about letting him know how you got on? No.

Didn't suggest you let him know how you got on? No.

MARTIN, J.A.

In his judgment the learned judge sets out the evidence upon which he founds it, saying, "These facts, shortly stated, constitute the basis of the complaint by the plaintiffs as to negligence," but he unfortunately, with respect, then entirely overlooked, and did not later notice, this very important "basis of the defence . . . as to negligence," because there can be no doubt that if the plaintiff had been instructed to report to the defendant within a few days and had done so, that he would have then seen that it was a case where an X-ray should be taken (from the unnecessary expense of which he had been properly desirous of saving her, as a person of small means) and also beyond question the true nature of the injury would have been discovered and rectified, as could easily have been done at that time, because it is found that "the defendant had the necessary skill and knowledge."

This omission to pass upon this primary piece of evidence while considering other portions as specially enumerated, including minor ones, leaves the case in a very unsatisfactory position, and so we must now, acting as the learned judge should have done, pass upon it, but without the benefit of having the witnesses before us, or else send the case back for a new trial at great expense and delay, which in the circumstances would not be justified.

The matter has caused me much difficulty, not to say anxiety, having regard to its consequences to the parties concerned, but after giving it very careful consideration I am of opinion that the defendant's evidence should be accepted as being the truth, not only because of his own definite statements but because it is the most probable thing that would have happened under the circumstances, which view is fortified by the evidence of Dr. P. A. McLennan upon cross-examination.

In coming to this conclusion I have not overlooked another

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weighty objection taken to the judgment, *viz.*, that it states: " . . . The plaintiff, reposing confidence in the defendant, expected an early recovery." This is directly contrary to her own testimony:

I had confidence in Dr. Large. He said it would take time, and it was badly bruised and sprained and it would take time to get well. There was no use going to another doctor. . . .

. . . Did Dr. Large not tell you it should be well in a week or ten days? No, he did not.

Nothing of that kind? No, he did not.

And her husband's evidence is to the same effect.

It follows that the judgment cannot be supported on the whole evidence, and therefore the appeal should be allowed.

MCPHILLIPS, J.A.

McPhillips, J.A. would allow the appeal.

MACDONALD, J.A.

Macdonald, J.A.: This is an appeal from a judgment awarding damages against appellant, a medical practitioner. for malpractice. Respondent slipped and fell on the street pavement in Vancouver dislocating a shoulder. She fell on the elbow, throwing her weight on the arm. Appellant, called in a few hours later, spent three-quarters of an hour applying tests by observation and manipulation to ascertain if a fracture or a dislocation occurred. He concluded that she sustained a bad sprain of the muscles or tendons and a severe bruise. On the following morning after a further examination he "was quite satisfied there was no fracture." He decided that there was no dislocation on the first visit "a very few minutes after I had seen her."

The conversation between doctor and patient at the end of the second examination is important and there is conflict between them. We have not the assistance of a finding by the learned trial judge on this point. Appellant testified that he told her he did not think it was necessary to take an X-ray; that she should massage the arm and "report to me in a matter of four or five days," as "those bruises should be well in from seven to ten days." Respondent said appellant told her that there would be no need of an X-ray; he "did not wish to put me to that expense"; that it was very badly bruised and sprained, also that she should exercise and massage the arm. "Of course" (he said) according to her evidence "it would take

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time but if you do as I tell you it will be all right in time." The impression she sought to convey was that appellant was so fully satisfied with his diagnosis that there was no necessity for a further call on his part, nor for respondent to report progress to him. The proper deduction from her evidence however is that the question of further possible attention was left open: in other words "there was no mention that he would call again." The inference from her reference to the X-ray too is, not that it would not be of assistance but that, at that stage, at all events, the expense might be avoided.

Four months later—no improvement of course taking place in the meantime, as there was a dislocation—she consulted Dr. Lyons of Powell River where she was visiting her daughter. He X-rayed the shoulder; found the dislocation and sent her to Dr. Patterson in Vancouver who specializes in bone and joint surgery. A major operation was performed to reduce it.

The trial judge based his finding of negligence solely on the ground that appellant should have had the shoulder X-rayed as Dr. Lyons did four months later

"or at any rate placed the responsibility upon the plaintiffs [husband and wife] if they were not willing to undertake the expense."

MACDONALD, J.A.

If it is true that in all cases where one sustains injuries to the shoulder or elsewhere likely to result in a fracture or dislocation a skiagram must be obtained if liability in damages is to be avoided in case of a faulty diagnosis the issue is simple. The evidence might then be confined to one question of fact not in dispute. I cannot, however, with great respect, agree that the decision depends solely upon this alleged omission. It may be, as the evidence shews, that in some cases it may transpire that the original diagnosis was faulty and that later as disclosed by failure of the injured member to improve an X-ray would be necessary. It was because of that possibility that appellant, according to his evidence, asked her "to report to me in the matter of four or five days" using as he stated a stock expression by doctors. It is natural to assume that he used words, at least of similar import but I do not rest on that conclusion.

An X-ray involves expense and far from being a ground of criticism it is commendable that a doctor, having regard to the means of the patient should at times dependent on circum-

stances, avoid it, always assuming that with co-operation between doctor and patient (both have responsibilities) it may be resorted to, if necessary, at a later stage without in the meantime causing injury to the patient because of the delay. It is self-evident that, assuming harm through delay for a reasonable time will not ensue (and respondent's medical witness did not say it would) a doctor who follows this course is not negligent.

Mr. *Burns* did not rest on the failure on appellant's part to order an X-ray on his first or second visit. He submitted that in any event proper tests were not applied to exclude the possibility of a dislocation and that some of the symptoms found actually pointed to a dislocation. That requires examination.

The ground upon which the trial judge based his judgment explains the failure to make a finding of fact on the important point referred to, *viz.*, the conversation that took place between doctor and patient as to future conduct, at the end of the second visit. If appellant's evidence should be accepted—assuming for the moment that he otherwise displayed reasonable skill—he ought to be acquitted of negligence because a later examination with the assistance of the X-ray would have disclosed the true condition and the dislocation could then be adjusted. Failure to progress, had it been reported to him would have led him to secure a skiagram. In the absence of a finding, I would, if necessary, accept the appellant's evidence, *viz.*, that he asked her to report progress. If on the other hand we accept respondent's evidence on this point what follows? Her evidence only amounts to this—that the question of further communication was not mentioned; certainly it was not excluded. She therefore acting prudently and fairly was obliged to report her condition to appellant if she failed to find that normal progress followed. If, as Dr. McLennan testified, a patient does not progress as expected the doctor naturally expects to be advised. Unnecessary calls are then avoided. That is the reasonable view. It protects the patient from needless expense while the doctor in the absence of an adverse report is satisfied that his original diagnosis was correct. This co-operation is essential to minimize the ever-present possibility of error. Respondents recognized that this obligation to advise the doctor might reasonably be expected because evidence was led by them to

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shew that although partially crippled and suffering pain at times the injured respondent was justified in believing for four months that the prolonged discomfort suffered might naturally be expected to follow a severe bruise or sprain; hence no necessity to report. Lay witnesses on her behalf (her medical witness did not say so—he was not asked) testified that they knew of cases where months elapsed before the injured member functioned normally after a bruise or sprain thus justifying the contention that suspicion of a more serious injury involving the need of further treatment was not aroused. We can, of course, say as the trial judge stated—it is common ground—that "her condition did not materially improve" and find from the evidence that she knew or ought reasonably to have known long before the end of four months and at a time when the mischief could be remedied without a major operation, that normal progress was not made and that fact should have been reported to appellant. In the statement of claim it is properly, I think, alleged that "the plaintiff's shoulder did not heal but on the contrary it became more and more painful." Respondent did not, of course, wilfully try to maim herself in order to collect damages. She was simply careless.

If, therefore, failure to obtain an X-ray at the outset was not *per se* a negligent act but depends, as I think it does, on other factors and surrounding circumstances, we have to ascertain if appellant used reasonable skill in applying recognized tests to exclude the reasonable possibility of a dislocation. To find what tests he applied we must depend upon his own evidence and that of the patient and another non-professional witness. These lay witnesses would not be technically accurate in describing what took place but substantially having regard to their limitations there is no important difference in the evidence of all parties concerned. We may, therefore, freely accept appellant's evidence in this respect. He said that he examined the arm and shoulder, felt the muscles and bones and "tried the various signs for dislocation." The shoulder was swollen taking up the loss of rotundity which otherwise would be apparent. Deformity, if found, would settle it. He could not feel the head of the humerus out of the normal position. Her arm

lay right against her side, that is vertically and I was able to manipulate, to adduct the arm slowly (*i.e.*, draw it away) and the arm would come right in again to the side.

She could also adduct the arm of her own volition (*i.e.*, draw it in again to the side). This according to recognized tests should indicate no dislocation. He lifted her arm to see what traction he could get and tried unsuccessfully to get her to touch her nose and forehead with the fingers. She was able to place her fingers on the opposite shoulder over the clavicle. This too was not indicative of a dislocation. The symptoms more likely pointed to a fracture.

After further examination on the second visit he was satisfied there was no fracture (1) because she could adduct the arm, (2) bring her finger tips up to the opposite shoulder, (3) no deformity in the shoulder, and because (4) he could not feel the head of the bone out of its socket. The muscles and tendons were bruised. As to treatment he asked her to apply hot fomentations and to gently massage the injured part. He did not advise exercise—that would be impossible. She is evidently mistaken on that point—no doctor would advise it.

MACDONALD, J.A.

On cross-examination he admitted that limitation of the movement is a sign of dislocation along with other features; also that pain in the shoulder joint (and she complained of it) was another sign. But "pain covers so many different things." It was a sub-coracoid dislocation and is often caused by a fall on the outstretched arm. The head of the humerus comes out of the glenoid cavity and under the coracoid, a projected spur under the armpit. It is a common form of dislocation because the muscles to prevent it are chiefly all over rather than under the shoulder. He summed up many symptoms and on the whole the controlling evidence did not indicate dislocation. She had, he found, certain limitations of movements indicating a sprain, a dislocation, a fracture, or some nerve condition and he had to exclude each one in arriving at a conclusion. Dislocation was excluded on several grounds already referred to. Appellant admitted that none of these and other tests referred to are infallible: on the contrary one has to explore in various directions (and he claimed he did so) to form an opinion by process of exclusion. He did not rely on any one test. From his diagnosis and examination he was convinced there was no dislocation.

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It is important to ascertain if the tests applied should reasonably, in the opinion of other medical men, lead to the conclusion that there was no dislocation without resort to the X-ray having special regard to the views of Dr. Lyons respondent's witness in view of the decision of the trial judge in respondent's favour. Unless, however, his evidence differs materially from other experts called by the appellant we should also accept their evidence. Dr. Lyons's suspicions were naturally aroused by the time that had elapsed without any improvement in the injured member as well as by the nature of the fall. When he examined her four months later he looked at the back to compare the two shoulders and from the prominence of the left shoulder (difference in the contour) and the angle of the left arm he suspected a dislocation. The point of the shoulder stood out. This showed that the head of the humerus was not in place. This evidence is not of value unless he also testified—and he did not—that this abnormality would be visible when appellant examined her. He did not in fact spend many minutes in examination—merely hastily made certain observations. She couldn't put her left hand (the injured one) on her right shoulder. He did not notice how far up she could place it "just from my own casual observations" but thought "she would possibly reach to the middle of the clavicle."

Dr. Lyons found her arm hanging out from her side at an angle of 20 degrees—away from the side—a sign also of dislocation. "She can't bring it to the side." "That" he said "is a classical symptom of dislocation." It existed when he saw her. She could not adduct the arm—a primary symptom and "yet" he conceded "the time Dr. Large examined her she could adduct the arm; that would be an indication that there was no dislocation" and "a very strong one." After four months some atrophy of the muscles would take place, and this would make the markings more prominent to locate a dislocation. The swelling of the tissues too was gone when he examined her. His evidence is not at all conclusive against the appellant. He does not profess to say or to indicate that the tests applied by appellant, if made, were inconclusive nor that the movements of the patient's arm described by appellant could not have been secured or if secured would not reasonably lead a skilful physician to the con-

clusion that there was no dislocation. Neither does he say that no conclusion of reasonable certainty could or ought to be arrived at without resort to the X-ray.

As to his own practice in cases of this kind, upon being asked, "when any one comes to you what do you do first" he said "examine it: probably X-ray it." At another stage, speaking for himself he said "I have no hesitation in X-raying any accident that comes under my observation," but did not, I think, intend that this answer should be taken literally. He did say, as the trial judge quoted, "You can locate the nature of the injury by X-ray whereas you can't without it." That however should be qualified as he also said "If I think it needs it I do" and again "I X-ray every accident that I think should be X-rayed regardless of cost" and again "If you don't think it is necessary you don't have it taken," adding "It is resorted to to resolve the doubt." He also said one could tell by feeling with the hand "whether the shoulder is dislocated or not." That is not consistent with the suggestion that an X-ray is imperative.

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Dr. Patterson (who specializes in bone and joint surgery) to whom the patient was sent by Dr. Lyons testifying for appellant, said that he first examined her with special reference to signs of dislocation and could not find any present. He agreed that the tests applied by appellant should reveal it. He said:

Dr. Lyons had 'phoned me that he found a dislocated shoulder and that is why I was particularly interested in finding whether or not the signs were there and I really thought there had been some mistake in the interpretation of the X-ray until I saw it.

It showed dislocation. This was confirmed on operating. It was not the typical dislocation. The most important feature of his evidence, explaining the whole difficulty was that he found that "the front portion of the socket of the glenoid cavity was missing." In his opinion this was a congenital condition of an unusual character and explained the fact that ordinary tests did not reveal the true condition.

When I did find it I realized that was the reason that I hadn't found signs of a dislocated shoulder.

As to the missing portion, he said:

I could find no evidence that it ever had been there.

There was no fragment of bone shewn by the X-ray or by his search.

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On the question of taking X-rays in such cases Dr. Patterson said:

I don't take many X-rays. I would like to have them in a very much larger percentage of cases, but if I can reasonably make up my mind that I can treat a case without X-ray, I don't have it, on account of the cost, without the patient is wealthy or can afford to spend the money.

And again:

Several times a month I tell people not to go to the expense of an X-ray even when they suggest it, because I know they can't afford it, and I think I can get on without it; and in some of these cases I find later I have to get an X-ray.

It would, of course, "make it much easier for me" to have it.

I am not always right: I sometimes find later on that I have to get one.

But if he took one in every case:

I would consider I was running myself out of business.

Further:

I don't have anything like the X-rays some men have—not nearly as many now as I used to. It is a question of judgment in each case. . . .

As an example, he said:

I had a case at noon today where something fell on a patient's foot, and there is a fracture, I am satisfied. I don't know whether it has gone into the joint or not. Now, he was willing to have an X-ray, and I told him I thought we could do without it. I think that I can find in two or three days if it has involved the joint, without an X-ray, and if I am not sure in the course of a week or so, I will get an X-ray, but I am not going to put them to the expense of an X-ray if it is not necessary. That is my attitude. I would like to have them, I would like to have had it in this case, it would have cleared my mind at once. Now I still have it on my mind.

The skiagram taken by Dr. Lyons was lost. There is no suggestion that it was deliberately destroyed. It would not, however, assist in determining the existence or otherwise of the abnormal or congenital condition referred to.

It didn't shew this condition of abnormality.

It would, however, shew that the bone was not where it usually would be in a sub-coracoid dislocation.

Dr. Patterson's decision that the condition was congenital was based first on the appearance found at the operation and secondly on the absence of any fragment showing in the X-ray.

It is of some significance too that Dr. Patterson asked everybody in the operating room to look at it.

It was an unusual condition. After proceeding as he described in his evidence he came to the conclusion that it was congenital because there was no evidence of fracture surface or any covering tissue that would exist following frac-

ture—there was no raw bone surface; there was no granulated tissue, that is the formation of fibrous tissue over the bony surface.

He wanted to make sure that it was congenital and not fractured in dislocation. The absence of fragments would be additional evidence of congenital condition—also the surface of the bone would be entirely different if it were the result of a fracture. Notwithstanding this abnormal condition it could at the outset have been put back by manipulation in the same position as before the accident.

This unusual congenital condition would interfere with or possibly prevent a proper diagnosis in the first place. This view was supported by Dr. McLennan who also specializes in bone and joint surgery. He stated it would "tend to minimize the condition—make it more difficult to determine by manipulation or feeling or on inspection." He also testified that the methods adopted by appellant in his diagnosis were "the usual methods to be adopted by any capable careful physician or surgeon." It was " a reasonable examination to give."

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Dr. Lyons was called in rebuttal but did not displace the evidence given by Dr. Patterson and Dr. McLennan. In an attempt to shew that this abnormal condition did not exist as disclosed by an examination of the stereo films taken by him and later lost he was asked:

What did it shew as to the abnormality of the glenoid cavity?

and said:

I saw no fractures.

No question of a missing part? I did not see any.

Could you have seen it if the missing part that is suggested was existing there? I presume that it would be—it could be detected.

It could be detected? Although I am not an authority on X-ray.

You looked for fracture and was satisfied it was not there? Yes.

Or a deficiency in the glenoid cavity? Yes.

But later, he said:

My examination of the film was merely for the purpose of determining whether there was dislocation or not.

Asked to explain why the film would not shew it Dr. Lyons said:

I won't attempt to explain it because I can't.

Well do you mean that sometimes X-rays make mistakes? Yes, they do sometimes.

It is apparent that this evidence, not dissimilar to Dr. Patterson's does not shew that the congenital condition did not

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exist. That would be disclosed beyond question upon operating and as the trial judge made no finding on the point I think we must irresistibly draw the inference that it did exist.

On the foregoing facts, adopting the law as outlined by the learned trial judge, appellant should be acquitted of the charge of negligence. He can only be so charged on the assumption that in all cases where an injury results from an ordinary fall, and dislocation is suspected an X-ray must be taken. No binding authority lays down that requirement as essential. Dr. Lyons's evidence, read as a whole, does not support that view. If that is conceded it is only necessary to add that there is no serious question on the part of any witness called that the ordinary tests, although not infallible, would in the vast majority of cases point to a definite conclusion. Undoubtedly the abnormality referred to, openly exposed by Dr. Patterson to others in the course of the operation, prevented or at least interfered with an accurate diagnosis. The unfortunate result arose not from want of reasonable care on appellant's part but because of respondent's failure, when she knew or ought to have known that the shoulder was not improving, to notify appellant. Reasonable co-operation would have prevented the serious results that followed. Dr. Large I have no doubt, is, as was testified, a skilful and capable physician of long experience and the evidence does not warrant a finding that would impair a reputation obtained by years of devotion to professional work.

I would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Wood, Hogg & Bird.*
Solicitors for respondents: *Burns, Walkem & Thomson.*

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Partnership agreement—No transfer of interest without consent of partners—Transfer of a partner's interest—No consent obtained—Transfer of assets to an incorporated company—Dissolution—Right to an accounting—Pleadings—Right of amendment—R.S.B.C. 1924, Cap. 191, Secs. 34 and 41.

Five East Indians entered into a partnership on equal terms under written agreement of the 16th of October, 1916, under the name of "Mayo Lumber Company." The agreement contained a clause that no partner could sell his share in the partnership without the consent in writing of the other partners. On October 2nd, 1917, one partner, Sheam Singh, sold two-sevenths of his interest to one Inder Singh, and on July 19th, 1920, Inder Singh sold his interest to the plaintiff. Two of the original partners, Mayo Singh and Kapoor Singh acquired all the interests in the partnership with the exception of the share held by the plaintiff, and on November 24th, 1932, they incorporated the Mayo Lumber Company, Limited with a capital of $100,000, divided into 1,000 shares of $100 each, and on the 3rd of December following in consideration of $70,000, they transferred to the incorporated company all the assets of the Mayo Lumber Company except a 50-ton Shay locomotive and a donkey-engine, taking 700 shares of the incorporated company as payment in full for said assets, and later by resolution they transferred to the incorporated company the said locomotive and donkey-engine for $29,800, receiving in lieu thereof 268 shares of the incorporated company. The remaining 30 shares of the incorporated company were then offered to the plaintiff for his interest in the Mayo Lumber Company but he refused to accept them, and brought action for a declaration that he is the owner of a one-twenty-third interest in the Mayo Lumber Company, alternatively that Sheam Singh has been a trustee for him for his interest, that the transfer to the Mayo Lumber Company Limited was fraudulent and void, for an accounting, and that the Mayo Lumber Company be wound up. The action was dismissed.

Held, on appeal, affirming the decision of MORRISON, C.J.S.C., that the partnership agreement against transferring shares without the consent of the remaining partners was never abandoned and the transfer by Sheam Singh was a nullity as no consent was given by the other partners, and the plaintiff therefore had no interest in either of the companies.

Held, further, that under section 34 of the Partnership Act the assignee of a partner's share is entitled, after dissolution, to an account, and there was here a dissolution. He may therefore have been entitled to an account for the partnership under said section but he did not plead for that relief or ask for it in his notice of appeal. He does not ask for an amendment and in the circumstances it should not be granted.

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Statement

APPEAL by plaintiff from the decision of MORRISON, C.J.S.C. of the 9th of December, 1931, in an action for a declaration that he is the owner of a one-twenty-third interest in a business known as the Mayo Lumber Company, alternatively that the defendant Sheam Singh has since the 19th of July, 1920, been a trustee for the plaintiff for said one-twenty-third interest in said company; that an alleged transfer of the assets and business of the Mayo Lumber Company to the Mayo Lumber Company, Limited, on the 28th of November, 1924, is fraudulent and void, for an accounting of said business and payment of the plaintiff's share, and winding up of said business and for an injunction restraining the Mayo Lumber Company, Limited from dealing in any way with the assets of the Mayo Lumber Company, and for damages. On the 16th of October, 1916, Kapoor Singh, Mayo Singh, Sheam Singh, Doman Singh and Jawalla Singh entered into a co-partnership agreement in writing under the name of the Mayo Lumber Company, each having a one-fifth interest, the capital subscribed being $23,000. One of the terms of the partnership agreement was that no partner of the firm was entitled to sell his share without the consent in writing, of the other partners, but on the approval of any sale the purchaser would become a partner and be entitled to all the privileges and rights of a partner. On October 2nd, 1917, Sheam Singh, owing one Inder Singh $1,000, transferred to him a two-sevenths' interest in his share in the business, and shortly prior to July 19th, 1920, the plaintiff purchased Inder Singh's interest (being one-twenty-third of the whole business) for $2,000. In October, 1921, Mayo Singh acquired the interests of Doman Singh and Jawalla Singh and the remaining interest of Sheam Singh, and in November, 1924, Mayo Singh and Kapoor Singh incorporated the Mayo Lumber Company, Limited, and representing themselves as the sole owners of the partnership business they transferred to the Mayo Lumber Company, Limited, all the assets of the partnership business previously carried on under the name of Mayo Lumber Company, with the exception of a 50-ton Shay locomotive and one donkey-engine. The capital stock of the Mayo Lumber Company, Limited was 1,000 shares of $100 each, and the consideration for the

transfer was $70,000, Mayo Singh and Kapoor Singh accepting therefor 350 shares each in the capital stock of the incorporated company. The Shay locomotive and the donkey-engine above referred to were transferred to the incorporated company by the partnership in October, 1925, the consideration therefor being 268 shares of the incorporated company. The remaining 30 shares in the company were reserved and later offered to the plaintiff for his interest in the Mayo Lumber Company, but he refused to accept them. The plaintiff's action was dismissed.

The appeal was argued at Vancouver on the 7th, 8th and 9th of March, 1932, before MACDONALD, C.J.B.C., MARTIN, McPHILLIPS and MACDONALD, JJ.A.

Argument

Mayers, K.C., for appellant: This action is for an accounting after dissolution. The plaintiff is entitled as assignee of a portion of Sheam Singh's interest, Sheam Singh being a trustee for the plaintiff: see *Dodson* v. *Downey* (1901), 2 Ch. 620 at p. 622; *Watts* v. *Driscoll* (1901), 1 Ch. 294 at p. 308; *Bonnin* v. *Neame* (1910), 1 Ch. 732; *Whetham* v. *Davey* (1885), 30 Ch. D. 574; Halsbury's Laws of England, Vol. 28, p. 48, sec. 93, p. 207, sec. 415. As to the property being mixed up see *In re Hallett's Estate* (1879), 13 Ch. D. 696 at p. 709.

J. W. deB. Farris, K.C., for respondent: The trial was on the issue as to whether Harnam Singh was a partner. On the question of trusteeship there is no proof that the defendant had any knowledge of it, and it was never pleaded. There was no proof of dissolution of the partnership and there is no allegation of dissolution. The partners never consented to the transfer of Sheam Singh's interest and the plaintiff has no *status* to bring this action.

Matheson, for respondent Sheam Singh: The pleadings disclose no cause of action against us.

Mayers, in reply, referred to *W. H. Malkin Co. Ltd.* v. *Crossley* (1923), 32 B.C. 207 at p. 209; *Loveridge* v. *Taylor* (1896), 17 N.S.W.L.R. 50; *In re Steel Wing Company* (1921), 1 Ch. 349 at p. 355.

Cur. adv. vult.

10th June, 1932.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: Five East Indians entered into a

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partnership on equal terms under written agreement of the 16th of October, 1916, which contained the following articles:

10. No partner of the firm shall be entitled to sell his share of the partnership without the consent in writing of the other partners and it is hereby agreed that if a sale by one partner of his interest in the firm be approved by the other partners the purchaser shall become a partner and entitled to the same rights and privileges and subject to the same liabilities as if he were one of the parties hereto.

11. Upon the dissolution of the partnership the property of the firm shall be realized and the proceeds thereof applied in paying the debts and liabilities of the firm and then in paying to each partner his share of the balance thereof.

The partnership was to be for five years but it was carried on until the transfer of the assets to the limited company on December 3rd, 1924.

On the 2nd of October, 1917, one of the partners Sheam Singh otherwise known as Shiam Singh sold to one Inder Singh two-sevenths of his interest in the partnership without the consent in writing or otherwise of his co-partners and on the 19th of July, 1920, Inder Singh assigned this interest to the plaintiff. It is on this title that the plaintiff founds his action and, *inter alia,* claims an accounting from the Mayo Lumber Company and from the limited company.

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As between himself and his co-partners Sheam Singh's sale was a nullity since it was prohibited by the partnership agreement. It is, however, good as between Sheam and Inder.

Before the sale of the assets of the Mayo Lumber Company to the incorporated company, Mayo Singh in October, 1921, obtained from Jawalla Singh his share in the company and also received a power of attorney from Sheam Singh authorizing him to dispose of that partner's further interest in the assets. He also obtained from Doman Singh a similar power of attorney to dispose of his interest. Thus Mayo Singh became by said purchase and said powers of attorney, along with the remaining partner Kapoor Singh, in control of the partnership and its assets with power to transfer them to the incorporated company. That company paid for these assets with shares in the company.

I think, therefore, that the plaintiff had no interest whatever in the Mayo Lumber Company, except as hereinafter mentioned, nor in the limited company when those assets were transferred. There is nothing in the case to shew that the covenant in article

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10 of the partnership deed was ever repealed or modified. It is true that one or two of the partners acted in contravention of it but without the consent of the other partners in writing or otherwise.

The situation, therefore, is that the plaintiff appears to own as against Sheam Singh a two-sevenths' interest in Sheam's share. There is nothing on which Sheam could be constituted trustee for the plaintiff. The plaintiff is a mere assignee of an interest in Sheam's share. He was not a partner. He was not a partner in the partnership company, nor a shareholder in the incorporated company.

The appellant does not ask for relief against Sheam Singh in his notice of appeal, except as trustee which he is not. As a partner plaintiff has no legal claim to an account by the defendants. By section 34 of the Partnership Act, however, the application of which to this case is denied by the plaintiff, the assignee of a partner's share is entitled, after dissolution, to an account by the partnership of that partner's share. As set out above there was, I think, a dissolution. If there was not a dissolution then nothing further need be said on the subject I am now dealing with. The plaintiff, therefore, may have been entitled to an account from the partnership under said section 34 but he has not pleaded that relief, nor asked for it in his notice of appeal. The assignor Sheam Singh is a defendant in this action and by paragraph 16 of the statement of claim the plaintiff alternatively alleges that Sheam Singh is a trustee for him of an undivided one-twenty-third interest in the co-partnership and in the limited company, and asks for an account by the defendants of the profits of said interest. This pleading is not in accordance with his right under said section 34. The defendant Sheam Singh in his statement of defence denies privity between himself and the plaintiff and denies any present interest in the partnership or in the company. He is now residing and has for years been residing in India and disclaims any interest in this dispute and denies that the plaintiff has any cause of action against him. The only claim made against him either in the pleadings or in the notice of appeal is that he is trustee for the plaintiff but the plaintiff has entirely failed to prove that he holds any money or land in trust for him. There

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was no accounting between himself and his co-defendants and it is not shewn that there is anything of which he could be a trustee for the plaintiff.

An amendment was not asked for and I do not think that we ought now to amend so as to set up the plaintiff's real right of action, if any, against the defendants. It would mean a trial of the new issue and the incurring of a large amount of additional expense caused by the plaintiff's failure to set up his true cause of action in the first place.

MACDONALD, C.J.B.C.

The appeal should therefore be dismissed.

MARTIN, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This is a most complicated case and I cannot help observing that the case which is attempted to be made out by the appellant is wholly unsupported by the necessary evidence. Try as one can to unravel the chain of events and alleged agreements as between the parties it is always profitless and leads to no real result and fails to establish that the appellant has any enforceable action at law as against any one or more of the parties to the action. The evidence is left in a most inextricable state and it is impossible to found any judgment thereon. It occurs to me that the appellant in view of the state of matters might well have been advised to accept the shares in the corporation which were tendered to him. Certainly no case is made upon the facts as I read them notwithstanding the persuasive argument of Mr. *Mayers* the learned counsel for the appellant. I am, therefore, of the opinion that the learned trial judge (MORRISON, C.J.S.C.) rightly—after hearing the voluminous evidence and seeing the witnesses—dismissed the action. It is not possible to take a different view. The onus was upon the appellant to make out his case and in this he woefully failed.

The appeal, in my opinion, should be dismissed.

MACDONALD, J.A.

MACDONALD, J.A.: On October 16th, 1916, a partnership known as the "Mayo Lumber Company" was formed by an agreement in writing executed by five East Indians, *viz.*, Kapoor Singh, Mayo Singh, Doman Singh, Sheam Singh and Jawalla Singh to carry on the business of lumber and shingle manufac-

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turers. The agreement provided for a working capital of $20,000 to which each partner should contribute equally. It also stipulated that "the property of the business shall belong to the partners equally." A further clause provided that:

No partner of the firm shall be entitled to sell his share of the partnership without the consent in writing of the other partners and it is hereby agreed that if a sale by one partner of his interest in the firm be approved by the other partners the purchaser shall become a partner and entitled to the same rights and privileges and subject to the same liabilities as if he were one of the parties hereto.

On October 15th, 1921, Jawalla Singh for the consideration of $2,000 by agreement transferred to Mayo Singh all his interests in the partnership. Mayo Singh also apparently acquired the interest of Doman Singh in 1921.

The appellant herein acquired his interest in the following manner:

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By agreement of October 2nd, 1917, Sheam Singh, for the consideration of $1,000 transferred to one Inder Singh a two-sevenths' part of his interest in the capital and profits of the Mayo Lumber Company partnership and on the 19th of July, 1920, for the sum of $2,000 Inder Singh transferred the said two-sevenths' interest to this appellant. Sheam Singh also apparently disposed of his remaining interest in the partnership in parts to various other parties. This purchase of a part of Sheam Singh's original share did not make the appellant a partner in the business of the Mayo Lumber Company. He only became the assignee of a part interest. In any event appellant could not become a member of that company. As assignee of a part of Sheam Singh's share he could only look to him for his share of the profits, etc. There is some reference in the evidence to a further investment by appellant of $700—an alleged half-interest with Sheam Singh—but as there is no claim in the pleadings in respect thereto (it is confined to a one-twenty-third interest of the whole or two-sevenths of Sheam Singh's share) and his counsel at the trial stated that "there is no such claim," thus closing the door to further possible inquiries, it should not be considered.

Appellant alleges by his statement of claim that because of the foregoing events he became (or was admitted as) a partner of the Mayo Lumber Company, to the extent of a one-twenty-

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third part share or interest therein. There is, as already intimated, no basis in law for this claim. On November 21st, 1924, Mayo Lumber Company, Limited (one of the respondents) was incorporated with a capital of $100,000 divided into 1,000 shares of $100 each and on the 3rd of December, 1924, the respondents Mayo Singh and Kapoor Singh, described as "carrying on business under the firm name and style of Mayo Lumber Company," in consideration of $70,000 (700 shares of $100 each) trasferred by bill of sale to the lumber company all the goods, chattels and personal property hitherto owned by the partnership including sawmill plant, machinery, lumber (except one 50-ton Shay locomotive and one (11 x 14) donkey-engine (Empire). Mayo Singh and Kapoor Singh were apparently in sole control over these assets when this bill of sale was executed. The remaining original partners either surrendered their interests or sold out to Mayo Singh and Kapoor Singh. The whole 700 shares were allotted to Mayo Singh and Kapoor Singh plus two other shares which they purchased as incorporators. The two last-mentioned chattels excepted from the bill of sale were by resolution transferred to the incorporated company by the partnership (Kapoor Singh signing as manager) on October 29th, 1925, for the purchase price of $29,800 to be paid by the allotment of 298 fully-paid shares, 268 of which were to be delivered to various allottees while the remaining 30 were to be reserved and held presumably for the appellant in satisfaction of his interest. A certificate for these 30 shares was issued by the company to the appellant and at the same time and to be executed contemporaneously with delivery of the shares a release was prepared to be signed by appellant acknowledging that the receipt of the 30 shares would be in full settlement for "what share or interest [he] had in the Mayo Lumber Company before incorporation." This appellant refused to execute and the 30 shares were returned by him.

Appellant issued a writ against the respondents in September, 1925, and by endorsement asked for a declaration that "he is the owner of two-thirty-fifths' share or interest in the partnership business of the Mayo Lumber Company. It is obvious that he never had a share or interest in the business as such (he is the assignee of part of a partner's interest) and the action in

this respect was misconceived. He also asks "for an account of the partnership business" and "dissolution and winding-up of the said partnership business." It is obvious that, as assignee, he cannot "interfere in the management or administration of the partnership business or affairs or require any accounts of the partnership transaction" (R.S.B.C. 1924, Cap. 191, Sec. 34 (1)); and equally obvious that until dissolution he cannot have the more limited accounting provided by section 34 (2). Far from alleging dissolution he asks the Court to order it.

This material misconception as to the nature of his rights and the relief, if any, to which he is entitled persists in the statement of claim. He alleges (par. 4) that the five men who entered into the partnership agreement of October 16th, 1916, had "interested with them other members of their countrymen who had subscribed money to the partnership funds and that the prohibition in the partnership agreement against transferring shares without the consent of the remaining partners was abandoned. All this is contrary to the true facts. Neither the appellant nor "other members of their countrymen"—all assignees of individual shares—subscribed to the "partnership funds" and even if they did no consent was obtained. The allegation in paragraph 5 too is equally without basis in fact.

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Paragraph 6 alleges that these assignees were not in fact assignees of individual shares but subscribed to the partnership capital and "were recognized as having an interest in the partnership business." Paragraph 7 recites the manner in which appellants' predecessor in title acquired his two-sevenths' interest from Sheam Singh, an original partner, on October 2nd, 1917, and alleges that by reason thereof Inder Singh acquired a one-twenty-third interest "in the whole partnership business." That is not so. Paragraph 8 alleges that appellant "advanced money" to Sheam Singh "for the purpose of the partnership business" (for aught we know a loan) and also purchased "the said one-twenty-third part in the said partnership business owned by the said Inder Singh, [referred to in the last paragraph] and all accrued profits . . . accruing to . . . Inder Singh from the 2nd day of October, 1917" for $2,000 and "the said plaintiff [appellant] was thereupon admitted to the said partnership to the extent of a one-twenty-third part share of

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interest therein." No attempt was made, or could be made to support this allegation. It is an additional misconception of the true situation.

Then follows a narrative of the transfer of the assets of the partnership by the respondents—Kapoor Singh and Mayo Singh —to the incorporated company with an allegation of fraud in respect to which no evidence was offered and it is again reiterated in paragraph 11 that the appellant was "a member of the said partnership and the owner of a one-twenty-third share therein." Paragraph 12 simply outlines the share consideration for the transfer to the limited company while paragraph 13 alleges that this transfer was fraudulent and void as against the appellant because it was carried out without the knowledge or consent of one of the partners, *viz.*, the appellant. This too is beside the mark. In paragraph 13 he alleges that he frequently requested an accounting and particularly on the 10th of June, 1925, from "the Mayo Lumber Company" (*i.e.*, the partnership) of the "assets and liabilities and profits of the partnership business since the 22nd day of October, 1917." This too is on the basis that he was a partner. He cannot mean an assignee's accounting as that arises only upon dissolution. Before that event he must look only to his vendor and "must accept the accounts of profits agreed to by the partners (section 34 (1)).

Paragraph 16, the final paragraph, contains the only material and relevant allegations affecting however only the respondent Sheam Singh, separately represented on this appeal and in the action. Alternatively he claims a declaration that the latter was a trustee for him of an undivided one-twenty-third interest in the said co-partnership and asks for an accounting of the profits of the interest. This will be briefly dealt with later as a separate claim.

In the prayer appellant asks for a declaration that he was the owner of a one-twenty-third share or interest in the business of the partnership and in the profits thereof since October 2nd, 1917. What he should ask for is to receive the share of profits to which his vendor was entitled on the basis of no dissolution; or the share of the partnership assets to which his vendor was entitled as between the latter and the other parties on the basis that dissolution took place when the partnership assets were

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transferred to the limited company. He asks therefore for a declaration to which he is not entitled. Alternatively he asks for an accounting as against Sheam Singh. This demand must be confined strictly to the two parties immediately concerned, *viz.*, appellant and Sheam Singh, leaving aside the intervention of Inder Singh. He asks for a declaration that the transfer to the limited company was fraudulent and void: for an account "of the partnership business" an order that the "partnership business be wound up" and an injunction, damages for trespass and damages for conversion.

I have taken the trouble to analyze the statement of claim because (apart from the allegations against Sheam Singh) we are virtually asked on this appeal to disregard it (counsel for the appellant insisted at the trial that the pleadings must be adhered to) and based upon the true facts disclosed in evidence —facts necessarily elicited in the light of the pleadings as framed—grant to appellant the relief, not that he claimed but rather the relief he should have claimed. Courts are naturally reluctant to withhold relief warranted by the true facts and at times overlook an erroneous plea if satisfied no prejudice would result and that all the facts have been brought to light. There must however be some limit to this indulgence. The appellant's case was a comparatively simple one. He never was a partner and therefore wholly misconceived his rights. He should have alleged that he was the assignee of part of a partner's share; that the partnership was dissolved by the transfer of assets to a limited company or by deed or otherwise; that he was entitled to receive the actual share of his assignor in the partnership assets irrespective of any dealing in the partnership assets as between his vendor and the other partners among themselves or by transfer to a joint-stock company; that the remaining partners had knowledge of his interest and that he was entitled to an accounting from the date of dissolution to ascertain the value of his assignor's share. This is the case now presented for the first time on appeal without any request for an amendment of the pleadings. It means that appellants should be permitted to assert one cause of action at the trial and having failed to establish it, prosecute on appeal a second, and entirely different cause of action and compel the respondents to meet it with evidence

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adduced in defending the first case put forward. I do not think we can ignore so complete a departure from the pleadings.

It was urged that we have all the facts (on that point I am not fully satisfied) and that we should apply the principles outlined in such cases as *Watts* v. *Driscoll* (1901), 1 Ch. 294 and *Whetham* v. *Davey* (1885), 30 Ch. D. 574; and give effect to the provisions of section 34 of the Partnership Act. On the question of knowledge, in view of the denials of the respondents, Mayo Singh and Kapoor Singh, and the fact that the point was not material on the action as framed and tried, I would hesitate to hold that they or either of them acting for the partnership had notice of the appellant's interest as assignee. They may have only known that all the original partners (like themselves) transferred part of their shares without receiving information as to the circuitous dealings of each partner (including Sheam Singh) with their shares; or possibly ascertained the true facts, as they say, only after the lumber company was formed when they reserved 30 shares for the appellant in respect to his interest. We should not make such a finding at this stage on a point that should have been pleaded so that evidence might be directed to that issue. On the question of dissolution the same observations apply. It is doubtless true that the partnership was dissolved when all but a few of the assets were transferred to the Mayo Company Limited (*Loveridge* v. *Taylor* (1896), 17 N.S.W. L.R. 50) and that the later transfer represents only the continuance of the partnership to complete transactions begun but not finished at the time of the dissolution (section 41). Far, however, from alleging it, the appellant asks in his writ not only for a winding-up order but for dissolution.

As to the respondent Sheam Singh the plea in paragraph 16 of the statement of claim would appear to be sufficient and ordinarily appellant would be entitled to relief as against him under section 34 (2) of the Partnership Act. But although the evidence of the respondent Sheam Singh was taken on commission in India it was not directed to this point. The same observation applies to the evidence offered at the trial on appellant's behalf. This claim was not litigated. Appellant does not shew that this respondent failed to account to him for any profits

received or that he has in his hands as trustee any money belonging to appellant.

I would dismiss the appeal.

Appeal dismissed.

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HARNAM SINGH v. KAPOOR SINGH

Solicitors for appellant: *Courtney & Elliott.*

Solicitors for respondents (other than Sheam Singh): *Farris, Farris, Stultz & Sloan.*

Solicitor for respondent Sheam Singh: *Mackenzie Matheson.*

OVERN v. STRAND *ET AL.*

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Practice—Costs—Taxation—Judgment against all defendants with costs—No apportionment by taxing officer—Item 13 of Appendix "N"—Distribution.

In an action for tort against four defendants, who defended separately, the formal judgment, as to costs, restored by the Supreme Court of Canada, read, "That the defendants do pay to the plaintiff her costs of this action, such payment to be made forthwith after taxation." On the taxation it appeared that the costs of the action had been augmented by certain proceedings taken by individual defendants and not joined in by the others. The taxing officer allowed against all the defendants the costs occasioned by them all and segregated and apportioned the special costs occasioned by the acts of the individual defendants to the defendant who occasioned same.

Held, affirming the decision of MORRISON. C.J.S.C. ((1930), 42 B.C. 358), that the taxing officer has no right to go behind the directions contained in the judgment. If any apportionment or segregation is to be made it should be set out in the judgment.

On the contention by defendants that four items in the plaintiff's bill, namely (1), fee on motion for enlargement of trial; (2), fee on motion for trial by jury; (3), process for setting down for trial in June; and (4), process for setting down for trial in September, were all covered by item 13 of Appendix "N" and carried only the one fee:—

Held, that item 13 should be read distributively and that the four items were allowable (MACDONALD, C.J.B.C. dissenting).

Bradshaw v. *British Columbia Rapid Transit Co.* (1927), 38 B.C. 430, approved.

APPEAL by defendant, Hudson's Bay Company, from the decision of MORRISON, C.J.S.C. of the 17th of February, 1930

Statement

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(reported, 42 B.C. 358), on appeal from the taxation of costs in the action. The judgment in the action provided that the defendants do pay to the plaintiff her costs of this action forthwith after taxation, and the judgment of the Supreme Court of Canada provided that the appellant (plaintiff) was entitled to her costs throughout against all the defendants. The registrar's certificate recited that the plaintiff's costs against all the defendants jointly were allowed at $1,731.30, that the plaintiff's extra costs against all defendants except the Hudson's Bay Company were allowed at $100.30, that the plaintiff's extra costs as against the defendant Strand alone were allowed at $151.20, and the plaintiff's extra costs as against *Wilson & Wilson* alone were allowed at $125.

Statement

The defendants further claimed that four items, namely: 1. Fee on motion for enlargement of trial $50; 2. Fee on motion for trial by jury $75; 3. Process *re* setting down for trial in June $75; 4. Process setting down for trial in September $75; should all be included as one item and $75 only be allowed under item 13 of Appendix "N"; further, that the general costs of the action including counsel fees, should be apportioned as between the respective defendants. The plaintiff claimed by cross-appeal that the registrar having taxed the plaintiff's costs of action at $2,107.80 had no power to apportion said costs amongst the several defendants and should have certified that the defendants were liable for the full sum instead of apportioning them. The appeal of the Hudson's Bay Company was dismissed and the plaintiff's cross-appeal was allowed by MORRISON, C.J.S.C. giving the plaintiff the costs of the action against all the defendants. The Hudson's Bay Company appealed on the ground that the costs should be apportioned as to the Hudson's Bay Company according to the issues raised by the company.

The appeal was argued at Victoria on the 4th of July, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Ghent Davis, for appellant: That the costs should be segregated between the defendants according to the issues in which each are involved see *Stumm* v. *Dixon* (1889), 22 Q.B.D. 529;

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Merchants Bank v. *Houston* (1900), 7 B.C. 352; *Hobson* v. *Sir W. C. Leng & Co.* (1914), 3 K.B. 1245; *Overn* v. *Strand* (1930), 42 B.C. 358. In the case of a solicitor acting without authority see *Newbiggin-by-the-Sea Gas Company* v. *Armstrong* (1879), 13 Ch. D. 310; *Nurse* v. *Durnford* (1879), *ib.* 764.

J. A. MacInnes, for respondent: When the formal judgment says "costs of action" there is no apportionment by the taxing officer: see *Overn* v. *Strand* (1931), S.C.R. 720 at p. 734; *Ingram & Boyle, Limited* v. *Services Maritimes du Treport, Limited* (1914), 3 K.B. 28. The taxing officer cannot go behind the judgment: see *Fouchier & Son* v. *St. Louis* (1889), 13 Pr. 318. The Chancery rule, as declared in *Hobson* v. *Sir W. C. Leng & Co.* (1914), 3 K.B. 1245, applies in British Columbia. Item 13 of Appendix "N" is not inclusive but distributive, and does not include counsel fees: see *Bradshaw* v. *British Columbia Rapid Transit Co.* (1927), 38 B.C. 430.

Argument

Davis, replied.

MACDONALD, C.J.B.C.: I think on the question of the apportionment, which would be properly an apportionment between the parties, that the appeal should be dismissed.

On the other branch of the case, as to section 13, page 246, where it says, "All process relating to setting down actions for trial, adjournments, change of venue, jury applications, record for judge, subpœnas for witnesses, and jury process, consultations preparatory to trial, and advising on evidence," shall be taxed at $75, it seems to me that that was intended to include all those, whether done once or a second time. In that case the appeal should succeed. And that has relation to all the parties. That could be taxed against all the defendants, and once and for all. It seems to me that that is the proper construction of that section 13. And that therefore the appeal should be allowed as to that item. To the extent of $75 the appeal should be allowed, and the other should be dismissed.

MACDONALD, C.J.B.C.

MARTIN, J.A.: In my opinion the appeal should be dismissed in regard to all the items with respect to which Mr. *Davis* very nicely presented his point. I do not think, having regard to the circumstances of this case, and the way that the issues here were brought in controversy by the present respondent, that the case

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of the *Merchants Bank* v. *Houston*, a decision of my brother DRAKE (1900), 7 B.C. 352, stands in our way. And the other points are disposed of by the form of the formal judgment in the Supreme Court of Canada, and the formal judgment in the Court below.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the opinion the appeal should be dismissed. In the first place, I think it is well that there should be uniformity in practice. And in regard to that we have a judgment here of the Chief Justice of the Supreme Court, and we also have a judgment of Mr. Justice D. A. MCDONALD, which deals with the question. And then we have the judgment of the Supreme Court of Canada, which imposes throughout all costs upon the defendants jointly. As it is the duty of the Court below to carry out the judgment of the Court above, it seems to me that this is not a case for any alteration of the declared imposition of costs, in truth there is no jurisdiction in this Court to do so.

In my opinion the appeal should be dismissed.

MACDONALD, J.A.

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

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

Solicitors for appellant: *E. P. Davis & Co.*
Solicitors for respondent: *MacInnes & Arnold.*

LOCKETT v. SOLLOWAY, MILLS & COMPANY LIMITED.

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

1932 July 25.

LOCKETT v. SOLLOWAY, MILLS & CO. LTD.

Practice—Costs—Appeal to Supreme Court of Canada—Deposit of security for respondent's costs—Abandonment of appeal and respondent's costs thereof paid—Application by respondent for charging order or deposit for security—R.S.B.C. 1924, Cap. 136, Sec. 104.

The defendants' appeal to the Court of Appeal, having been dismissed, an appeal was taken to the Supreme Court of Canada and $500 was paid into Court as security for the respondent's costs of appeal. The appeal was subsequently dismissed for want of prosecution and the respondent's costs thereof were paid by the appellants. On an application by respondent's solicitor for a charging order on the $500 so deposited, basing his claim upon section 104 of the Legal Professions Act:—

Held, that this sum was paid into Court for a special purpose, and that purpose having been satisfied in full, the appellants are entitled to a return of this sum.

Statement

APPLICATION by respondent's solicitor for a charging order on $500 deposited by the appellants as security for respondent's costs on appeal to the Supreme Court of Canada. After the appellants had given notice of appeal to the Supreme Court of Canada and paid the $500 into Court as security for the respondent's costs, the appeal was dismissed for want of prosecution and the respondent's costs were paid by the appellants. The respondent's claim was based on section 104 of the Legal Professions Act. Heard by MACDONALD, C.J.B.C. in Chambers at Victoria on the 15th of July, 1932.

G. L. Fraser, for the application.
W. B. Farris, K.C., contra.

25th July, 1932.

Judgment

MACDONALD, C.J.B.C.: Judgment was recovered by the respondent Lockett against Solloway, Mills & Co. Ltd., appellants, for a large sum of money. On appeal the Court of Appeal dismissed the appeal with costs whereupon an appeal was launched to the Supreme Court of Canada and $500 was paid into Court by the appellants therein as security for the respondent Lockett's costs of appeal. The appeal was subsequently

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dismissed for want of prosecution and the respondent's costs thereof were paid by the appellants.

This is an application by respondent's solicitor for a charging order on the said deposit for security in favour of said solicitor for his costs in the Court of Appeal. The applicant bases his claim upon section 104 of the Legal Professions Act, Cap. 136, R.S.B.C. 1924, in the argument, but relied also upon the principles of equity.

By said section 104 the solicitor employed in a cause is given a charge upon the property recovered or preserved by his efforts for his costs in the Court in which it was recovered or preserved and the Court or a judge may make an order for payment of such costs out of the property so recovered or preserved. The said section differs from the corresponding English section 28 of the Solicitors Act which gives only the right to apply, while our section gives what is tantamount to a lien—a distinction of some importance in many cases but of no importance in the present one.

Judgment

Did the respondent's solicitor "recover or preserve" the said security for costs within the meaning of said section 104? I think clearly not. It was paid in for a special purpose and that purpose has been satisfied in full and the appellants are entitled to take it out. It has not been recovered or preserved for or to respondent by his solicitor—*In re Wadsworth. Rhodes* v. *Sugden* (1885), 29 Ch. D. 517, and *The Dirigo* (1920), P. 425.

Under the said section 104 the applicant therefore has no claim upon this fund.

I think I ought to refer to what took place upon the argument before me. The appellants' solicitor conceded that if the application had been made by the respondent himself for a charging order by way of equitable execution upon this fund his solicitor might have had a claim upon it, if the order were granted, and I understood appellants' solicitor to consent that the present application should be expanded to allow me to treat it in that way. He would then rely upon section 86 of the Winding-up Act, Cap. 213, R.S.C. 1927, as a bar to the applicant's relief. I cannot even for the saving of costs treat the matter in that way. It might raise several questions at present of no concern. It might also raise an issue between the liquidator of the appellant

company which is now being wound up and who is not represented here and the parties represented. I therefore refrain from considering that phase of the matter at all. It is unnecessary now to do so. I express no opinion as to what the result ought to be if the respondent had obtained equitable execution and the applicant had applied for payment out of that fund, and I express no opinion one way or the other upon the construction of said section 86 of the Winding-up Act. The application is therefore dismissed with costs.

Application dismissed.

MATTHEWS v. THE CONTINENTAL CASUALTY COMPANY.

Insurance, accident—Time indemnity—"At once and continuously after the occurrence."

The plaintiff, insured under an accident policy of the defendant company, was wholly disabled by an accident to his knee on April 9th, 1930. The "total loss of time" clause of the policy provided that "If injury such as is before described shall at once and continuously after the occurrence of the accidental event wholly disable the insured from performing each and every duty pertaining to his occupation the insurer will pay said accident indemnity for such period, not exceeding five years, as the insured shall be so disabled after the first three days." Immediately after the accident the plaintiff was taken to the hospital at Campbell River and wholly prevented from working until May 19th when he tried to get work, and on June 1st he commenced working in a logging camp where he remained three weeks as a signalman at full pay, but finding his knee gave him pain necessitating first aid treatment every night, he returned to his home in Vancouver, and entering the General Hospital was operated on, a dislocated cartilage being removed from his knee, and he was wholly and continuously disabled until October, 1931, when he was recommended to the Workmen's Compensation Board as fit for light work. On May 22nd, 1930, the plaintiff had been paid the full amount of indemnity then earned and gave the company a receipt and release in full of all claims with respect to the injuries sustained on April 9th, 1930. When in the Vancouver General Hospital he made a further claim which the com-

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pany rejected. In an action on the policy the plaintiff obtained judgment as and for a continuous total disability.

Held, on appeal, reversing the decision of FISHER, J. (MCPHILLIPS, J.A. dissenting), that the plaintiff's claim for further payments under the policy did not fall within the words "at once and continuously after the occurrence of the accidental event" and the appeal should be allowed.

Statement

APPEAL by defendant company from the decision of FISHER, J. of the 1st of March, 1932, in an action to recover $1,080 under an accident-insurance policy. The defendant company insured the plaintiff on the 1st of April, 1930, in the principal sum of $500 with accident indemnity at the rate of $60 per month. The plaintiff worked for a lumber company, and on April 9th, 1930, when running, he slipped and struck his knee on a log, injuring it. He was taken to a hospital at Campbell River, and on the 16th of May following was examined by a doctor of the Workmen's Compensation Board who pronounced him sufficiently well to go to work on May 19th. On May 22nd he received a cheque from the defendant company for $72 with a memorandum which the company asked him to sign and return, relieving the company from further liability as to the injured knee, which he signed and returned to the company. He went to work again during the first week in June, 1930, but his knee troubled him and after working for three weeks he returned to Vancouver where he was again examined by the Workmen's Compensation Board doctor who advised examination by another doctor. He was then examined by Dr. Peter McLennan, who operated on his knee removing a dislocated cartilage. He was then in the hospital until the following September and continued under disability on crutches until April, 1931. When insured the plaintiff was seventeen and one-half years old and it was a term of the policy that the insurance under it should not cover any person under the age of 18 years or over the age of 65 years, but the plaintiff advised the company's agent of his correct age at the time the said agent solicited for the policy. On the 22nd of April, 1931, the plaintiff repudiated the release that he signed as to further disability on the 22nd of May, 1930, and tendered to the defendant the sum of $72, the amount previously paid by the defendant to the plaintiff, but said tender was refused by the defendant.

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

Argument

P. J. McIntyre, for appellant: Respondent was disabled for five weeks and was then pronounced well when after being paid by the company and signing a release as far as his knee was concerned, he went back to work for three weeks before again complaining of his knee. The injury must be continuous. He accepted payment for injury up to the time he returned to work. He adopted the policy and having done so he adopts it in full: see *Smith* v. *United States Nat. Life & Casualty Co.* (1929), 281 Pac. 413; *Laventhal* v. *Fidelity & Casualty Co.* (1909), 98 Pac. 1075; *Doyle* v. *New Jersey Fidelity & Plate Glass Ins. Co.* (1916), 182 S.W. 944; *Vess* v. *United Benev. Soc. of America* (1904), 47 S.E. 942.

Bray, for respondent: The release given by the plaintiff at the time he received the company's cheque was signed by him on a mistake of fact. We submit the injury was continuous. The fact that he went back to work for three weeks after a doctor said he was well, did not break the continuity. Everything that happened after, including the operation, was a result of the first accident: see *Hooper* v. *Accidental Death Insurance Co.* (1860), 5 H. & N. 546; *Fidelity and Casualty Company of New York* v. *Mitchell* (1917), A.C. 592; Welford on Insurance, 2nd Ed., 265-6.

McIntyre, replied.

Cur. adv. vult.

4th October, 1932.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The plaintiff who was an infant, suing by his next friend, secured during infancy a policy of accident insurance from the defendants. He was injured by an accident and on the same day brought to the hospital in Campbell River from whence, after his recovery, he obtained employment similar to the employment he had before followed, namely, signaller in a logging camp, and at the current rate of wages. He performed his duties as such for three weeks when he was again sent to hospital (in Vancouver) suffering from synovitis, the result of the accident aforesaid. The company paid him in

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full for the time lost up to his discharge from the Campbell River hospital. He now claims further compensation for his suffering since his relapse for which the company does not admit liability. The policy sets forth the contract between the parties, shortly, as follows:

The insurance given by this policy is against loss of life, limb, limbs, sight or time [in this case it is loss of time] resulting from a personal bodily injury (suicide or self-destruction while either sane or insane not included) which is effected solely and independently of all other causes by the happening of an external, violent and accidental event, and for loss of time resulting from bodily sickness or disease.

Part II. of the policy contains this:

A. Total Loss of Time. If injury such as is before described shall at once and continuously after the occurrence of the accidental event wholly disable the insured from performing each and every duty pertaining to his occupation, the insurer will pay said accident indemnity for such period, not exceeding five years, as the insured shall be so disabled after the first three days.

It is this clause that the company relies on in its resistance to the claim. As I read that clause it means that if the injury shall at once and continuously after its occurrence wholly disable the insured from performing each and every duty pertaining to his occupation then he is entitled to claim indemnity.

MACDONALD, C.J.B.C.

The correspondence shews, first, Exhibit 4—plaintiff to defendants—plaintiff reports the injury to his knee and asks for a proper form of report. This is dated 10th March, 1929. He reports the injury as occurring on the 9th. On the 15th the agent of the company acknowledged receipt of the last letter, enclosing form of report which was duly made and of which no complaint appears. His physician made a report of which the important items are as follows. He says:

The patient will be able to work May 19th, 1930. Synovitis has now gone—still complains of ache in joint. No complications have arisen.

On the 18th of May plaintiff wrote to the agent:

Enclosed find form A filled out. Will return to work next week. All O.K. now. P.S. Please forward cheque to above address.

On May 22nd the agent enclosed draft for $72, the amount of indemnity then earned. He pointed out that unless care was taken synovitis was liable to develop again and disable upon slight strain. The draft for the indemnity was duly received by the plaintiff and paid and he writes acknowledging receipt:

In full payment, satisfaction and release of any and all claims that I myself, . . . now have or may hereafter have against said company,

under policy . . . for or on account of injuries or illness sustained by me on or about 9 April, 1930, and any loss that may hereafter result from said injuries or illness.

On the 27th of July, 1930, plaintiff wrote to the agent saying that:

After returning to work on June 27th, I worked for three weeks, and found I couldn't stand it any more so I came to town and saw another doctor who, on examining the knee said it would have to be operated on and sent me to the hospital as soon as a bed was available. While at work my knee slipped out of joint several times, and the knee was swollen up all the time I worked. I quit work on the 18th June.

This was replied to by the company who regretted that they could do nothing further in the way of indemnity since the matter had been settled up.

I may mention here that the company forwarded to the plaintiff a slip to be attached to the policy which says:

Notwithstanding the fact that I have heretofore suffered from synovitis left knee, I hereby agree that no indemnity of any kind or amount shall be payable to me or to my beneficiary under said policy for loss which results wholly or partly, directly or indirectly, from any disease of or injury to left knee in any form; this notwithstanding any provision there may be to the contrary in said policy contained. This agreement is executed by me in duplicate, one copy to be attached to the said policy as a part thereof, and the other to be retained by the company.

This is signed by the plaintiff on the 23rd of May, 1930. It was contended that this separate agreement is not binding upon the plaintiff because it was not part of the original policy. Without deciding that point, I shall confine my opinion to what is contained in the original policy itself and which has been quoted above. I shall treat the subsequent agreement as evidence only, and not as a contract. Having regard, therefore, to the policy itself, I cannot see how the plaintiff can succeed in this action. He was only entitled to succeed if his injury at once and continuously after the occurrence wholly disabled him from performing each and every duty pertaining to his occupation. Now as the correspondence shews he not only informed the defendant that he was on the 18th or 19th of May "Now O.K." but admitted in said subsequent agreement that no indemnity of any kind should become due to him from any disease of or injury to the left knee, the injury complained of. Not only was the plaintiff not wholly and continuously disabled from performing all work substantially essential to his duty or duties, but any part of such work, and he has proven that he was not so

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disabled by working at his occupation for three weeks for the usual remuneration and the evidence shews that he performed all his duties as a signalman during that time.

It is perhaps a commendable trait of human character to attempt to assist the unfortunate in a case of this kind, but the Court must and does remember that a contract between an individual and an insurance company is to be interpreted on the same principle as other contracts and that it is not permissible to strain a point in favour of a claim as against the company. Now it is difficult to imagine a clearer and more specific contract than the one here. It is fair and explicit in its terms and in no way ambiguous. The defendant company even warned the plaintiff against the possibility of future trouble in the knee, so that had he not been satisfied that he was entirely cured he should have remained in hospital until the cure was beyond question. The company naturally wished to avoid too early a return to work which might cause a relapse and therefore the policy was worded so as to exclude responsibility in a case of that sort. The agreement, however, between the parties should be construed in accordance with its terms and with fairest canons of construction without favour to either party.

The contract was made by an infant in his own name but no serious point was made of this by the defendant. The contract is not void but at worst might not be ratified at maturity but the company cannot complain of the defect of infancy and the plaintiff himself has taken the advantage of the contract and has received an indemnity under it. See section 95 (1) of the Insurance Act, since the argument cited to us, which sets the matter at rest.

The question was raised as to whether the policy was in effect at the time of the accident. That is to say whether it had been delivered to the plaintiff prior to that time. It is dated the 1st of April, and if it were not delivered before the accident objection to that has been waived by the company by paying an indemnity under it. Another question was also raised as to misrepresentation of the date of the plaintiff's birth. A mistake was unquestionably made with regard to that, but that mistake has, I think, also been waived by the payment of the indemnity; that as the learned judge found, being known to the defendant.

The learned judge appears to have found in plaintiff's favour on the ground that the subsequent agreement was entered into under a mistake of fact on the part of both parties. As I have already said I am not considering that agreement as a release, but merely as a piece of evidence. If it had not been made my decision would be the same, as it is now, that the plaintiff is not entitled to succeed, and that his action must be dismissed.

MARTIN, J.A.: By the terms of the accident policy in question the plaintiff was indemnified against accidental injury by the following relevant clauses in the policy:

A. Total Loss of Time. If injury such as is before described shall at once and continuously after the occurrence of the accidental event wholly disable the insured from performing each and every duty pertaining to his occupation, the insurer will pay said accident indemnity for such period, not exceeding five years, as the insured shall be so disabled after the first three days.

B. Partial Loss of Time. If injury such as is before described shall not at once wholly and continuously disable the insured but shall thereafter within ninety days wholly disable him, or shall, either at once after the injury or at once after a period of total disability, prevent him from performing work substantially essential to his duty or duties the insurer will pay one-half said accident indemnity for such period not exceeding six months as he shall be so disabled; . . .

MARTIN, J.A.

The question arises on the meaning and application of the words "continuously disable" in those clauses. It appears, briefly, from the evidence that the insured was wholly disabled by an accident to his knee at Campbell River, V.I., on the 9th of April, 1930, which caused him to go to the hospital there and wholly prevented him from working till the 19th of May at which time he tried to get work but was unable to do so till about the 1st of June when he worked in a logging camp at Port Renfrew, V.I., for about three weeks as signalman at the full pay then of $3.20 a day for that class of work, but finding in doing it that his knee gave him "considerable pain" necessitating "first aid treatment every night from the first aid man" he gave up that employment at the end of three weeks and returned to his home in Vancouver, and, at the suggestion of Dr. Nay, who had attended him in Vancouver in May after coming out of the Campbell River hospital, went, about the 25th of July, to see Dr. McLennan who sent him to the Vancouver General Hospital and operated on him on the 28th and removed a dis-

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located cartilage within the knee joint, with the result that he was further wholly and continuously disabled up to the 15th of October the following year, 1931, at which time Dr. McLennan recommended him to the said Board as fit for light work, and at the time of the trial he was still partially disabled but could do his old work as signalman under favourable conditions.

On the 18th of May, 1930, when in Vancouver, he wrote to defendant that " . . . Will return to work next week. All O.K. now": he explains that nevertheless he did have a pain in his knee but he thought he could go to work because Dr. Nay (who was also one of the Workmen's Compensation Board's doctors) had told him he was fit for it. In the report of the Lourdes Hospital surgeon at Campbell River, dated 18th April, 1930, wherein the insured was admitted on the 9th of April, it is stated:

Was the total disability immediate after the accident and continuous? Yes.

Is the assured yet totally unable to attend to any part of his usual duty? Yes.

If so, when should he be able for light duty? In about 4 weeks.

MARTIN, J.A.

He did not resume work till at least about six weeks thereafter, and he had left that hospital and returned to Vancouver on the 5th of May (Exhibit 6). Pursuant to the defendant's request that he should get a report from "your Doctor" he got one from Dr. Nay (Exhibit 6A) dated 16th May, which he sent in to the defendant, which acknowledged it on 22nd May (Exhibit 8), "as reported by your Doctor." In that report entitled "Attending Physician's Report of Injury," it is stated:

A. What phase of the injury is now preventing the patient from returning to work? Able to work May 19th/30. Synovitis has now gone—still complains of "ache" in joint.

B. What complications, if any, have arisen since last report? None.

C. Give dates of treatment since last report. May 5th, 12th, 16th.

D. If still disabled, on what date do you think he will be able to resume work? May 19th, 1930.

In his letter to defendant of the 27th of July, 1930, written from the General Hospital in Vancouver, he says:

After returning to work on June 27th I worked for three weeks, and found I couldn't stand it any more so I came in town and saw another doctor who, on examining the knee said it would have to be operated on and sent me to the hospital as soon as a bed was available. While at work my knee slipped out of joint several times, and the knee was swollen up all the time I worked. I quit work on the 18th June . . .

The plaintiff claimed and got judgment as and for a continuous total disability though the learned judge found as a fact that he

undoubtedly worked for some three weeks and obtained apparently the usual pay, but he says that he was receiving first aid treatment and was finding difficulty in his work. . . .

The learned judge was of opinion that "the continuity was not broken" by this period of work within "the reasonable interpretation of the clause," but, with every respect, I am unable after a consideration of the cases cited to us, to take that view of the matter, which is not in accord with said decisions, particularly that of the District Court of Appeal of California in *Smith* v. *United States Nat. Life & Casualty Co.* (1929), 281 Pac. 413, wherein several authorities are cited in support of its judgment the reasoning of which on a policy identical in essentials with that before us commends itself to my judgment at least. There the assured went back to his employment as a cement worker in the belief, based upon his doctor's opinion, that he had recovered from the effects of a dog-bite and worked steadily for a little over a month when he became ill and was taken to a hospital and died three days later from hydrophobia as the direct result of the dog bite. The Court was unanimous in the opinion that the contract had been broken saying, p. 414:

Respondent contends that because the effects of the hydrophobia were not made manifest until November 26, from which date the insured was totally disabled until his death, the conditions of the policy were substantially met. We cannot agree with this view. If Smith, urged on by a spirit of industry, had returned to his work for a few hours or even a day or two, but found the pain suffered or his incapacity to be such as to prevent his continuing at his employment, it might well be urged that the abortive attempt to resume his work did not preclude him from claiming a "continued total disability." Smith's total period of inability to work between the accident and his death was about seventeen days, while the period he did work and so far as the record shews, without any inconvenience or pain, was a period of five weeks. No reasonable interpretation of the language referred to can bring Smith's death within the terms of the policy.

Nor can it, to my mind, reasonably be said that in the circumstances at Bar the period of three weeks' return to work can be reasonably brought within the terms of this policy, and the principle involved is not altered by the fact that he had reason to believe he was fit for work based on the opinion of his own doctor, and that belief must have been speedily displaced, if his

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evidence is true, by the fact that he "had to have first-aid treatment every night" which should have warned him that it was dangerous to persist in the attempt to work even though he was "urged on by a spirit of industry" very laudable in itself, but nevertheless contrary to his contract of indemnity.

The case is an unfortunate one, but in law there is, in my opinion, no other course open to us than to allow the appeal and dismiss the action.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion this appeal should be dismissed. The learned trial judge arrived at the right conclusion upon the evidence as I view it. The American cases have been very much relied upon in this appeal. It would seem to be quite unnecessary to turn to other than our own authoritative decisions. The first case that would seem to me to fully support the judgment of the learned trial judge is *Hooper* v. *Accidental Death Insurance Co.* (1860), 5 H. & N. 546. There it was held that as the plaintiff was so disabled as to be incapable of following his usual occupation, business or pursuits he was "wholly disabled from following his usual occupation, business or pursuits" within the meaning of the policy. Here we have a young man under age suing by his step-father and next friend to whom an accident policy was issued by the appellant—who met with an accident and it would appear it was thought that he had completely recovered from the effects thereof—but as the learned trial judge has found that was not the case and a mistake of fact occurred. The appellant insists that because the young man mistakenly thought he was recovered and went to work that although it is now established he was not fully recovered that nevertheless all benefits under the policy are gone. I cannot but observe when reading the evidence in this case that it is a matter for comment that the appellant resists payment. The young man, to his credit, went to work in good faith but immediately it was shewn he was not able to work effectively. He struggled along for three weeks receiving first aid every day for some three weeks, when he was able to go to Vancouver by steamer. The medical evidence is complete upon this point and an operation had to be performed attributive solely to the accident. With regard to the claimed release given

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by the young man to the appellant that, in my opinion, is valueless in law; further it was given in the belief that he was fully recovered when it turned out not to be the fact. The learned trial judge upon the evidence, in my opinion, was fully justified in holding, as he did, that the young man was continuously after the occurrence of the accidental event wholly disabled and for a long time thereafter disabled from performing each and every duty pertaining to his occupation. The case of *Fidelity and Casualty Company of New York* v. *Mitchell,* in the Privy Council, is very much in point in this case ((1917), A.C. 592). There Lord Dunedin, at p. 594, said:

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> Before the trial judge the defendants, while admitting the notification of the accident, pleaded that if the accident had happened there had been complete recovery from its effects, or if there had not been complete recovery, that such non-recovery was due to inattention on the part of the plaintiff and a fraudulent design on his part to prevent the injury healing. These pleas were emphatically negatived by the trial judge, whose verdict on this matter was unanimously confirmed by the Court of Appeal; and they have not been insisted on before this Board.

Here we have the learned trial judge making his finding that there was no complete recovery. It is to be noted that the policy in the above case may be said to be in practically the same words as the policy sued upon in the present case. I would therefore dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: I am reluctantly forced to the conclusion that because of respondent's employment for three weeks as a signalman the continuity of disablement was broken and the appeal must be allowed.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellant: *P. J. McIntyre.*
Solicitor for respondent: *H. R. Bray.*

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RICHARDSON v. LOHN

RICHARDSON v. LOHN.

Mechanic's lien—Amendment of plaint—Trial—Amendment of affidavit of lien in accordance with amended plaint—R.S.B.C. 1924, Cap. 156, Secs. 19 and 20.

The plaintiff entered into a contract with the defendant for the building of a house, and in the course of construction certain extras were authorized and ordered by the defendant. The plaintiff filed an affidavit of lien for $393.17 for extras on the 10th of February, 1931. By order of the 4th of May following the plaintiff was allowed to amend his plaint claiming $590 under the contract and reducing his claim for extras to $288.17. On the trial the plaintiff applied to amend the affidavit of lien by claiming the amount set out in the amended plaint.

Held, that a substantial and not a meticulous compliance with the statute is required, the test being whether the parties concerned were misled in the circumstances. The onus as to prejudice is on the party objecting to the registered claim and as the evidence does not disclose that the defendant is prejudiced by anything contained in the claim, section 20 of the Act should be applied and the amendment allowed.

Statement

CONSOLIDATED actions to enforce mechanics' liens. The facts are set out in the reasons for judgment. Tried by ELLIS, Co. J. at New Westminster on the 26th of February, 1932.

Gibson, and *Wasson*, for plaintiffs.
H. M. Drost, and *Verchere*, for defendants.

2nd April, 1932.

ELLIS, Co. J.: This is a consolidation of a number of claims in mechanics' lien actions, and raises a question of considerable importance as to the powers of the Court under section 20 of the Act.

Judgment

The plaintiff Richardson, contractor, in his affidavit of lien sworn by him on the 9th of February, 1931, and filed pursuant to the Act on or about the 10th of February, 1931, claims a lien for $393.17 for labour and material supplied and furnished by him in connection with the construction of a dwelling-house for the defendant Ada Lohn. Richardson had a contract with the the said defendant and the amount claimed in the affidavit of lien is for extras.

By an order dated May 4th, 1931, the plaintiff was allowed

to amend his plaint by claiming $590 under the written contract he had with the defendant Lohn, and by reducing his claim for extras to $288.17, making a total claim of $878.17.

At the trial of the action, the plaintiff applied to amend the affidavit of lien by claiming for the amount as set out in the amended plaint.

Section 19 of the Act sets out the requirements of the affidavit. It shall state, in substance:

(*f.*) The particulars of the kind of works, services, improvements, or materials done, made, or furnished:

(*h.*) The sum claimed to be owing, and when due.

Section 20 enacts as follows:

A substantial compliance only with the last preceding section shall be required, and no lien shall be invalidated by reason of failure to comply with any of the requisites thereof, unless, in the opinion of the judge adjudicating upon the lien under this Act, the owner, contractor, sub-contractor, mortgagee, or some other person is prejudiced thereby, and then only to the extent to which he is prejudiced, and the judge may allow the affidavit, statement of claim, plaint, and summons to be amended accordingly; and may allow the addition or substitution of all proper parties to the claim of lien, and the action to enforce the same, although the time for filing the affidavit mentioned in the last preceding section or the time for instituting proceedings under section 23 has expired.

Judgment

A statute, like the Mechanics' Lien Act, gives a privilege in favour of the creditor, and in derogation of ordinary rights. Therefore a person claiming under the statute must bring himself strictly within its terms, and the statute cannot be strained in favour of a person claiming under it nor against those who must bear its impositions. This is a general and a well recognized principle.

Subsection (6) of section 23 of the Interpretation Act, R.S.B.C. 1924, Cap. 1, says:

Every Act and every provision or enactment thereof shall be deemed remedial, . . . and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of such provision or enactment, according to their true intent, meaning and spirit.

In *Douglas* v. *Mill Creek Lumber Co.* (1923), 32 B.C. 13, MARTIN, J.A. at p. 18 says:

It is now well established that in cases of this sort, at least a substantial and not a meticulous compliance with the statute is what the Court will require, the test being, were the parties concerned misled in the circumstances?

This was a case under the Woodmen's Lien for Wages Act

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which does not have a curative section such as the Mechanics' Lien Act.

In *Robock* v. *Peters* (1900), 13 Man. L.R. 124, Killam, C.J., at p. 141, after reciting the curative clause of the Manitoba Act, which is substantially the same as ours, says:

> First, only substantial compliance with sections 15 and 16 is required; and, secondly, no failure in such compliance, in however substantial a degree, is to invalidate the lien unless some party is prejudiced, provided there is registration of a claim. I think that the onus on the question of prejudice is upon the party objecting to the registered claim. The defect is not to invalidate the lien, unless, in the opinion of the judge, there is prejudice to some one. That is, the judge must positively form the opinion, for which purpose he must have some evidence, either direct or arising out of the circumstances and the nature of the defect.

The power of the Court to amend is very exhaustively dealt with by Turgeon, J.A., in *Fitzgerald and Powell* v. *Apperley* (1926), 2 W.W.R. 689. At p. 702, he says:

> The object of the Act is to provide that land shall bear the cost of improvements placed upon it by a contractor with the consent of the owner.

In discussing the question whether the curative section of the Acts should be limited or restricted in its application to remedy only such objections as may be classed as mere technicalities or informalities, or mistakes of procedure, the learned judge says, p. 704:

Judgment

> . . . the question still remains: what is a technicality, an informality, a mistake of procedure? This question, I think, can be answered only in the light of all the facts of each particular case.

He then goes on to point out that the Mechanics' Lien Act is a remedial measure, the provisions of which should be so construed as to ensure the attainment of its object, and that errors committed by one entitled to a lien in giving his notice to the public, which the registration of the claim for lien is, should be remedied when this can reasonably be done without prejudicing anyone's rights. The plaintiff's rights to realize upon the lien which the Act gives him should not be defeated on any but the most substantial grounds, when he has done nothing to prejudice the position of the other party.

The curative section of our Act is dealt with by SWANSON, Co. J., in *Dale* v. *International Mining Syndicate* (1917), 25 B.C. 1. The learned judge holds in that case that registration was obligatory under the Act, and follows what he considers is a principle to be implied from the decision of the Court of

Appeal in *J. A. Flett, Limited* v. *World Building Limited, and John Coughlan & Sons* (1914), 19 B.C. 73.

In this case, section 20 of the Act was not expressly dealt with. It was considered in *W. T. McArthur & Co.* v. *Mutual Life of Canada Insurance Co.* (1928), 39 B.C. 554. The Court of Appeal decided that while the judge may have had power to allow the amendment, the attempt to make it comply with the Act did not cure the objection to the lien claims. The old case of *Rafuse* v. *Hunter* (1906), 12 B.C. 126, is not of much assistance, as the judge decided that it was not a case of amending a lien that does not comply with the section, but is a creation of a new lien which the statute does not contemplate.

Now, what are the facts of the case of Bar? The plaintiff, under a written contract, was employed to construct and erect a dwelling-house upon the lands of the defendant Lohn. During the construction of the building, certain changes were authorized and ordered by Mrs. Lohn, or her husband with her knowledge and consent. These changes created extras for which the plaintiff is entitled to be paid. These extras while not part of the original contract, varied it in a number of particulars and the evidence clearly shews that Mrs. Lohn knew what was going on during construction as she lived close by and was constantly watching the building as it progressed.

Judgment

How, then, has she been prejudiced by anything contained in the registered claim of lien or omitted from it? She knew all along what was due the plaintiff. That is, she knew he had a claim under the contract and for extras.

It is contended by her counsel that the amendment if allowed sets up an entirely new cause of action, not contained in the affidavit of lien, and that the plaintiff must be confined to his claim for extras. This, I think, is fallacious. The real test is, what prejudice has been caused? I can find none, in so far as the defendant Lohn is concerned. The other defendant did not prove any.

Section 20 should be applied and the amendment allowed subject to the right of counsel for the mortgagee to shew that prejudice was proven at the trial, or that it should be concluded from the circumstances.

Under the terms of the contract, payment was to be made as

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follows: $300 to start building; $1,100 when the roof is on; $1,200 when the first coat of plaster is on; $500 when house is ready for finish; and the balance when the house is finished, a total of $3,950.

The evidence satisfies me that the plaintiff Richardson made a definite arrangement with Weeks, when he took over the work the latter had started, at the price of $260.65. This, with the cash payment of $40 made by the plaintiff, constituted payment of the first $300 under the contract, and was accepted by Richardson. The second payment made by the defendant Lohn was $140 and was made in September. The evidence given by Mr. Thomas on this point can bear no other construction. There is little dispute as to when the other payments were made. They were: $970, November 5th, and $1,500, November 26th.

One of the questions in dispute is how far was the work advanced when the payments were made? Richardson, in his direct evidence, says he started work on September 9th, the roof was on in the first week of October, the first coat of plaster was on the last of October, or the first of November, and the house was ready for finish about November 29th, a few days, he says, before he got the last payment. There is no doubt the last payment was, in fact, made on November 26th. There can be no doubt that he was paid $2,910 before the house was ready for finish. Under the terms of the contract, he was entitled to receive the sum of $3,100 when the house was ready for finish, a difference in the two sums of only $190.

The term "ready for finish," means when the second coat of plaster is on, and the house is ready to have the casings and the "base" boards put on, and to be finished. This is the plaintiff's own definition. He admits the plaster was not all dry, and he could not go ahead with all the finishing because of this.

In his examination for discovery, questions 165 and 166, he says he was putting on casings, waiting for the plaster to dry, trimming windows and gradually finishing.

The payments called for under the contract were made or substantially so. In fact, when the last payment was made in November, the plaintiff still had work to do before he was entitled to receive the payment of $1,500 made on November 26th.

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In November, the relations of all the parties were apparently amicable, and there was no evidence of any intention on the part of the plaintiff to abandon his contract, nor is any reasonable excuse or justification given for his so doing. He was not entitled to the $500 payment called for under the contract when he claims he was. After he received the last payment in November, he continued on his work in December, and worked in January as well as the weather conditions would permit. Then he threw up his contract, quit the premises, and took his tools away. Whether he did this because he was losing money on the contract, or whether it was because of a mistaken idea he was not being properly paid, is not clear. It is abundantly clear, however, that this abandonment was his own act, and was not justified under the terms of the contract. The situation thus created necessitated the defendant in making other arrangements to finish the house, which cost her more money.

Judgment

The extras claimed by the plaintiff are on a different footing. They were done at the request of the defendant and should be paid for. The evidence as to what work was done in January, and the exact date when the last work was done, was somewhat obscure and indefinite. Whether the last work done is done in good faith or as a pretext to revive a right to file a lien, is a question for the trial judge. *Sayward* v. *Dunsmuir and Harrison* (1905), 11 B.C. 375. I think there is sufficient evidence to draw a conclusion that work was done within the time provided by the Act to entitle the plaintiff to a lien for extras.

It is well established that the time in which sub-contractors are entitled to a lien is based on the main contract.

The plaintiff is entitled to a lien for the extras amounting to $237.37; against this the defendant is entitled to set off the sum which it cost her to complete the house by reason of the plaintiff abandoning the contract.

The remaining plaintiffs have satisfied me that they are entitled to the amounts claimed respectively by them, and there will be judgment accordingly.

Judgment accordingly.

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

1932

Sept. 26.

BLAND v. AGNEW

BLAND v. AGNEW.

Practice—Court of Appeal—Ex parte order for leave to proceed in forma pauperis—Application to set aside—11 Henry VII., Cap. 12—Whether in force—Court of Appeal Rule 21—R.S.B.C. 1924, Cap. 80.

On an application to discharge an order made *ex parte* for leave to proceed *in forma pauperis*:—

Held, that the order should be set aside as rule 21 of the Court of Appeal Rules excludes an application made *ex parte* to a judge.

Held, further, that chapter 12 of 11 Henry VII., being an Act "To help and speed poor persons in their suits," is in force in British Columbia by virtue of the English Law Act.

Statement

MOTION to set aside an *ex parte* order for leave to proceed *in forma pauperis*. Heard by MACDONALD, C.J.B.C. in Chambers at Victoria on the 19th of September, 1932.

O'Halloran, for the motion.
Beckwith, contra.

26th September, 1932.

Judgment

MACDONALD, C.J.B.C.: This is an application to discharge an order made by me *ex parte* in Chambers, on the grounds that the English statute 11 Henry VII., Cap. 12, is not in force here, and secondly that if it is, a judge in Chambers has no authority to make the order, or in any event not *ex parte*. I think the said 11 Henry VII. statute is in force here by virtue of the English Law Act, Cap. 80, R.S.B.C. 1924. It was argued that the procedure sections of that Act were not so introduced; that law and procedure were different things. I cannot agree with this in this connection. They are different branches of law but both are law.

Outside of said Act we have no substantive law or rules of procedure in this Province on the subject. The procedure in the Act so far as applicable to the conditions in British Columbia must be followed, and if any of them are inapplicable, which they plainly are, rules must be adopted by the Court which has inherent jurisdiction in analogy to the rules set out in the Act. In Manitoba the Courts held in two cases that the application may be made to a judge *ex parte*. In Alberta the same question

came up and a contrary conclusion arrived at, but only because of rules to the contrary in that Province.

The only rule here affecting the application in this Court is rule 21 of the Court of Appeal Rules, which although not passed with reference to an application of this character is general in its application and requires the application to be made on two clear days' notice when made to a judge. Rule 21, I think, would exclude an application made *ex parte* to a judge. I express no opinion as to whether it could be made to a judge even with notice. This application was properly made to a judge to set aside the *ex parte* order: Halsbury's Laws of England, Vol. 18, p. 218; *Daniel* v. *Clapham* (1877), 63 L.T. Jo. 7.

Judgment

I would, therefore, set aside the *ex parte* order without costs and allow this application without costs.

A substantive application may be made to the Court of Appeal and may be made *ex parte*: *Ex parte Goldberg* (1893), 1 Q.B. 417; *Handford* v. *George Clarke, Limited* (1907), 1 K.B. 181; *Merriman* v. *Geach* (1913), 1 K.B. 37. *Paul* v. *Chandler & Fisher, Ltd.* (1924), 2 W.W.R. 577 is one of the Manitoba cases above referred to and is a decision of the Court of Appeal.

Application granted.

MURPHY, J. (In Chambers)

1932

Sept. 29.

IN RE IMMIGRATION ACT AND SUE SUN POY

IN RE IMMIGRATION ACT AND SUE SUN POY.

Habeas corpus—Certiorari in aid—Warrant—Arrest—Proceedings based on section 26 of The Opium and Narcotic Drug Act, 1929—Applicability of Immigration Act—R.S.C. 1927, Cap. 93, Sec. 42—Can. Stats. 1929, Cap. 49, Sec. 26.

Applicant was arrested on a warrant after having been given his liberty on *habeas corpus* proceedings, following a previous arrest with a view to deportation under section 26 of The Opium and Narcotic Drug Act, 1929. On *habeas corpus* proceedings with *certiorari* in aid:—

Held, that as the return shews that the proceedings herein are based on section 26 of The Opium and Narcotic Drug Act, 1929, and only such provisions of the Immigration Act can be relied upon as section 26 makes applicable, and the provisions authorizing arrest contained in section 42 of the Immigration Act are inapplicable to proceedings under said section 26, there is no legal authority to issue the warrant under which the applicant is held and he is entitled to his liberty.

Statement

APPLICATION for a writ of *habeas corpus* with *certiorari* in aid. Heard by MURPHY, J. in Chambers at Victoria on the 28th of September, 1932.

O'Halloran, for the application.
Moresby, K.C., for the Crown.

29th September, 1932.

Judgment

MURPHY, J.: Application for *habeas corpus*. Applicant was at large when arrested on the warrant in question herein, having been given his liberty on *habeas corpus* proceedings following a previous arrest with a view to his deportation under section 26 of The Opium and Narcotic Drug Act, 1929. A cardinal principle of the British system of Government is that no man can be deprived of his liberty except by due process of law. In my opinion there was no legal authority to issue the warrant under which applicant is held and it is consequently a nullity. The return shews that it is issued in supposed pursuance of powers contained in the Immigration Act, but the return also shews that the proceedings herein are based on section 26 of The Opium and Narcotic Drug Act, 1929. That section is consequently the master section to be considered. Only such pro-

visions of the Immigration Act can be relied upon as section 26 makes applicable. The only portions of that Act so made applicable are those relating to inquiry, detention and deportation. The provision authorizing arrest contained in section 42 of the Immigration Act is consequently inapplicable to proceedings under said section 26. The applicant is entitled to his liberty. Counsel were prepared to argue numerous other points but, if my view of section 26 is correct the applicant must be set free so I considered it unnecessary to have such arguments proceed.

Application granted.

QUEEN INSURANCE COMPANY OF AMERICA v. HOFFAR-BEECHING SHIPYARDS LIMITED.

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Oct. 3.

QUEEN INSURANCE COMPANY OF AMERICA *v.* HOFFAR-BEECHING SHIPYARDS LTD.

Insurance, marine—Advances made to repair vessel—Part of price due—Insurable interest.

G., having contracted to tow certain logs for a company, entered into a further contract with the defendant company whereby the defendant agreed to construct a tow-boat to be used for the towing operations. As security for payment of the price of the boat (about $6,000), G. assigned to the defendant the moneys payable to him under the towing contract. On the 13th of June, 1928, G. was given possession of the boat and the defendant took out a policy of insurance on the boat with the plaintiff company. In November following the boat was damaged and the insurers retained the defendant company to make the repairs to the extent of $3,200, which amount the plaintiff paid the defendant under the insurance policy. At the time the boat was damaged G. still owed the defendant $2,000 on the purchase price. In June, 1929, G. paid for the boat in full and received from the defendant a bill of sale, the defendant up to that time being the registered owner thereof. In an action to recover the moneys paid under the insurance policy, on the ground that the defendant had no insurable interest in the boat:—

Held, that the defendant had an insurable interest and had a right to collect the insurance money for the benefit of itself and G. and the action should be dismissed.

Statement

ACTION to recover moneys paid under an insurance policy on a boat which was damaged, on the ground that the defendant

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QUEEN INSURANCE COMPANY OF AMERICA v. HOFFAR-BEECHING SHIPYARDS LTD.

had no insurable interest in the boat. The facts are set out in the head-note and reasons for judgment. Tried by MCDONALD, J. at Vancouver on the 30th of September, 1932.

Hossie, K.C., for plaintiff.
Burns, K.C., and *Lundell*, for defendant.

3rd October, 1932.

Judgment

MCDONALD, J.: In March, 1928, one C. R. Garner entered into a contract with Chehalis Logging Company Limited to tow certain logs and thereupon entered into a further contract with defendant company whereby the defendant agreed to construct a 35-foot tow-boat to be used in such towing operations. Garner, as security for payment of the price of the boat (some $6,000), assigned to the defendant the moneys accruing due to him under his contract with the logging company. On the 13th of June, 1928, the defendant gave to Garner possession of the boat, Garner signing the following receipt:

> Received from you today tow-boat "C. R. Garner" in good order at my risk from this date.

On the same day the defendant took out a policy of insurance upon the boat with the plaintiff company, the loss, if any, under that policy being payable "for the account of concerned." In November, 1928, the boat was damaged and the defendant company was retained (I assume) by the insurers to make repairs to the extent of $3,200, which amount the plaintiff paid to the defendant under its policy of insurance. At the time of the injury to the boat Garner was still indebted to the defendant on account of the purchase price in a sum exceeding $2,000. In June, 1929, when Garner had paid the full price of the boat, he received from defendant a bill of sale and registered same, the defendant up to that time having been registered owner of the boat.

The plaintiff now seeks to recover the moneys paid under the insurance policy taking the ground that the defendant had no insurable interest in the boat but that only Garner had a right to insure. This contention is to my mind absolutely untenable as the authorities cited by Mr. *Burns* amply shew the defendant clearly had an insurable interest and had a right to collect the insurance money for the benefit of itself and Garner or whoever

else might be concerned. See Marine Insurance Act, B.C. Stats. 1925, Cap. 21, Secs. 7, 9, 16 (2) and 28 (2). These sections are really but a codification of the common law as laid down clearly in *Lucens* v. *Craufurd* (1802), 3 Bos. & P. 75 and particularly *Clark* v. *Scottish Imperial Insurance Co.* (1879), 4 S.C.R. 192. With the greatest deference to counsel who contend otherwise it seems to me that the defendant in this case is in a much stronger position than was the respondent in the last-mentioned case. The action is dismissed.

Action dismissed.

REX v. ROOS.

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1932

Oct. 4.

REX *v.* ROOS

Criminal law—The Juvenile Delinquents Act, 1929—Exclusiveness of jurisdiction—Duty of judge of Supreme Court or Court of Assize—Can. Stats. 1929, Cap. 46, Sec. 9—Criminal Code, Sec. 1120.

Where a person charged with an indictable offence is brought before a judge of either the Supreme Court or a judge of Assize, and he establishes that because of his age The Juvenile Delinquents Act, 1929, confers exclusive jurisdiction upon the Juvenile Court, the only course open to the judge, where section 9 of the said Act does not apply, is to quash the charge and the Crown may take whatever steps it sees fit in respect to the matter.

Statement

APPLICATION to quash an indictment at the Assizes on the ground that there was no jurisdiction to deal with the offence, as owing to the age of the accused, the exclusive jurisdiction is visited in the Juvenile Court. Heard by MACDONALD, J. at Vancouver on the 4th of October, 1932.

Hogg, for accused.
Bull, K.C., for the Crown.

Judgment

MACDONALD, J.: Counsel for the accused applies to the Court to quash the "charge," on the ground that there is no jurisdiction in this Court to deal with the offence. The basis

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of the application is that, on account of the age of the accused, the exclusive jurisdiction is vested in the Juvenile Court, which I am informed exists at the town of Powell River. It is admitted that the accused Roos is within the age limit, as set by proclamation, that is, he is under the age of 18 years, and if so, in that event, section 4 of The Juvenile Delinquents Act, 1929, confers exclusive jurisdiction upon the Juvenile Court. The objection, therefore, seems to be well founded, as counsel for the Crown frankly admits. The question then arises what disposition I should make of this charge. I had in mind at first that section 1120 of the Criminal Code might be applied, because in effect, the accused person is seeking to be discharged, but on reconsideration I do not think that section is applicable. It reads in part:

Before a judge or criminal Court having jurisdiction in the premises by way of *certiorari*, *habeas corpus* or otherwise.

Judgment

I do not think the words "or otherwise" would be applicable under the circumstances. It is properly contended that I have no jurisdiction over the offence, sitting as a judge of either the Supreme Court or as a judge of Assize. It occurs to me, that the course I pursued in the *Rex* v. *Cardarelli* case (1929), 2 W.W.R. 223 might be followed. There again, however, at that time I was disposing of an application for *habeas corpus* so I had jurisdiction. What, then, is the result where a party, accused of a crime which is indictable, may be committed to the next Court of competent jurisdiction, which is the Assize Court now sitting, and the point is raised that The Juvenile Delinquents Act, 1929, gives the exclusive jurisdiction to which I have referred. Holding, as I have, that the charge or indictment cannot be preferred through such exclusive jurisdiction, and that section 9 of the Act does not apply, would it mean that the accused person is to be free from any further liability? In other words, if there has been an offence committed, is he to be relieved from any punishment? It has been held in England, and also by Mr. Justice Meredith in *Rex* v. *Frejd* (1910), 22 O.L.R. 566, that a Superior Court had jurisdiction under the circumstances there outlined. They do not correspond, however, with the situation presented this morning. In that case the majority of the Court held that section

1120 was applicable. Clute, J. had, prior to the Court of Appeal dealing with the matter, held that the warrant of commitment was defective and should be quashed; but in lieu of discharging the defendant from custody he ordered that he should be remanded to the place where he was convicted, and brought before the two justices for preliminary hearing on the charge. In other words, the trial should be held *de novo*. The majority of the Court of Appeal upheld the decision of Clute, J., and decided that section 1120 of the Criminal Code was applicable. Meredith, J., however, considered that it was not applicable on account of its wording, but exercised an inherent jurisdiction of the Court, and the concluding portion of his remarks throws light upon the views he held in the matter:

> Having regard to the nature of the charge against him, as stated upon the argument here, and to the very considerable punishment the man has already undergone, I would have made an order for his discharge simply, leaving it to the prosecutor, or the Crown, if not yet satisfied, to take the usual steps for the apprehension and prosecution of the prisoner anew; but I do not dissent from the order now made, though less satisfied with it than if it were such as I have indicated.

Judgment

If I had jurisdiction to deal with the matter along these lines, I might appropriate the remarks of the learned judge, in dealing with the situation which is before me today: But as I have already indicated, I have no jurisdiction. A charge or indictment being brought before this Assize and ground being shewn that the Court has no jurisdiction, the only course I can pursue is to quash the charge and the Crown may take whatever steps it sees fit in respect to the matter.

I understand the accused person has already served some time. I am not in a position to say whether that was sufficient punishment or not. It is for the authorities to determine. His counsel is fully advised of the fact, that the quashing of the charge does not relieve the accused from liability, if he be liable for the offence, which is outlined in the charge.

Application granted.

FISHER, J.
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BEXON v. BEXON.

Divorce—Maintenance—Petition by wife—After decree absolute—Jurisdiction—Misconduct by wife—Right to raise on application as bar to maintenance—R.S.B.C. 1924, Cap. 70, Sec. 17—Divorce rule 65 et seq.

A petition for maintenance under divorce rule 65 *et seq.* can be entertained after the decree absolute.

A respondent who has not brought to the attention of the Court alleged misconduct of the wife as a bar to the divorce, cannot later raise such a defence as a bar to the allowance of maintenance.

Statement

APPLICATION by the petitioner (wife) for maintenance under divorce rule 65 *et seq.* Heard by FISHER, J. in Chambers at Vancouver on the 11th of October, 1932.

J. A. Grimmett, for petitioner.
J. O. Wilson, for respondent.

13th October, 1932.

Judgment

FISHER, J.: In this matter I think it should first be noted that the application by the wife (petitioner) is one for maintenance under divorce rule 65 and following rules. The rule reads in part as follows:

> The application for maintenance or periodical payments on a decree for dissolution . . . shall be made in a separate petition which may be filed at any time not later than one calendar month after decree absolute except by leave. . . .

It may also be noted that section 17 of our Act, Cap. 70, R.S.B.C. 1924 (being section 32 of the Matrimonial Causes Act, 1857, 20 & 21 Vict., Cap. 85) provides that "on any such decree," etc. The construction apparently put upon the word "on" is "shortly after." There is therefore jurisdiction to entertain a petition after the decree absolute (*Bradley* v. *Bradley* (1878), 3 P.D. 47) though formerly it was considered that there was no power after final decree was pronounced. (*Vicars* v. *Vicars* (1859), 29 L.J., P. & M. 20). Hall on Divorce says at p. 94:

> Anything in the nature of what is sometimes called "permanent alimony" in a suit for dissolution is the creature of the Matrimonial Causes Act, 1857 (s. 32), and monetary allotments made under that Act and its amend-

ing Act are best considered separate and apart from the allotments made in judicial separation suits.

And at p. 682-3:

It is, therefore, convenient to denominate the permanent allowance ordered after a decree of judicial separation by the name of "permanent alimony," and allowances made after decrees of dissolution, nullity, and restitution by the name of "maintenance." . . . In allotting maintenance the Court is directed to take into consideration the fortune of the wife, if any, and the ability of the husband to earn and the conduct of the parties (20 & 21 Vict., c. 85, s. 32), and generally all the circumstances of the case, including the existence or non-existence of children and their custody.

Judgment

In *Sidney* v. *Sidney* (1866), L.R. 1 P. & D. 78 the full Court held that an order for maintenance for a divorced wife made under section 32 of the Matrimonial Causes Act, 1857, must form part of the decree for dissolution. As has already been pointed out, however, it has been held that there is jurisdiction to entertain the petition after the decree absolute but I think it is obvious that it is based upon the decree and that our Divorce Rules proceed upon the assumption that any misconduct on the part of the petitioner during the marriage, such as adultery, will and must be brought to the attention of the Court before the decree absolute is granted. In the present case it may be argued that the respondent husband should not be deprived of a defence or the right to plead the misconduct of his wife during the marriage as a fact to be considered upon the application for maintenance. It seems to me, however, that it would not be in the interest of the public or in accordance with the spirit or letter of our Divorce Act or Rules if a respondent should be at liberty to elect not to bring to the attention of the Court the alleged misconduct of the wife as a bar to the divorce and later raise such a defence as a bar to the allowance of maintenance. It seems to me that the issue which the petitioner had to prove was that she was entitled under the Act to the decree and this was traversable by the respondent and, as the Court is not bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery (section 16), the respondent should be bound to raise any charge of adultery which can be made against the petitioner or should be estopped from raising it thereafter as otherwise the Court on the one hand might grant a decree for dissolution which it would not have granted had the counter-charge been pleaded and later find

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itself refusing maintenance upon the ground of the misconduct of the petitioner. In this connection reference might be made to what was said by the Court in *Hoysted* v. *Commissioner of Taxation* (1926), 1 W.W.R. 286 at pp. 296-7:

It is seen from this citation of authority that if in any Court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to any point whether of assumption or admission, which was in substance the *ratio* of, and fundamental to, the decision. The rule on this subject was set forth in the leading case of *Henderson* v. *Henderson* (1843), 3 Hare 100, at p. 114 (67 E.R. 313) by Vice-Chancellor Wigram as follows: "I believe I state the rule of the Court correctly when I say that where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." This authority has been frequently referred to and followed, and is settled law. . . . In short, the present point was one which, if taken, went to the root of the matter on the prior occasion, so that its omission was no mere default in pleading but a real attempt to divide one argument into two and to multiply litigation.

My conclusion on the whole matter therefore is that misconduct on the part of the petitioner, such as is now suggested by the respondent in the present case, was something which "went to the root of the matter on the prior occasion" and the respondent not having brought such matter to the attention of the Court before cannot be heard to raise it now in his answer to the petition of the wife for maintenance.

Application granted.

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BLUMBERGER v. SOLLOWAY, MILLS & CO. LTD.

BLUMBERGER v. SOLLOWAY, MILLS & COMPANY, LIMITED.

Stock Exchange—Broker and client—Stocks and bonds delivered broker as collateral—Conversion—Evidence of—Access to broker's books—Privilege—Appeal.

The plaintiff employed the defendants as stock-brokers and delivered to them certain stocks, shares and bonds as collateral security to cover indebtedness for the sale or purchase of stock by the defendants to his order on the market. The plaintiff later changed his stock-brokers, and on the defendants transferring the securities to the newly-employed firm the plaintiff took exception to the securities so transferred and brought action for damages for wrongful conversion of the securities so deposited with the defendants. Applications for discovery or admissions from the defendants by interrogatories as to the disposition of the securities were met by a claim of privilege on the ground that it would tend to incriminate them. Finally the senior counsel for the defendants was served with a *subpœna* as a witness. He admitted custody of the defendants' books, but claimed privilege by virtue of professional services, but an order was made that the books be produced. It was held on the trial that the entries in the books disclosed a *prima facie* case of conversion and the resulting damages were fixed at the market price of the securities when sold.

Held, on appeal, affirming the decision of MACDONALD, J., that the defendants were not authorized to dispose of the securities until a debt to them by the plaintiff had been incurred, and this subject-matter lay "peculiarly within the knowledge of the defendants." In order to rebut the presumption that they had converted the securities, they were bound to prove their right to dispose of them, and this they have failed to do.

Statement

APPEAL by defendants from the decision of MACDONALD, J. of the 11th of December, 1931 (reported, 45 B.C. 66), in an action for damages for wrongful conversion of certain stocks and bonds delivered by the plaintiff to the defendants as collateral security for any indebtedness owing by the plaintiff to the defendants in the course of the defendants' employment as brokers in the purchase and sale of stocks. The facts are sufficiently stated in the judgment of the trial judge.

The appeal was argued at Vancouver on the 15th to the 18th of March, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

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Argument

Sloan, for appellants: We are charged with wrongful conversion of plaintiff's stock. We submit there was no conversion, and any sales that were made were in accordance with the contract. The certificates were all endorsed in blank when delivered and were street certificates and negotiable: see Meyer on Stock Brokers, 319; *Cartwright & Crickmore Ltd.* v. *MacInnes* (1931), S.C.R. 425 at pp. 428-9; *Forget* v. *Baxter* (1900), A.C. 467. On onus of proof see Meyer on Stock Brokers, 326 (footnote). It cannot be presumed we were short in this stock, it must be distinctly proved: see *Beatty* v. *Neelon* (1886), 13 S.C.R. 1 at p. 5. On the right to substitute certificates that are pledged see *Ellis & Co.'s Trustee* v. *Dixon-Johnson* (1925), A.C. 489. As long as the respondent had an account with us we had a right to possession of the stock: see *Halliday* v. *Holgate* (1868), 37 L.J., Ex. 174. This action is for damages only and not accounting: see *John* v. *Dodwell & Co., Lim.* (1918), 87 L.J., P.C. 92 at p. 95; *Smith* v. *Baker* (1873), L.R. 8 C.P. 350; *Rice* v. *Reed* (1900), 1 Q.B. 54 at p. 66. As to damages see Mayne on Damages, 19th Ed., p. 40; *Nagy* v. *Venne* (1916), 34 W.L.R. 413. Even if he is entitled to damages he should be debited the amount received on sales: *Donald* v. *Suckling* (1866), 35 L.J., Q.B. 232 at p. 251; *Hiort* v. *London & North Western Rail. Co.* (1879), 48 L.J., Q.B. 545 at pp. 547 and 549; *Johnson* v. *Stear* (1863), 15 C.B. (N.S.) 330; *Williams* v. *The Peel River Land and Mineral Company Limited* (1887), 55 L.T. 689; *Clarke* v. *Baillie* (1911), 45 S.C.R. 50.

J. A. MacInnes, for respondent, referred to *Rex* v. *Christie* (1914), A.C. 545; *Gray* v. *Haig* (1855), 20 Beav. 219; *Webb* v. *East* (1880), 49 L.J., Ex. 250; Meyer on Stock Brokers, 319; Phipson on Evidence, 7th Ed., pp. 156 and 170. When the learned judge below finds the measure of damages see Meyer on Stock Brokers, pp. 552 and 554. On the liability of Solloway and Mills personally see Lindley on Companies, 6th Ed., 205; *Poulton* v. *London and South Western Railway Co.* (1867), L.R. 2 Q.B. 534. As to criminal liability see *Rex* v. *Medley* (1834), 6 Car. & P. 292. As to the directors being liable for the Company's torts see *Betts* v. *Neilson* (1868), 3 Chy. App. 429; *De Vitre* v. *Betts* (1873), L.R. 6 H.L. 319;

Dickson v. *Evans* (1794), 6 Term Rep. 57; *Hibbs* v. *Ross* (1866), L.R. 1 Q.B. 534; *Sunderland* v. *Solloway, Mills & Co. Ltd.* (1931), 44 B.C. 241; *General Accident, Fire and Life Assurance Corporation* v. *Robertson* (1909), A.C. 404; Bray on Discovery, 315; *Ex parte Symes* (1805), 11 Ves. 521; *Lloyd* v. *Passingham* (1809), 16 Ves. 59 at p. 69; *Wentworth* v. *Lloyd* (1864), 10 H.L. Cas. 589; *Bartlett* v. *Lewis* (1862), 12 C.B. (N.S.) 249.

Sloan, replied.

Cur. adv. vult.

7th June, 1932.

MACDONALD, C.J.B.C.: On the 14th of June, 1928, the plaintiff made an arrangement with the defendants by which they were to trade on the stock market in Vancouver, in buying and selling shares, stocks and bonds for the plaintiff. The statement of claim sets out that on that date the plaintiff deposited with the defendants 100 shares of "Lakeshore" and did supply other shares from time to time thereafter during their course of trading extending over a period of about a year and one-half. Paragraph 5 of the statement of claim says:

The said stocks, shares and bonds were so delivered by the plaintiff and accepted by the defendants for the purpose and with the intent and upon the understanding that the same were to be held and carried by the defendants as collateral security for any balance or balances which the plaintiff might owe to the defendants from time to time.

MACDONALD, C.J.B.C.

This is substantiated by the evidence. The plaintiff stated:

Did you deliver to them any securities at any time? Yes, sir, I did.

For what purpose? As collateral security.

For what? In case I ordered other securities bought, that these would be held as collateral until, or I failed in payment or something—they would have the right to dispose and sell it.

And again:

Now, I ask you if you did not in the first place deposit this collateral with the intention that you would carry on an active trading account with this company? I did.

And you proceeded to place orders to buy and sell actively with this company? I did.

These questions, I think, establish the fact that the deposit of the securities with the defendants was for the purpose of enabling them to carry on a general trading account in other shares, stocks and bonds upon the security of those deposited.

There is nothing in the appeal book to shew, and I think the

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contrary may be inferred, that the plaintiff supplied any cash to meet payments made by defendants in connection with this business, which was to be carried on on margin, and, I think, from what has been already said that the proper inference is that the collateral might be sold from time to time to cover any indebtedness which the plaintiff might incur to the defendants in the business. So far as this appeal is concerned this shews the beginning of the business of the parties.

The plaintiff alleged, though he did not prove it, that the defendants sold securities delivered from time to time, immediately on receipt and converted them to their own use. At the end of the trial he asked leave to amend and alleged "that the defendant sold or otherwise disposed of these shares." I therefore think that the defendants were only entitled to sell the collateral securities or parts of them to reimburse themselves for money paid out on margin or otherwise. The plaintiff's stand is that—I delivered to you certain securities amounting in all to about 30 blocks of shares, etc. I demanded them back at the end of our dealings and you failed to produce them. Therefore, I am entitled to damages for conversion of these securities.

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It is admitted that the defendants purchased from time to time securities for the plaintiff and it is conceded by the plaintiff that these were purchased on his order and that when they were sold they were sold on his order including some of the collaterals aforesaid. Confirmations were sent to the plaintiff in each case and monthly statements of their accounts were furnished to the plaintiff which he admits he followed closely. Then after about a year and a half's business and when the defendants Solloway and Mills had been arrested he ordered his agents Branson & Brown to take over the account and the securities in the defendants' hands and this was accordingly done. He admits that according to the monthly statements rendered to him if they were *bona fide,* that is to say that if the purchases and sales were actually made as therein stated by defendants, everything which he was entitled to from them was transferred to Branson & Brown.

Plaintiff gave this evidence at the trial:

And in the end when you closed out this account all the shares that you had there on the assumption that this account (the monthly accounts) was

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correct were turned over to Branson & Brown, weren't they? Yes, but I had nothing to do with these. I had another account there.

Nothing further appears about this other account except that he called it a Trust Account. Its relation, if any, to this appeal was not developed at the trial. The plaintiff's contention is that defendants' monthly statements while shewing a clear accounting of all matters between them were untrue, and while he did not plead a case of conducting a bucket-shop that, I think, is what he intimated had been the defendants' course of business with him. Also in order to test the plaintiff's right to claim damages for conversion it was necessary, I think, for defendants to prove that at the time of each conversion there was a debt due from the plaintiff to the defendant which would justify sale of the collateral and this, of course, necessarily implies proof of the *bona fides* of the purchases alleged to have been made by the defendants. A full account between the parties of their dealings with dates of each transaction was very clearly necessary to enable the Court to say whether there had been a proper disposal of the proceeds of the sale of collaterals or not. This was the main issue to be tried and I think this issue was open to the parties on the pleadings but no attempt was made to present the case in that way All that the plaintiff made out in presenting his case was that he had supplied these collateral securities and had not received them back and that therefore the defendants were guilty of conversion. That evidence would be insufficient to support the action, in the absence of evidence of the defendants' right to use the collaterals.

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The application for the production of the defendants' books and documents was resisted on the ground that their production would incriminate the defendants. This application was disposed of by the trial judge against the defendants and their books were consequently produced at the trial. The learned judge found that entries in the books did not correspond to the entries in the monthly statements delivered to the plaintiff and he therefore held against the defendants. In what way they did not correspond is not stated and therefore that finding does not help me. But this became largely immaterial when the books were produced.

Reference to the accounts in the books is shewn at pages 113

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to 136 both inclusive of the appeal book. These entries may not in all respects correspond with the monthly statements but unless they shew that the plaintiff was not indebted to the defendants on the respective dates of the disposal of the collaterals they fail to meet the issue.

The right to exclude the books on the ground aforesaid is one of considerable controversy, and as I am in some doubt on the question I accept the finding of the trial judge on this question.

This being the situation of the case at this time it remained for the defendants to prove that they had properly disposed of the collaterals, that is to say, that the *onus probandi* should be placed upon them. They were authorized to dispose of the collateral as paragraph 5 of the statement of claim recites "for any balance or balances which the plaintiff might owe to the defendants from time to time." The existence or non-existence of such debts were peculiarly within the knowledge of the defendants and I think the onus was upon them to shew that in accordance with their duty they had properly disposed of the collateral securities. In Taylor on Evidence, 12th Ed., Vol. 1, sec. 376 it is said:

In several of the instances above given the Legislature has adopted a principle which *the common law also recognizes* [the italics are mine], and which may here be noticed as a *second exception* to the general rule that the burthen of proof lies on the party who substantially alleges the affirmative. The exception is this, that, where the subject-matter of the allegation *lies peculiarly within the knowledge* of one of the parties, that party must prove it, whether it be of an affirmative or a negative character, and even though there be a presumption of law in his favour.

And section 377:

This exception equally prevails in all civil or criminal proceedings instituted against parties for doing acts which they are not permitted to do unless duly qualified, [or I may add authorized].

Ashton & Co. v. *London and North-Western Railway* (1918), 2 K.B. 488, confirmed by the House of Lords (1920), A.C. 84. *Rex* v. *Scott* (1921), 86 J.P. 69.

In this case I think the defendants were not authorized to dispose of the securities until a debt to them by the plaintiff had been incurred, and it is apparent to me that the subject-matter lay "peculiarly within the knowledge of the defendants." In order to rebut the presumption that they had converted the securities they were bound to prove their right to dispose of them and this they have failed to do.

Finding then that the defendants have failed affirmatively to prove that these securities were rightly disposed of, I cannot see how on the present evidence the Court can properly review the amount of damages assessed. In my opinion, it would require the services of an accountant to shew in what respects the defendants had violated or fulfilled their duties. That statement of account would cover all of the trading transactions between the parties with dates of disposal of collateral to enable me to decide the legality of individual transactions. The failure to give that proof is that of defendants. They consequently have failed to make out their defence or to enable the Court to review the damages, if any.

There is a cross-appeal against the division of the damages by which Solloway, Mills & Company were held liable for only $11,150, and not for the whole damages. This cross-appeal is founded on the fact that while the dealings of the plaintiff commenced with Solloway, Mills & Company yet the limited company subsequently took over the business of the partnership and it was by the limited company that the wrongs were done, on and subsequent to the 2nd of November, 1928. Over this period the limited company were held liable for wrongs committed by it amounting to upwards of $34,000. No special notice was given to the plaintiff of the change. But a receipt was given signed by the company for every share deposited as collateral during that period and monthly statements of their operations for the plaintiff were delivered signed in the same way, and, since the plaintiff has sworn that his business with his broker was closely scrutinized by him and that he knew of the distinction between a partnership and an incorporated company, he must, I think look to the incorporated company alone for his damages for the company's wrongs.

The defendants also contended that the damages had not been properly assessed. But in the absence of proper statements of account, such as I have mentioned, I cannot give effect to this contention. The defendants had the opportunity to have the damages, if any, properly assessed and if they failed, and I think they did, to supply the proper proofs this is their own fault.

I would dismiss the appeal and the cross-appeal.

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MARTIN, J.A.: This is a difficult case and not free from doubt, but I find myself unable to say that the learned judge below has not, substantially, reached the right conclusion and therefore the appeal and cross-appeal should be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am in complete agreement with the conclusion arrived at by the learned trial judge, Mr. Justice W. A. MACDONALD. The learned judge throughout a long trial lasting four days, gave very painstaking attention to both the facts and the law and in his reasons for judgment elaborately dealt with both and I cannot persuade myself that he went wrong in any particular which would at all warrant the judgment being set aside. The case is one of similarity in character with a number of cases coming before this Court, and is a still further exhibition of the woeful conduct of brokers in the stock boom and final crash which so lately startled the whole country. Brokers as other agents occupy a fiduciary character towards their clients and the clients are entitled to the fullest disclosure of their dealings and they must be held to the strictest account. It is to be remarked that in this case as in other cases coming before this Court the brokers have taken a line of action which the law does not admit of—that is, a refusal to make known what was done on behalf of the client—yet collateral securities of the client are sold and the moneys appropriated by the brokers to their own use without shewing or attempting to shew that there was any warrant for so doing.

In such a case what can be the result? It must be as it has been held and rightly held, that the brokers, here the defendants, and the appellants should pay the highest market price of the securities so converted, when so converted. I do not think I can usefully add anything more, in that the learned trial judge has so completely disposed of all the issues in the action. With respect to the cross-appeal of the respondent I cannot view that with any favour. The facts are so overwhelming that the respondent was aware of the change in business from the private partnership to the company that it is utterly idle to contend, in view of the patent facts, that there is liability upon other than the company during the times the company was operating the business.

Therefore, my opinion is that the appeal should be dismissed and also that the cross-appeal should be dismissed.

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MACDONALD, J.A.: I would dismiss the appeal and the cross-appeal.

Appeal and cross-appeal dismissed.

Solicitors for appellants: *Farris, Farris, Stultz & Sloan.*
Solicitors for respondent: *Fleishman & MacLean.*

GEALL v. THE CORPORATION OF THE TOWNSHIP OF RICHMOND.

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Drainage—Ditch constructed by municipality to drain highway—Subsequent extension of ditch to drain other lands—Flooding of land from ditch—Liability of municipality.

In an action for damages the plaintiff claimed that water from an area beyond an elevated strip of land (the Aase area) was improperly brought by the defendant municipality through a ditch that was constructed in order to drain a public road adjoining his land, the municipality extending the ditch through the elevated strip of land to the Aase area beyond, and drawing the water from that area into the ditch, thus causing it to overflow and damage his property. It was held on the trial that the water beyond the elevated strip would not reach the plaintiff's land in the course of nature, and the plaintiff was entitled to damages.

Held, on appeal, reversing the decision of FISHER, J. (MCPHILLIPS, J.A. dissenting), that on the evidence the essential facts are lacking to support the finding of the learned trial judge, namely, that the defendant is responsible for the water from the Aase area being discharged into the ditch adjoining the plaintiff's property.

Per MACDONALD, C.J.B.C.: What happened is that the foreign water has filled the ditch to such an extent as to leave insufficient room for the plaintiff's water. The plaintiff does not prove that Aase's water was brought to and flooded his land. He does not prove a tort. He claims damages as a matter of right but he has not proved his right by either a grant, contract, prescription, or estoppel, if indeed it would be acquired by any one of them.

Per MACDONALD, J.A.: The only basis for complaint by respondent is that for a short distance between his property and the Aase area a so-called

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height of land intervenes and that this natural barrier should have determined the policy in construction of ditches. The onus is on the respondent to establish that while the lands were in a material state this ridge extended east and west far enough to prevent water from the Aase area from seeping southerly to his property. This he failed to do and he cannot successfully claim that the plaintiff committed a tort in extending the ditch northerly.

Statement

APPEAL by defendant from the decision of FISHER, J. of the 10th of March, 1932, in an action for damages to the plaintiff's lands, being lot five in the south half of section twenty-six, block four, North Range, seven West, Lulu Island, from flooding caused by negligent and improper construction and maintenance of ditches by the defendant, whereby water has been brought on the plaintiff's land, and for a mandatory order directing the defendant to provide a sufficient outlet for the ditches adjoining the plaintiff's land, so that the water flowing therein shall not flood plaintiff's land. The plaintiff's lot (No. 5, about ten acres) was low-lying land and liable to be flooded during the winter months. In April, 1920, the plaintiff applied for a road, and shortly after the defendant municipality in co-operation with the plaintiff, constructed a public road on the east side of his property with a ditch alongside running south to what is known as the Williams ditch, and this road and ditch were shortly after extended north to the north-east corner of lot six. North of lot five was lot six and north of six was known as the Aase property (50 acres). The water on the Aase property naturally flowed in a south-easterly direction. In 1922 Aase cut a ditch from the south-east corner of his property into the Geall ditch, but finding that this additional water flooded his land Geall put in a dam at the north-east corner of lot six and stopped the water from the Aase property from coming into his ditch, and he claimed he was then free from waters flooding his land. In 1927 the municipality extended the Geall road and ditch north to Aase's house and took out the dam that was put in by Geall in 1924, the result being that the additional water coming through his ditch flooded his land. He then brought this action and recovered judgment for $1,480.

The appeal was argued at Victoria on the 15th and 16th of June, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

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Argument

Donaghy, K.C., for appellant: The plaintiff claims that the municipality took water from another watershed into his ditch, increasing the volume so that it overflowed the ditch and flooded his property, destroying the crop. Lulu Island is very flat and we say the water would naturally flow to Geall's ditch from the Aase property. Geall's property was dry for three years owing to his wrongfully blocking a culvert across the railway track near the north-east corner of block 6, as this culvert carried the water away from Aase's property. The plaintiff has ten acres of the lowest ground. There is no such thing as a watershed in this vicinity. At high tide this land is below sea level, and being protected by dykes the water only runs off at low tide. What was done by the municipality accelerated the natural drainage. The damage complained of was done in December, 1930, and January, 1931. He was protected for three years by diverting the water from its natural course. We have a statutory right to do what we did: see section 297 of the Municipal Act. See also *The Mersey Docks Trustees* v. *Gibbs* (1866), L.R. 1 H.L. 93; *Pelletier* v. *R. M. of Springfield* (1924), 3 W.W.R. 786.

Reid, K.C., for respondent: There are two points in this case, first, we submit that we come within the case of *Hobson* v. *Corporation of Richmond* (1923), 32 B.C. 369, and secondly, the condition of this land is such that water can be diverted from its natural flow into other channels very easily. The plaintiff has a cause of action if without the action of man the water goes one way by nature, and the flow is changed by the action of some person so as to cause him damage: see *Milton* v. *Surrey* (1903), 10 B.C. 296; *Woolard* v. *Corporation of Burnaby* (1905), 2 W.L.R. 402; *Paisley* v. *Local Improvement District No. 399* (1921), 17 Alta. L.R. 193; Garrett on Nuisances, 3rd Ed., 141.

Donaghy, replied.

Cur. adv. vult.

4th October, 1932.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The defendant is a municipal corporation in whom the control of roads and road allowances are vested by the Municipal Act of this Province, the fee being in

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the Crown. The plaintiff is the owner of lot 5 in section 26, block 4, range 7, West, Lulu Island, within the jurisdiction of the defendant; and said lot abuts on what is now known as the Geall Road, one block east of No. 1 Road, shewn on plan, Exhibit 28. The said locality is low-lying land and the plaintiff's lot is the lowest portion of it. When he entered upon it in 1919 it was in the state of nature and was then in winter seasons flooded with surface water from heavy rains. To remedy this the plaintiff made a temporary ditch on defendant's road allowance, but this failed to carry off his water; whereupon he applied to defendant to grade the said road in front of his property and to dig a ditch alongside of it complementary to the road, which the defendant did. It graded the road from the south-eastern corner of lot 6 in said section, south to Williams Road and connected the ditch thereon with one along Williams Road running due west to No. 1 Road, which had a large drainage ditch in it into which it emptied and flowed south into a tidal river. The plaintiff's land was below high tide and the ditches had an outlet only between tides. Exhibit 1 consists of extracts from the defendant's council's minutes covering the period in question in this action and indicates what was done by both parties.

MACDONALD, C.J.B.C.

The said ditch on the Geall Road was subsequently deepened by defendant as was that on Williams Road and thereafter from 1924 to 1927 the plaintiff's water found its way to said ditch. The plaintiff put into the Geall Road ditch an obstacle or dam which prevented water from the north thereof coming into the ditch. In 1928 one Aase the owner of the northerly portion of section 26 applied to the council to have the Geall Road and ditch extended to his property and the dam put in by the plaintiff removed so that his water might not be prevented from coming down into the Geall Road ditch. This was done by the council and thereafter Aase's water came into the Geall Road ditch which brought about this action for an injunction and damages. The learned judge who took a view of the *locus in quo* found that Aase's water would not reach plaintiff's land in the course of nature but instead of granting an injunction he gave damages against the defendant for the alleged wrong. The learned judge in making this finding said that he found that

without human intervention Aase's water would not come into the ditch. He further said:

I cannot accept the evidence of the plaintiff, however, that his land was flooded worse than it was before he had any ditch. The evidence satisfies me that the land in the neighbourhood in its natural state was practically a swamp in the wet season and, that the plaintiff's land was not unaffected by this condition. I think it is quite apparent from the fact already referred to, *viz.*, that the plaintiff applied to the council for a road in 1920 on the ground that the water could not get away [from his land].

I think these extracts from the reasons for judgment shew that the real complaint of the plaintiff is that defendant by taking out the dam and extending the road and ditch has rendered the ditch unable to take the plaintiff's flood water, not that it was flooded by the said foreign water. In other words the plaintiff is suing on the assumption that the defendant's land was the *servient tenement;* that the defendant was in duty bound to take his water and not to interfere prejudicially to him in the drainage which he enjoyed by means of defendant's ditch. I think the inference may fairly be made from the plaintiff's own evidence, read as a whole, that the flooding he complains of is not that foreign water is discharged from the ditch upon his land but that the flooding caused by the heavy rains is not being drained away from his land because the ditch was already full of the water from above. It was for the plaintiff to prove that foreign water was deposited on his land and he has failed to prove this substantially and specifically.

MACDONALD, C.J.B.C.

Now the defendant by the said Municipal Act of the Province had the power and I think that power implies the duty to make roads for the convenience of the public, and while power to construct ditches, under the authority of the Ditches and Watercourses Act, exists there is no pretence that the ditch in question was made under the latter Act. It was made under the power of the defendant to make roads of which the ditch is a necessary adjunct. The defendant, therefore, had the power to extend the Geall Road and ditch to the north past Aase's premises. All these ditches are clearly artificial ones and the rights affecting them are within the rules applicable to such watercourses. It may be that the fact that this is an artificial watercourse would not justify the defendant bringing foreign water on to the plaintiff's land, which would not come there in the course of

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nature, but as I understand the facts of this case, as indicated by the extracts I have quoted from the reasons for judgment, the learned judge did not find that Aase's water was brought to and discharged upon the plaintiff's land. He finds that it overflows into the plaintiff's land or prevents the water draining off the plaintiff's land and he also finds that the making of these ditches has not caused the land to be more wet than it was in its original condition. What has happened is that the foreign water has filled the ditch to such an extent as to leave insufficient room for the plaintiff's water. The plaintiff does not prove that Aase's water was brought to and flooded his land. He does not prove a tort. He claims drainage as a matter of right, but he has not proved his right by either a grant, contract, prescription, or estoppel, if indeed it could be acquired by any one of them. In *Islington Vestry* v. *Hornsey Urban Council* (1900), 1 Ch. 695 at pp. 705-6, Lindley, M.R., delivering the judgment of the Court consisting of himself, Rigby, and Vaughan Williams, LL.J., said:

> This is not a question affecting the plaintiffs as private individuals. They are a public body, with public duties, and with rights and powers conferred upon them for the purpose of enabling them to discharge those duties. This must be borne in mind in considering the effect of their past conduct, when that is relied upon as estopping them from asserting a right to put an end to what they have permitted, and even encouraged and agreed to allow.

That was a case where the plaintiff consented to the defendant discharging sewage from an outside municipality into a sewer of the plaintiff. It was held that it must be regarded as a mere revocable licence, although it was agreed to between the parties. The plaintiffs brought the action to restrain the discharge of said sewage into their sewer. The Court held that their action was well founded. It follows from that case that in the case of an artificial sewer or drain into which the defendant had permitted an outside party to discharge sewage it being outside the powers of the municipal body such as the defendant in this case is, is revocable and the permitted usage would not estop the defendant from revoking the authority. The present case is a much stronger case on its equitable side than that was. Here, the defendant is content to leave the drains as they are. It is not seeking an injunction against the plaintiff's discharge of

water into the ditches. The difference in the principles applicable to artificial watercourses and to those applicable to natural watercourses are explained in *Gaved* v. *Martyn* (1865), 34 L.J., C.P. 353, where Erle, C.J., at p. 363 said:

> The water in an artificial stream flowing in the land of the party by whom it is caused to flow is the property of that party, and is not subject to any rights or liabilities in respect of other persons.

See also *Acton* v. *Blundell* (1843), 12 M. & W. 324; *Arkwright* v. *Gell* (1839), 6 M. & W. 203 and *Wood* v. *Waud* (1849), 3 Ex. 748.

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It is true as shewn by the authorities that if the artificial stream is intended to be permanent and is so understood by the parties, it may by reason of such permanency be governed by the same rules and subject to the same rights as if it were a natural stream but apart from the inability of the defendant to recognize any rights in this artificial stream in the plaintiff as already pointed out, I am of opinion that the work done on the Geall Road and ditch was not intended to be a permanent work; to so hold would be to hold that the defendant would be forever prevented from grading the road allowance north of the Geall Road and thus performing its public duties. Neither can the outlet of this water be improved because it is impossible to regulate the tides which now cause the trouble complained of.

I think, therefore, the appeal must be allowed.

MARTIN, J.A.

MARTIN, J.A.: This case presents no difficulty upon the law which is well established—*Milton* v. *Surrey* (1903), 10 B.C. 296; *Woolard* v. *Corporation of Burnaby* (1905), 2 W.L.R. 402—but much upon the ascertainment of the fact of the truth about the natural flow of the water before it was disturbed by the plaintiff and his neighbours and the defendant at their request at different times. The crux of the case is to establish with certainty the way in which the water flowed naturally from the land to the north of the plaintiff's lot 5, as shewn on Exhibit 5, assuming that there is or was anything to the north of it, constituting an irregularity in level of three inches at best, that could properly and substantially be called a "height of land" or a natural ridge to form an "elevation" or "obstruction" as the learned judge describes it (pp. 291-3) to protect the plaintiff therefrom, and in my opinion the evidence falls far

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short of such, under the circumstances, very difficult proof, particularly when there has to be borne in mind the fact that the plaintiff's said lot in its natural state was thus regarded by the learned trial judge:

> I find that the said lot 5 is low-lying land, and was liable to be flooded especially during the winter months with a heavy rainfall at certain conditions of the tide.

And again:

> I cannot accept the evidence of the plaintiff however that his land was flooded worse than it was before he had any ditch. The evidence satisfies me that the land in the neighbourhood in its natural state was practically a swamp in the wet season and, that the plaintiff's land was not unaffected by this condition.

MARTIN, J.A.

The plaintiff's lot was, indeed, not merely "not unaffected by this condition" but it was most affected thereby because the evidence is clear that it formed the lowest part of "the swamp"; and the plaintiff's own engineer admitted that "in a state of nature it would be saturated"; and "is a very low and flat area"; which is in accord with the defendant's witness, Grauer, who describes it as a "duck pond" in the winter, about knee-deep in an area of five to six acres. It is here to be observed that the evidence of the engineer is far from satisfactory as a whole because he admits the surprising fact that he had never tried to find out about sea level or "the high tide of the sea," though as the learned judge pointed out at the beginning of his judgment in the quotation, *supra,* "certain conditions of the tide" combined with rainfall cause the flooding complained of, as is obvious when the run-off from all the drainage is to the main dyke on No. 1 Road and thence out to tide-water, and therefore the whole system of drainage upon Lulu Island depends upon the tides.

It is also obvious that this original condition throws an exceptionally heavy burden upon the plaintiff in establishing his case upon the firm foundation of reasonable certainty, and in my opinion he has failed to do so. The lack of definite evidence, in particular, upon the extent and final direction of the flow of water caused by the so-called natural ridge, assuming it existed, is unfortunate because unless it was shewn that it extended across and beyond the whole road allowance and consequently diverted or carried clear to the south-west the water therefrom,

its prior south-west course and direction would be of no real assistance to the plaintiff's case, for if the water were simply brought to and discharged upon the road allowance at that point and thereabouts indefinitely, there could be no legal objection to the act of the defendant in building and extending that road to the north of plaintiff's land and incidentally draining off the natural surface water by digging ditches in the ordinary necessary way to make a proper foundation for the road and keep the water off it after completion.

MARTIN, J.A.

This point has wholly escaped the attention of the learned judge, as set out in his ample reasons, though no satisfactory judgment can be given upon the case unless it is taken into weighty consideration.

After a careful review of all the facts upon which the question turns I can only reach the conclusion that, with every respect, and upon the plaintiff's own evidence, the essential facts are lacking to support the finding of the learned judge that "the defendant is responsible for the water from the Aase land [*i.e.*, the 50 acres to the north of lots 5 and 6] being discharged into the Geall ditch after 1927," and it follows, therefore, that the appeal should be allowed.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: The trial in this action took place extending over four days before Mr. Justice FISHER without a jury and a very considerable body of evidence was adduced at the trial upon both sides. The learned judge had before him civil engineers upon both sides and the learned judge took a view. In his reasons for judgment we have him saying:

> I pause here to state that I have had the advantage of a view which rendered the evidence more intelligible and my conclusion from the whole evidence is that the lands of the plaintiff though not specially adapted for, were nevertheless reasonably fit for growing currants and other small fruits after the Geal ditch was put in and connected with the Williams and No. 1 Road ditches and were and would have continued to be so fit, even in seasons as wet as that of 1930-31 so long as the water from the Aase land was not discharged into the Geall ditch but ceases to be so whenever such waters reached the Geal ditch.

After careful consideration of the evidence and what was advanced by the learned counsel upon both sides, I am satisfied that the learned trial judge arrived at the right conclusion. That which brought about the damage to the lands of the

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respondent was unquestionably the wrongful interference of the appellant with the natural height of land on the north boundary of lot 6. The learned judge made this finding:

I find, as a fact, . . . and my conclusion from the whole evidence is that, if there had been no human interference the land of the plaintiff [respondent] would not naturally have received off the Aase property the water that now goes into the Geall ditch and which, as I find, causes an overflow on to the plaintiff's land or prevents the water draining off the plaintiff's land.

The learned trial judge further found:

I think that the defendant [appellant] having full knowledge of the conditions existing was negligent in proceeding to comply with the request of Aase for a road and in extending the Geall ditch without making sure that provision had been made to prevent the water from his land, *i.e.*, from another watershed as I have found being brought by its actions unto the Geall ditch to the damage of the plaintiff [respondent].

MCPHILLIPS, J.A.

It is clear that with this finding, and there is, in my opinion, ample evidence to support it, that the case is well within the *ratio decidendi* of *Woolard* v. *Corporation of Burnaby* (1905), 2 W.L.R. 402, a decision referred to by the learned trial judge. The Court of Appeal has not had the advantage of seeing the witnesses and the civil engineers who gave evidence and there was conflict in evidence as between the civil engineers and, coupled with the view that the learned trial judge had, this Court is not in a position in my opinion upon the facts of the case to differ from the conclusion arrived at by the learned trial judge, and in this connection I would refer to *S.S. Hontestroom* v. *S.S. Sagaporack* (1927), A.C. 37 at p. 47, where Lord Sumner in his speech in the House of Lords said:

What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute: Order LXVIII., r. 1. It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and unless it can be shewn that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.

In my opinion this appeal from the judgment of the learned trial judge should fail. The learned trial judge, as would

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appear by his reasons for judgment, went most exhaustively into the evidence and had the great advantage of a view in a territory of exceptional land formation, low-lying but very fruitful, and any interference with the natural conditions is always fraught with danger. Here, in my opinion, there was careless and active interference upon the part of the appellant amounting to an actionable wrong and the learned trial judge rightly, in my opinion, imposed damages therefor upon the appellant in the whole amount $1,480, and the damages so assessed are not, in my opinion, at all excessive.

MACDONALD, J.A.

MACDONALD, J.A.: The respondent asserts that water from an area of approximately twenty acres was improperly brought by appellant through a ditch constructed by it as part of a drainage system along a public road adjoining his lands, causing it to overflow and damage his property. The only possible basis for respondent's complaint is that for a short distance between his property and the twenty-acre tract a so-called height of land intervenes and that this natural barrier should have determined the policy of appellant in the construction of ditches, leading it to convey the water from the area referred to in another direction. I am not satisfied that it was incumbent upon appellant in constructing ditches to at all regard as a controlling factor this scarcely perceptible ridge only a few inches in height, but I do not rest on that view. In any event the onus was on respondent to establish that while the lands were in a natural state and before the highway and the Electric Railway line contiguous to his lands were constructed this ridge extended easterly across these roadways far enough to prevent water from the twenty acres seeping southerly towards his property. This he failed to do. He cannot, therefore, successfully say that appellant committed a tort in conveying the water through a ditch immediately adjoining the twenty-acre area and following a course through virtually level lands to an outlet in the Fraser River. I do not regard any other points raised as material and would allow the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Cowan & Cowan.*
Solicitors for respondent: *Beck & Grimmett.*

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JOHNSON v. SOLLOWAY, MILLS & CO. LTD.

JOHNSON v. SOLLOWAY, MILLS & COMPANY LIMITED.

Stock-broker—Bankruptcy—Right of action by trustee against other brokers based on "bucketing"—Fraud—Agency—Personal liability of directors.

In an action for damages brought by the trustee in bankruptcy of a stock-broker firm against another stock-brokerage company and the individual directors thereof, based on the alleged "bucketing" of orders given by the bankrupt company to the defendant company, it was held on the evidence that the bankrupt company had been a customer of the defendant company and not merely an agent, that the securities advanced by the bankrupt to the defendant had lost their identity as the property of any individual client of the bankrupt, and the only course was an action by the trustee for the benefit of the estate. The evidence disclosed that the customer's orders were not carried out, the defendant reporting fictitious transactions, and the plaintiff was entitled to recover the money paid and the value of the securities deposited with the defendants, and the individual directors being parties to the fraudulent transactions were personally liable for the damage caused thereby.

Held, on appeal, affirming the decision of FISHER, J. (MACDONALD, J.A. dissenting in part), that on the evidence disclosed the learned judge below reached the right conclusion and the appeal should be dismissed.

Statement

APPEAL by defendants from the decision of FISHER, J. of the 15th of February, 1932 (reported, 45 B.C. 420), in an action for damages for breach of trust and return of all moneys paid by Theo. Frontier & Company Limited to the defendants, and alternatively for damages for fraud. Theo. Frontier & Company became bankrupt on the 18th of September, 1929, and the plaintiff was appointed his trustee. From April, 1928, until the date of said bankruptcy Theo. Frontier & Company gave the defendant orders to buy and sell mining and oil stocks listed on the Stock Exchange in Vancouver, Calgary and Toronto, and deposited share certificates with the defendants as collateral security for their marginal account. The plaintiff claims that the defendants failed to purchase the shares specified in the buying orders and the defendant company disposed of the collateral security and failed to account for the proceeds, and that the directors of the defendant company had knowledge of such wrongful acts and were guilty of a breach of trust. The

relevant facts are set out in the judgment of the learned trial judge.

The appeal was argued at Victoria on the 16th and 17th of June, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

W. B. Farris, K.C., for appellants: The plaintiff as trustee of the bankrupt estate had no right to bring this action, secondly, assuming the defendants had a short position the plaintiff has not satisfied the onus of proof to establish that such short position was an illegal position and thirdly, there is no evidence making Solloway and Mills individually liable. As to the first point, Frontier and Company carried on business in Kamloops, and dealt through other companies. The funds sent Solloway, Mills & Co. were trust funds. The trustee cannot sue: see sections 23 and 43 (2) of the Bankruptcy Act, 2 C.B.R. 261; *In re R. P. Clark & Co. (Vancouver) Ltd.* (1931), 44 B.C. 301. Next, as to being legally or illegally short see Meyer on Stock Brokers, 186. There is no evidence that the defendants were illegally short. They must prove their case: see Kerr on Fraud and Mistake, 6th Ed., 558; *Conmee* v. *Securities Holding Co.* (1907), 38 S.C.R. 601. No *prima facie* case has been established. Thirdly, they are not individually liable: see *Belvedere Fish Guano Company* v. *Rainham Chemical Works, Feldman and Partridge* (1920), 2 K.B. 487; *Salomon* v. *Salomon & Co.* (1897), A.C. 22.

G. L. Fraser, for respondent: The funds sent Solloway, Mills & Co. were not trust funds but assuming they were, if the debtor had any beneficial interest in the funds it passes to the trustee: see Meyer on Stock Brokers, pp. 252-3. A stock-broker has a real interest in the contract, he has a lien on the stock for the money he advances and pays interest on the loan. One having a special interest may sue in his own name: see Bowstead on Agency, 8th Ed., 431; 9 C.J. p. 511 (note 38); *St. Thomas's Hospital (Governors)* v. *Richardson* (1910), 1 K.B. 271; *Hudson* v. *Granger* (1821), 5 B. & Ald. 27; *In re Belleau & Co.* (1930), 12 C.B.R. 1 at p. 19. When a broker buys for a client he is the principal and no one else: see *Croft* v. *Mitchell* (1913), 10 D.L.R. 695; Meyer on Stock Brokers, pp. 390 and

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393; *Salter & Arnold, Ltd.* v. *Dominion Bank* (1926), S.C.R. 621 at pp. 626-7. As to personal liability of Solloway and Mills, there was no question that Solloway, Mills & Co. were selling short. Solloway, Mills & Co. did not allow customers to sell short but these brokers failed to buy shares for customers which created the large short position. When an order was given to purchase the company did not purchase at all and the individuals knew of these fraudulent transactions. The directors fraudulently participated in these breaches of trust. When in the position of a trust relationship the ordinary rules of burden of proof do not apply: see *Nocton* v. *Ashburton (Lord)* (1914), A.C. 932 at p. 946; Lewin on Trusts, 13th Ed., 471. We rely on the authorities referred to in the reasons for judgment of the learned trial judge.

Farris, replied.

Cur. adv. vult.

4th October, 1932.

MACDONALD, C.J.B.C.: This is an action arising out of stock transactions between the bankrupt and the defendants. Some of the transactions were made for cash and the judge held that they were distinctly not a factor in the case. He said [45 B.C. at p. 432]:

MACDONALD, C.J.B.C.

> My own view is that the plaintiff's right to relief in connection with the margin transactions may be considered without reference to the cash transactions.

And with this I entirely agree. I think he was quite right in his view with reference to the margin transactions. The defendants fail to prove that they had performed their duties according to law, in respect to these transactions. They were bound when they undertook the business to buy according to respondent's orders, to pay the difference between the margin and the cost of the shares and account on that basis. The defendants did not do that. They have failed to shew that they bought as they were instructed and accounted as they were bound in law to do. Their transactions were, I think, bucketshop transactions. At all events they have failed to prove the contrary. Their entries in their books were fraudulent purporting to shew purchases and sales of shares which were never purchased or sold.

Therefore, I think, the learned judge came to the right conclusion and the appeals should be dismissed.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This again is a typical case of brokers failing in their duty and refusing to make proper discovery of dealings had on behalf of clients, quite unmindful of the fiduciary position in which they are in the transaction of brokerage business and failure to adhere to the practice called for upon the Stock Exchange and the recognized rules binding upon all brokers. The learned trial judge has exhaustively and ably dealt with all the evidence and applied the law thereto correctly in my opinion and his conclusion was properly arrived at in view of all that was adduced before him. I cannot say that he arrived at any wrong conclusion; on the contrary I am convinced that the learned judge arrived at a conclusion which after full argument in this Court remains unshaken. I do not see any necessity to particularize the points of evidence which entitled the judgment of the learned trial judge. The judgment appealed from is clear to demonstration with no defence capable of being given effect to; in truth no defence in law was forthcoming. Therefore in my opinion the appeal should be dismissed.

MACDONALD, J.A.

MACDONALD, J.A.: I agree with the trial judge that the respondent, as trustee in bankruptcy, may maintain this action: also that in respect to the defendant, the incorporated company, the judgment should stand. I cannot agree however that the directors of the company, who were actively engaged in carrying on its business, are personally liable in damages either on the ground of agency (*i.e.,* that the company was the agent of the defendant directors) or that the directors being in control personally directed that illegal acts should be committed. Directors who participate in a fraud or the commission of a tort are personally liable but whatever the proper view may be on the question of burden of proof on the facts disclosed in the action

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against the company on this point the burden is on the respondent to establish the liability of the directors for active misfeasance in office and that burden has not been discharged. To this extent the appeal should be allowed.

Appeal dismissed, Macdonald, J.A. dissenting in part.

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

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SMITH v. HARRIS INVESTMENTS LTD.

SMITH v. HARRIS INVESTMENTS LIMITED AND HARRIS.

Practice—Order for issuance of concurrent writ of summons and service—Affidavit in support—Sufficiency of—Action for libel—Application to set aside order and service of writ—Order XI., rr. 1 and 4.

On an application for leave to serve a writ out of the jurisdiction, the affidavit in support is not sufficient where it contains a mere statement of what the plaintiff claims or is bringing his action for, and that someone believes the plaintiff has a good cause of action; the affidavit should shew a *prima facie* cause of action within the jurisdiction and disclose a substantial question which the plaintiff desires to try. Sufficient information should be given to make clear the ground on which the Court is asked to proceed.

Statement

APPLICATION to set aside service *ex juris* of a concurrent writ of summons and to discharge the order authorizing the issuance and service of same, on the ground that the affidavit in support does not contain a sufficient statement of facts to justify the making of the order. Heard by FISHER, J. in Chambers at Vancouver on the 11th of October, 1932.

Robertson, K.C., for the application.
Lundell, contra.

17th October, 1932.

Judgment

FISHER, J.: Application by the defendant B. Harris to set aside service upon him of the concurrent writ of summons herein

and to discharge the order authorizing the issuance and service of such on the ground that the affidavit upon which the said order was made does not contain any or alternatively a sufficient statement of facts to justify the making of the order or the issue of the said writ.

Counsel on behalf of the said defendant cites *Chemische Fabrikvormals Sandoz* v. *Badische Anilin und Soda Fabriks* (1904), 90 L.T. 733 where, at p. 735, Lord Davey, referring to Order XI., says:

Rule 4 of the same order prescribes that the application is to be supported by evidence stating that in the belief of the deponent the plaintiff has a good cause of action, and no such leave is to be granted unless it be made sufficiently to appear to the Court or judge that the case is a proper one for service out of the jurisdiction under this order. This does not, of course, mean that a mere statement by any deponent who is put forward to make the affidavit that he believes that there is a good cause of action is sufficient. On the other hand the Court is not, on an application for leave to serve out of the jurisdiction, or on a motion made to discharge an order for such service, called upon to try the action, or express a premature opinion on its merits, and where there are conflicting statements as to material facts, any such opinion must necessarily be based on insufficient materials. But I think that the application should be supported by an affidavit stating facts which, if proved, would be a sufficient foundation for the alleged cause of action, and, as a rule, the affidavit should be by some person acquainted with the facts, or, at any rate, should specify the sources or persons from whom the deponent derives his information.

Judgment

Reference is also made to the Yearly Practice, 1932, where, at p. 98, we find the following statement:

The affidavit should state what the proposed cause of action is, and should state the facts sufficiently to enable the judge to decide whether the case comes within one or other of the sub-rules.

Amongst other cases cited for this proposition it *Great Australian Gold Mining Company* v. *Martin* (1877), 5 Ch. D. 1 in which case James, L.J., at p. 11, says:

But I think, before the writ was issued in the first instance, there ought to have been an affidavit of merits to this extent, that is to say, an affidavit by the solicitor or some other person, saying, in the clearest possible way, "I have been advised and believe that the defendant, against whom the writ is asked for, made a misrepresentation with regard to the matters in question, and that that misrepresentation has been used in England, and that in consequence of such misrepresentation so being used in England, the company have been put to a considerable expense, and he received the profits," or something to that effect. That would have been a cause of action, and a cause of action arising in England. There is some difficulty in saying what ought to be done, but something equivalent to that was required by the old Common Law Procedure Act, and, in my opinion, that

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ought to be now done before any man out of the jurisdiction is called upon to answer anything that anybody chooses to put into a writ of summons.

Counsel on behalf of the plaintiff refers to Daniell's Chancery Forms, 6th Ed., p. 154, but, if by the form there set out it is intended to suggest that a mere repetition of the writ is sufficient, I must say that it seems to me that the authorities above referred to would make it impossible to follow such suggestion. It also seems to me that the Court is not bound to give leave but has a discretion and my view in the present case is similar to that expressed in the *Chemische Fabrik* and *Great Australian* cases, *supra,* and is that the mere statement of what the plaintiff claims or is bringing his action for and that someone believes the plaintiff has a good cause of action is not sufficient but that before the defendant resident in Ontario should be compelled to defend an action here for libel, there should be an affidavit by the solicitor or some other person stating also in the clearest possible way that (or he had been advised and believed that) certain circular letters containing a libel had been sent by the defendants, etc.

My conclusion, therefore, is that the application on behalf of the said defendant, should be granted.

Application granted.

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REX v. DOWDELL

REX v. DOWDELL.

Constitutional law—Ill-treatment of children—Offence against Provincial Act—Section 79 of Infants Act—Validity—R.S.B.C. 1924, Cap. 112, Sec. 79.

Section 79 of the Infants Act provides that: "Any person who, having the care, custody, control, or charge of a child under the age of 18 years, ill-treats, neglects or abandons or exposes such child, or causes or procures to be ill-treated, neglected, abandoned, or exposed, shall be liable, on summary conviction, to a fine not exceeding one hundred dollars, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding three months."

Held, to be *intra vires* of the Provincial Legislature.

Statement

CERTIORARI proceedings to quash a conviction by the police magistrate of the Municipality of Langley for ill-treatment of a child under the age of 18 years, under section 79 of the Infants Act, the accused being fined $100 and in default of payment ordered to be imprisoned for three months. Heard by MACDONALD, J. in Chambers at Vancouver on the 28th of June, 1932.

C. L. McAlpine, for the application.
Selkirk, for the Crown.

19th October, 1932.

Judgment

MACDONALD, J.: Defendant seeks, through *certiorari* proceedings, to quash a conviction of the police magistrate of the Municipality of Langley, whereby she was fined $100 and in default of payment ordered to be imprisoned. The offence, as shewn by the conviction was, that the said Sarah Rose Dowdell, on divers dates between the 1st day of January and the 29th of March, 1932, having then the custody, control and charge of Reed Dowdell, a child under the age of 18 years, did then and there to wit:

At Hunter Road in the Municipality of Langley unlawfully ill-treat, neglect and expose such child, or cause and procured such child to be ill-treated, neglected or exposed contrary to the form of the statute in such case made and provided.

The information had, in addition to such wording of the

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conviction, these words: "and under section 79 of the Infants Act." The form of the conviction might be the subject of criticism, but counsel agreed that, although the conviction did not refer specially to said section 79, still that the only question to be decided upon the application was, whether this section of the Infants Act (R.S.B.C. 1924, Cap. 112) was *ultra vires* of the Provincial Legislature. It reads as follows:

79. Any person who, having the care, custody, control, or charge of a child under the age of eighteen years, ill-treats, neglects, or abandons or exposes such child, or causes or procures such child to be ill-treated, neglected, abandoned, or exposed, shall be liable, on summary conviction, to a fine not exceeding one hundred dollars, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding three months.

Standing by itself, this section might appear to create a criminal offence, but before I arrive at a conclusion to that effect, which would shew an invasion of the powers solely vested in the Dominion and thus destroy a salutary provision for the protection of children, several matters require consideration.

Judgment

There is no doubt that criminal law "in its widest sense, is reserved for the exclusive authority of the Dominion Parliament": *vide Attorney-General for Ontario* v. *Hamilton Street Railway* (1903), A.C. 524 at p. 529, but the Privy Council was there considering an entire Act "To prevent the Profanation of the Lord's Day"—not as here simply the section of an Act which of itself is not attacked.

The Infants Act, in common with similar legislation in other Provinces of Canada, deals with the care, custody, control and charge of children. Its provisions are intended to adequately cover this ground. It implements the jurisdiction of our Courts to deal with infants.

In construing a statute,—

It is an elementary rule that construction is to be made of all the parts together, and not of one part only by itself:

Maxwell on Statutes, 7th Ed., 25; Co. Litt. 381.a.; *Lincoln College's Case* (1595), 2 Co. Rep. 147. To the same effect Lord Blackburn in *Turquand* v. *Board of Trade* (1886), 11 App. Cas. 286 at p. 291 said in construing the Interpretation Act:

In construing this Act, of course, like every other Act, we must take the whole of the Act together, and as this is a very long Act, containing I think about sixty pages of very closely printed matter, it requires in order that

we may be certain that we omit nothing, that we should look carefully at it altogether and consider all the clauses.

While the question to be decided here, is not, strictly speaking, as to the construction or meaning of the section, but rather, as to whether the Province has exceeded its jurisdiction, still, the purpose and intent of the section should be considered in determining its validity. Unless lack of jurisdiction is clearly shewn, I should give such construction to the section, as would "suppress the mischief, and advance the remedy": *vide Heydon's Case* (1584), 2 Co. Rep. 18 at p. 20. The presumption is in favour of the legality of the legislation.

Then again the Interpretation Act provides, that all portions or sections of an Act shall be deemed to be remedial, as follows (section 23 (6)):

Every Act and every provision or enactment thereof shall be deemed remedial, whether its immediate purport be to direct the doing of anything which the Legislature deems to be for the public good, or to prevent or punish the doing of anything which it deems contrary to the public good; and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of such provision or enactment, according to their true intent, meaning, and spirit.

Judgment

I feel no doubt that the section in question was not intended to invade the criminal law of Canada but enacted in order to put "teeth" in the Infants Act and render it more effective according to its "true intent, meaning, and spirit." Then did the Province in so legislating overstep the boundaries of its jurisdiction.

Similar statutes are in force in other Provinces of Canada. Without dealing with them in detail, I will briefly refer to three of the Provinces.

In Ontario there is extensive legislation providing for protection to children, *viz.*, The Children's Protection Act, R.S.O. 1927, Cap. 279. Various sections of this Act impose penalties for violation of its provisions, in some cases being by fine, as well as imprisonment.

Section 13 of such Act under the caption of "penalty for ill-treatment" provides as follows:

Any person having the care, custody, control or charge of a child who abandons, deserts or neglects such child or inflicts unreasonable cruelty or ill-treatment upon such child not constituting an assault, shall be guilty of an offence and upon summary conviction thereof shall incur a penalty not

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exceeding $100 and shall, in lieu of or in addition thereto, be liable to imprisonment for a term not exceeding one year.

This section is only slightly different from said section 79 of the British Columbia Act. It is only qualified, so as not to be applicable to cruelty or ill-treatment, constituting an assault.

In Nova Scotia there is a statute termed "Of the Prevention and Punishment of Wrongs to Children" (R.S.N.S. 1923, Cap. 168). A general penalty therein provides, that every person, convicted of any offence against the Act, shall be liable to a penalty, of not less than $20 or more than $100 or to imprisonment in default of payment.

In Manitoba there is extensive legislation dealing with the welfare of children and known as "The Child Welfare Act" (C.A., 1924, Cap. 30). It creates a department of the Government and deals with all phases of the situation, to effect its objects. As to ill-treatment of children, section 175 is as drastic, at least in its terms as the one I am considering. Upon conviction the extreme penalty is more severe. It provides for imprisonment "for a term not exceeding five years, with hard labour, and with option of fine."

Judgment

Bearing in mind this legislation and the object, apparently sought to be attained by said section 79, then, unless the "field" be clearly occupied under the Criminal Code, I think, I should hold that it is not *ultra vires* of the Province. In other words, if the Criminal Code covers the ground and creates a statutory offence within the terms of such section, then the Provincial legislation becomes invalid and the same result would follow, if the matter were pursued, with respect to similar legislation in all the Provinces. The anomaly of the position however is, that if the offence, of which the defendant was convicted, comes within the Criminal Code, then support would be given to the conviction and it would be upheld. It would thus be immaterial whether said section 79 was invalid or not. As to whether the offence, as outlined in the said section 79, is included within the provisions of the Criminal Code, there might in that respect under certain circumstances be an overlapping, but giving a "fair, large and liberal construction" to the section, I do not think it comes in conflict with the Criminal Code and thus does not invade exclusive jurisdiction conferred

upon the Dominion Parliament with respect to criminal law. In this connection I utilize, with proper changes, a portion of the judgment in *Rex* v. *Osjorm* (1927), 2 W.W.R. 703 at p. 705. It would appear that, if the Province could not declare ill-treatment, neglect or abandonment of a child under the age of 18 years by persons having the care, custody or charge of such child to be an offence, looking at it in the aspect of criminal law, it could properly do so, looking at it in the aspect of the care, custody and charge of children. The latter is a right, as well as a duty, vested in the Province. *Vide* on this point *Hodge* v. *The Queen* (1883), 9 App. Cas. 117 at p. 130; 53 L.J., P.C. 1 at p. 6 that:

> Subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91.

Harvey, C.J. in *O'Brien* v. *Royal George Co. Ltd.* 16 Alta. L.R. 373; (1921), 1 W.W.R. 559 in his judgment, dealing with the closing of a temperance bar on Sunday, said (p. 375):

> It may seem peculiar that the purpose rather than the effect of legislation should be the guide for determining its validity but it is too late now to doubt that legislation may be valid and effective.

This case is also instructive, as being a decision supporting Provincial legislation which bordered on a subject, also dealt with in the Criminal Code.

Judgment

The majority of the Court of Appeal decided that the Provincial Act, while dealing with the observance of Sunday, still did not invade the field occupied by the Dominion under The Lord's Day Act.

The case of *Rex* v. *Cooper* (1925), 35 B.C. 457 was not cited upon the application and upon a cursory reading it might support the contention of the defendant but, upon further consideration, it emphasizes the distinction referred to in *O'Brien* v. *Royal George Co., Ltd., supra.* In that case Cooper was convicted under the Government Liquor Act, R.S.B.C. 1924, Cap. 146 for selling liquor to an Indian. The conviction was quashed by the County Court and the Crown was unsuccessful upon appeal. Reference was made to the Dominion Act and the Provincial Act, each purporting to deal with precisely the same offence, namely, selling liquor to an Indian. There was no question as to the jurisdiction of the Dominion to pass section 135 of the Indian Act, under its powers, in respect to the peace,

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order and good government of Canada. Then in addition the Parliament of Canada had, *inter alia,* under the B.N.A. Act, exclusive legislative authority with respect to the subject of "Indians." No doubt was expressed that the Province may, in the absence of Dominion legislation, pass a prohibitory law relating to matters of merely local or private nature in the Province. A portion of the judgment of MACDONALD, C.J.A. is pertinent as follows (p. 460):

> But when the two jurisdictions come in conflict, and to the extent of the conflict, I think it is settled law that the Dominion legislation excludes the operation of Provincial law.
>
> The assertion of the right by two distinct legislative bodies to make the same act an offence and subject the offender to a double penalty is, I think, contrary to the accepted principles of our law and contrary to the British North America Act. No doubt that result may sometimes be brought about indirectly, but there is no case in the books which goes the length of holding that when the Dominion has created a particular act a crime, the Province may for its purposes create the same act a crime.

Compare GALLIHER, J.A.:

> Where the Dominion have entered the field, as they have here, in the case of sale of liquor to Indians, to that extent their legislation is paramount.

Judgment

As to the offences relating to children and especially their care, welfare and treatment I think the field is not so fully and clearly occupied by the Criminal Code, as to render the impugned section, *ultra vires* of the Province. It comes within the fourth proposition referred to in *In re Fisheries Act, 1914; Attorney-General for Canada* v. *Attorney-General for British Columbia* (1929), 3 W.W.R. 449 at p. 453 as follows:

> There can be a domain in which Provincial and Dominion legislation may overlap in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail (see *Grand Trunk Railway of Canada* v. *Attorney-General of Canada* (1906), 76 L.J.P.C. 23; (1907), A.C. 65).

The section impugned simply implements and gives effect to the Provincial legislation with respect to children. I have thus come to the conclusion that, while said section 79 may be limited in its operation and effect, on account of the Criminal Code, still it is not invalid. In so determining, I am influenced by the grounds stated and the presumption in favour of validity of a statute, also by the existence of similar legislation in other Provinces for the same purpose. The application is dismissed with costs.

Application dismissed.

THE ROYAL TRUST COMPANY v. SHIMMIN.

MACDONALD, J. (In Chambers)

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THE ROYAL TRUST CO. v. SHIMMIN

Insurance, life—Will—Declaration, subsequent to will in favour of preferred beneficiary—Subsequent codicil—Effect of—B.C. Stats. 1925, Cap. 20, Secs. 28, 29 and 102.

R. P. Clark took out a policy of life insurance in the Manufacturers' Life Insurance Company for $5,000 in April, 1925. By his will of the 11th of September, 1926, he appointed The Royal Trust Company his executor. The beneficiary under the policy was changed by various declarations until finally by declaration of R. P. Clark on the 18th of July, 1930, the policy was made payable to his wife and she became the preferred beneficiary. The defendant Shimmin, authorized trustee of the estate of R. P. Clark & Company, Limited, recovered judgment against Mrs. Clark on the 1st of March, 1932, for $5,900. R. P. Clark made a codicil to his will on the 31st of March, 1932, whereby if the codicil prevailed the moneys payable under the policy would be subject to the terms of the will. R. P. Clark died on the 8th of April, 1932, and on May 12th following all moneys due from the Manufacturers' Life Insurance Company to Mrs. Clark under the policy were attached to answer the Shimmin judgment. On an issue between The Royal Trust Company as plaintiff and R. L. Shimmin as defendant to determine the disposition of the money payable on the insurance policy:—

Held, that although a codicil to a will operates as a revival of the will and is republished by the codicil and thus for many purposes the date of the original will is shifted to the date of the codicil, the republication did not necessarily make it operate for all purposes, the rule being subject to the limitation that the intention of the testator is not to be defeated thereby. The intention of the testator is clearly expressed in his declaration of July 18th, 1930, and there is no statement in the codicil that such previous intention had been changed. In order to destroy the benefits which R. P. Clark intended should be acquired by his wife, a document indicating such intention should have been executed by him. The plaintiff fails in the issue and judgment should be for the defendant.

Statement

ISSUE directed to determine as to the disposition of moneys payable under two life-insurance policies on the life of R. P. Clark, issued by the Manufacturers' Life Insurance Company. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. in Chambers at Vancouver on the 18th of October, 1932.

Robertson, K.C., and *A. B. Robertson*, for plaintiff.
McPhillips, K.C., for defendant.

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25th October, 1932.

MACDONALD, J.: On the 1st of March, 1932, Robert Laing Shimmin, as authorized trustee of the estate of R. P. Clark & Company (Vancouver) Limited, recovered a judgment against Mildred Hope Clark, wife of R. P. Clark for $5,900 and costs to be taxed.

The said Clark died on the 8th of April, 1932, his life being at the time insured with the said Manufacturers' Life Insurance Company, under two policies, dated respectively the 29th of April 1925, for $5,000 and the 10th of September, 1923, for $3,000.

On the 12th of May, 1932, all moneys owing, payable or accruing from the Manufacturers' Life Insurance Company to the said Mildred Hope Clark under the said policies were, by garnishee process, attached, to answer the said judgment.

Judgment

The said R. P. Clark had by his will, dated the 11th of September, 1926, appointed The Royal Trust Company as his executor. Prior to his death he executed a codicil to the said will, to which I will refer later on. The Royal Trust Company duly probated the said will and codicils, and, as such executor, claimed to be entitled to all moneys, which might be payable under the said policies, upon the life of the said R. P. Clark. A contest thus arose and this issue was directed to determine, as to the disposition of such moneys.

At the time of the service of the garnishee order, it was apparent that the said judgment creditor, who is defendant in the issue, sought to attach all moneys which might be payable to Mildred Hope Clark under the said policies, but before trial he abandoned any claim with respect to the policy for $3,000 and the issue is thus confined to the policy for $5,000. This policy when originally issued by the said Manufacturers' Life Insurance Company upon the life of R. P. Clark named as the beneficiary thereunder the Westminster Trust Company "as trustees for R. P. Clark & Company Limited, their successors, administrators or assigns." On the 5th of November, 1928, the said Westminster Trust Company transferred to the said R. P. Clark all its right, title and interest in the said policies and all benefits and advantages to be derived therefrom. The said R. P. Clark & Company, Limited, also made a like assignment to the

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same effect on the 7th of November, 1928. Then on the 8th of November, 1928, the said R. P. Clark made a declaration as to the said policy of $5,000, declaring that the moneys secured thereby should be payable "to my estate as detailed in my last will and testament and revoking any designation of beneficiary or appointments of benefits theretofore made." A copy of this declaration, which was in accordance with the Insurance Act, was registered with the said Manufacturers' Life Insurance Company on the 23rd of November, 1928. It remained effectual and binding, until the said R. P. Clark made another declaration on the 18th of July, 1930, in similar form, with a like revocation, desiring and ordering that all moneys secured under the said policy of $5,000 should be payable to Mildred Hope Clark, his wife. She thus became a preferred beneficiary under the Life Insurance Act. A trust was created in her favour within the terms of section 28 of said Act and without any contingency, reservation or limitation as referred to in subsection 2 thereof.

Judgment

It is conceded by counsel for The Royal Trust Company, plaintiff herein, that this declaration would, in accordance with its tenor, operate, so that Mrs. Mildred Hope Clark would be entitled to the moneys payable under the said policy and thus attachable to satisfy said judgment against her, if the said Clark had died, after making such declaration and before executing any other instrument.

It is apparent that section 29 of the Life Insurance Act was not nor in fact were any of the provisions of such Act thereafter specifically complied with so as to change the said last-mentioned declaration. The Act applies to the said policies and the benefits and preferences obtained thereunder by the insured should be accompanied by observance of its terms.

It is however contended that by a codicil to his will, executed by said R. P. Clark on the 31st of March, 1932, the effect of said declaration was destroyed and rendered the moneys payable under the said policy, subject to the terms of the will of the said R. P. Clark. If this contention prevailed, the result would be that The Royal Trust Company as executor would be entitled to such moneys and the said Mrs. Mildred Hope Clark would under the will have a very limited and contingent interest in the

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same. She might, under certain circumstances, have derived no benefit whatever from the said policy, contrary to the evident intention of her husband, when he made the said declaration on the 18th of July, 1930. The question then arises whether the codicil has the effect thus contended for.

There is no doubt that a codicil to a will operates as a revival of the will, as if the testator had made a new will at the time. While the will was republished by the codicil and thus for many purposes the date of the original will was, as it were, shifted to the date of the codicil, still the republication did not necessarily make it operate for all purposes "as if it had originally been made at the date of the republishing instrument; a contrary intention may be shewn.

> The rule is subject to the limitation that the intention of the testator is not to be defeated thereby:"

vide Halsbury's Laws of England, Vol. 28, p. 578.

Judgment

I have already referred to the intention of the testator as expressed in the declaration of the 18th of July, 1930, and that there is no statement in the codicil that such previous intention has been changed. The "property," so terming the benefits to be derived under the said policy of insurance, had been allocated as between the husband and his wife. I think, in order to destroy the benefits which R. P. Clark had thus intended should be acquired by his wife, a document, clearly indicating such intention should have been executed by him. In this connection Lord Campbell in *Hopwood* v. *Hopwood* (1859), 7 H.L. Cas. 728 at p. 737, in referring to the dissenting opinion of Lord Justice Turner, as to whether an instrument executed subsequent to the making of a will operated as an ademption, said:

> I entirely concur "that it is a question of intention, and that the object is to ascertain the intention of the parties."

Though the facts are quite different to those here presented, still this principle is generally applicable. I do not think that the mere republication of the original will has the effect contended for nor that the codicil so intended. If the testator had the intention now submitted he could have so expressed himself. The probability is that he simply intended to make specific bequests referred to in the codicil. Adopting the language of Lord Cottingham in *Powys* v. *Mansfield* (1837), 3 Myl. & Cr. 359 at p. 376:

The words of confirmation of the will were introduced as words of course, without any reference to the legacy [policy of insurance] in question.

Compare S.C. p. 376:

The codicil can only act upon the will as it existed at the time: and, at the time, the legacy [policy] revoked, [transferred] adeemed, or satisfied [allotted] formed no part of it.

I do not think authorities cited by the plaintiff affect the situation nor upon the facts operate in its favour.

I have already referred to the other ground, taken by the defendant, that in any event a republication of the will does not in view of non-compliance with the provisions of the Life Insurance Act support the plaintiff's claim.

Judgment

In my opinion the plaintiff fails in the issue and judgment should be in favour of the defendant with costs, subject to a set-off of any costs which the registrar may consider proper to tax, through the abortive attempt of the defendant to claim under his attachment the proceeds of both policies of insurance. Judgment accordingly.

Judgment accordingly.

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TODD v. DEPAOLA

TODD v. DEPAOLA: CITY OF VANCOUVER, GARNISHEE.

Attachment of Debts Act — Garnishee — "Employee"—"Wages or salary"— R.S.B.C. 1924, Cap. 17, Sec. 3.

The defendant was appointed official Italian police Court interpreter in Vancouver, and by his terms of service he was paid for interpreting cases in the police Court, $2.50 for one case per day; $4 for two cases per day, and not more than $5 per day for any number of cases. He was not obliged to be present in Court continuously, but was paid only for the work he actually did. He received a cheque at the end of each month for his services. The plaintiff issued a garnishing order against the City of Vancouver, and the city in compliance with the order paid the sum claimed into Court. On the plaintiff's application to set aside the order:—

Held, that as the defendant is paid wages or salary as an employee of the city within the provisions of section 3 of the Attachment of Debts Act, he is entitled to exemption and the garnishee order should be set aside.

Statement

APPLICATION to set aside a garnishee order. The defendant is one of the official police Court interpreters at the police Court in Vancouver. He is paid a fixed sum for each case he interprets when called upon to do so. He does not have to be at the police Court at all times, but when he is needed he is called upon and when he is not there when called upon he does not get paid. He is paid once a month by cheque from the City of Vancouver for the total remuneration earned. The plaintiff issued a garnishing order before judgment "for other than wages or salary" against the City of Vancouver. The city in compliance with the order paid $86.90 into Court. The defendant applied to set the order aside and payment out on the grounds that the money earned and paid into Court was for "wages and salary" within the meaning of the Attachment of Debts Act. Heard by ELLIS, Co. J. at Vancouver on the 18th of October, 1932.

S. W. Taylor, for plaintiff.
E. B. Bull, for defendant.

25th October, 1932.

Judgment

ELLIS, Co. J.: This is an application to set aside a garnishing order on a number of grounds, the principal one of which is that

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the provisions of the Attachment of Debts Act do not apply to the defendant.

The main contention involves the interpretation of the second paragraph of section 3 of the Act, reading as follows:

> Provided that no debt due or accruing due to a mechanic, workman, labourer, servant, clerk, or employee for or in respect of his wages or salary shall be liable to seizure or attachment under this Act," etc.

Judgment

The main facts seem to be admitted. The defendant was employed and appointed as official Italian police Court interpreter for the City of Vancouver in the month of April, 1929. His appointment was made by the late police magistrate and by the terms of his service he was to get for interpreting cases at the police Court $2.50 for one case per day, $4 for two cases per day and not over $5 for any number of cases per day. It appears that there was no obligation on the part of the defendant to be present at the police Court and he was paid only for the work he actually did while acting as interpreter and on the scale above mentioned. There is no power on the part of the city to enforce his attendance and consequently if he did not appear he did not get paid. The defendant is not a mechanic, workman, labourer or servant within the meaning of the Attachment of Debts Act. Was he a clerk or employee? If so, was he paid a wage or a salary? If he comes within the cases enumerated within the Act he is entitled to the exemption provided by the statute. If he does not, he is not so entitled. No cases expressly on the point were cited by counsel for either the plaintiff or defendant. According to the new English Dictionary (Oxford Edition) which does not vary materially from other dictionaries, the word "salary" is defined as follows:

> To pay a regular salary to; a fixed payment made periodically to a person as compensation for regular work.

The definition of "wage" is as follows:

> A payment to a person for services rendered. Formerly used widely, *e.g.*, for a salary or fee paid to persons of official or professional status, now . . . restricted to mean: The amount paid periodically, especially by the day or week or month, for the labour or service of a workman or servant.

Mr. *Bull* on behalf of the defendant in his very able argument cited a number of cases in support of his contention that the defendant was entitled to invoke the statute. The case of *Re Hartwick Fur Co. Ltd.; Murphy's Claim* (1914), 17 D.L.R. 853 was decided by Kelly, J. under the Dominion Winding-Up

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Act. In that case the learned judge held that the claimant was entitled to preference under the Winding-Up Act. Murphy, a claimant, was a commercial traveller and sold furs on commission. His whole time and service were given to his employer and the position as master and servant existed. The learned judge held that because of that relationship the method of payment did not change the position. In *Re Parkin Elevator Co., Ltd.: Dunsmoor's Claim* (1916), 31 D.L.R. 123, Meredith, C.J.C.P. held that a sales agent employed on a commission basis is not a "clerk or other person" entitled in respect of commissions, to rank as a preferred creditor for arrears of salary or wages within the meaning of section 70 of the Winding-Up Act. In *Re Western Coal Co. Ltd.* (1913), 12 D.L.R. 401 it was held that one employed without a definite term of hiring to haul coal with his own wagon and team, at a fixed sum per ton who works under the control and direction of his employer, is working for wages so as to make him a preferred creditor under the Companies Winding-Up Ordinance of the North-West Territories. All these cases relate to winding-up. In the latter case, which comes near to the case at Bar, the learned judge held that the claimant was employed to haul coal from the company's mine to Edmonton at a certain fixed sum per ton hauled. He was under no obligation to haul any specified quantity and he could stop work or be discharged at any time. The learned judge held that the relationship of master and servant existed in that case.

The Attachment of Debts Act was passed primarily for a specified purpose and protection is given a certain specified class.

After a very careful reading of the *Western Coal Co. Ltd.* case, *supra,* I cannot see any distinction between the principle decided by Beck, J. therein and the case at Bar. In addition there is a very close analogy to the facts. The fact that the defendant's name does not appear on the pay-roll of the City of Vancouver is immaterial. The city was liable to pay him when he performed services and by defining by its true name the compensation he got is attempting a too fine distinction on the interpretation of a statute.

The application is allowed.

Application allowed.

REX v. TAKAGISHI.

MACDONALD, J.

1932

Oct. 24.

REX
v.
TAKAGISHI

Criminal law — Practice — Criminal libel—Trial—Disagreement of jury—Discharge of accused—Later application to have indictment further proceeded with—Refused—Criminal Code, Secs. 962 and 1045.

The accused was indicted on a charge of criminal libel by the Grand Jury at the (1931) Fall Assizes in Vancouver, and on the trial the jury disagreeing, the case was traversed to the following Spring Assizes, when on the case coming up for further trial, counsel for the private prosecution, in the presence of counsel for the Crown and for the defendant, asked that the case be stayed, to which counsel for the Crown gave a formal consent and counsel for the defence had no objection, and the Court stayed the proceedings. Counsel for the defendant then moved for the discharge of the accused which, after discussion, was ordered by the Court without objection by counsel for the Crown or for the private prosecution. Counsel for the defendant applied for an order for payment of the costs under section 1045 of the Criminal Code, and an order was made to this effect and the costs were taxed. At the Fall Assizes of 1932 an application was made by counsel for the private prosecution to the presiding judge to have this indictment further proceeded with, stating that the Attorney-General was willing to remove the stay of proceedings which already existed.

Held, that the application should be refused, as there is no authority in the Criminal Code allowed the Attorney-General, after granting a stay of proceedings upon an indictment, to remove the stay and allow such indictment to be again proceeded with. The proper procedure would be for the Crown to prefer another "charge."

Statement

APPLICATION to set a date for trial of the defendant on indictment. The facts are set out in the head-note and reasons for judgment. Heard by MACDONALD, J. at Vancouver on the 24th of October, 1932.

Argument

Sloan, for the application: A stay of proceedings means what the phrase indicates. Proceedings under the indictment stayed, are merely in abeyance. When the Attorney-General lifts the stay, the wheels of justice commence again to move from the point where they were stopped by the stay. It is submitted that Takagishi is liable to trial on the old indictment: see Criminal Code, Sec. 962; Halsbury's Laws of England, Vol. 9, p. 350, sec. 680; Archbold's Criminal Pleading, 28th Ed., 128; Short & Mellor's Crown Office Practice, 2nd Ed., 142; *Goddard* v.

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Smith (1704), 6 Mod. 261; *Reg.* v. *Mitchel* (1848), 3 Cox, C.C. 93 at pp. 105 and 119; *Reg.* v. *Allen* (1862), 31 L.J., M.C. 129; *Reg.* v. *Thornton* (1878), 18 N.B.R. 140; *The King (McDonnell)* v. *Justices of Tyrone* (1912), 2 I.R. 44 at p. 48; *Rex* v. *Blackley* (1904), 8 Can. C.C. 405.

Argument

Craig, K.C., for accused: The entry of a stay of proceedings by the Attorney-General, and the discharge of the defendant made thereupon is a judgment for the defendant upon the indictment. That indictment is at an end: *Rex* v. *Blackley* (1904), 8 Can. C.C. 405; *Rex* v. *Fournier* (1916), 25 Can. C.C. 430. There is nothing in the Criminal Code giving any authority to the Attorney-General, to withdraw a stay of proceedings entered by him. The stay of proceedings has been acted on by the Court, in discharging the prisoner on the indictment, and it is therefore now too late for the Attorney-General to withdraw the stay of proceedings, even if he could have done so, before the stay had been acted on by the Court.

Judgment

MACDONALD, J.: The defendant, Takagishi, was indicted by the Grand Jury at the Fall Assizes of 1931. Upon the case being tried the jury disagreed, with the result that the case was traversed to the Spring Assizes of 1932. The indictment alleged a criminal libel, and when the case came on in due course for further trial, at such Spring Assizes, counsel for the Crown appeared and also counsel for the private prosecutor. The latter, addressing the Court, mentioned the facts, as I have shortly outlined them, and then was requested to state his position particularly, as to what he desired, in connection with the prosecution. He seemed to be rather undecided as to why he had made any application. Then upon the query being presented to him, as to whether he desired to have the case traversed, he said "I am asking to have it stayed." Mr. *Craig*, counsel for the defendant, stated he had no objection to that course being pursued. Counsel for the Crown gave a formal consent and the Court stayed proceedings.

Counsel for the defendant asked the Court whether there would be a discharge of the accused, which, after some discussion, was ordered by the Court, without any apparent objection by either counsel for the Crown, or for the private prosecutor.

Counsel for the defendant then applied for an order for payment of the costs under section 1045 of the Criminal Code. The Court desired to know if the proceedings, thus taken, were equivalent to an acquittal. Counsel for the defendant stated he had authority to that effect, and counsel for the private prosecutor in reply said that he considered it was not equivalent to an acquittal, as it was only a disagreement of the jury. The Court then took the position, which is now assumed by counsel for the defendant, that the case was withdrawn, stating that disagreement was not an acquittal, but that there has been a discharge of the prisoner out of custody without any comment. There was no doubt in this respect, and the order was made to that effect. The defendant was discharged and the costs were taxed. This discharge of the defendant was, to my mind, an important feature of the proceedings and entitled to considerable weight in disposing of the present application. This all occurred during and shortly after the Spring Assizes of 1932.

Judgment

Then at the present Fall Assizes an application is made to me, as the presiding judge, to have this indictment further proceeded with, it being stated by other counsel, engaged by the private prosecution, that the Attorney-General was willing, as he expressed it, to lift his hand, or remove the stay of proceedings which already existed. Counsel thus making the application went to considerable trouble in the matter, and I intimated to him that it would be necessary, if his application were acceded to, that he should have a formal statement by the Attorney-General, shewing approval of the course he was pursuing with respect to the prosecution. Upon the assumption that such formal statement could be obtained I gave the matter consideration and allowed the argument to proceed.

Counsel supporting the application frankly admits that there was no case in point, in which an indictment thus stayed was proceeded with, in the manner he now seeks to have pursued. He referred to several judgments in which the matter received some consideration, but admitted that the result of those cases does not give him the support which he would desire. In order to succeed, he submits that I should deduce from some remarks in these judgments, a result that would bring this indictment into operation once more and require the accused party, who has

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already been discharged, to appear at the next Assizes and again be placed on trial.

Several cases have been cited in this connection, but it does not seem to me that they in any way controvert the conclusion reached in Archbold's Criminal Pleading, 28th Ed., p. 128, which I will read without discussion:

A *nolle prosequi* puts an end to the prosecution . . . ; but does not operate as a bar or discharge or an acquittal on the merits . . ; and the party remains liable to be re-indicted.

Then reference was made by the text-writer to the fact that a fresh process may be awarded on the same indictment. He then adds: "but this *dictum* appears not to be law." Several cases are then cited in support of the latter proposition. I might also refer to some Canadian cases, but, without further discussion, I may state that I have come to the conclusion that the application should be refused.

Judgment

It would be establishing a new practice in criminal proceedings, without any warrant for so doing. It would be an anomaly, when you consider the fact that taxation of costs had already taken place, and if a new trial were held upon this indictment the benefit, thus obtained, under the order allowing the costs, might be affected and, in the result, be completely lost.

In conclusion, I might remark that there is no authority in the Criminal Code allowing the Attorney-General to grant a stay of proceedings upon an indictment, or as it was formerly termed, to enter a *nolle prosequi,* and then to remove the stay and allow such indictment to be again proceeded with. The proper procedure would be for the Crown to prefer another "charge."

I do not think I have any jurisdiction, which will warrant me making any order for costs.

Application refused.

JAMES AND JAMES v. PIEGL.

MACDONALD, J.

1932

Nov. 1.

JAMES v. PIEGL

Motor-vehicles—Pedestrian crossing street to board street-car—Run down by motor-car—Negligence—Damages.

A pedestrian crossing the road at an intersection to board a street-car has a right to expect that an on-coming automobile driver, coming from a distance, will see him and not come too close to the crossing for safety; further, that he would slacken his speed and have his car under such control that it could be stopped almost instantly.

Statement

ACTION for damages for injuries sustained by the plaintiff Sarah James, when run into by the defendant when driving his automobile at the intersection of Hastings Street and Ranelagh Avenue in the City of Vancouver. Mrs. James was standing at the north-east corner of the intersection waiting for a west-bound car. Cars going east past this intersection went two blocks further to the end of the rails and then returned, and it was the custom to take on west-bound passengers at this corner while proceeding east instead of allowing them to wait until their return. On an east-bound car stopping at the intersection, the plaintiff proceeded from the north-east corner to board the car, and as she stepped on to the road she was struck by the defendant who was driving his car westerly on Hastings Street. Tried by MACDONALD, J. at Vancouver on the 12th of September, 1932.

J. Edward Bird, for plaintiff.
G. F. H. Long, for defendant.

1st November, 1932.

Judgment

MACDONALD, J.: Plaintiffs seek to recover damages from defendant through negligence on his part, resulting in serious injuries to the plaintiff, Sarah James (hereafter called plaintiff). She was so injured by the defendant, on the 31st of July, 1931, while crossing Hastings Street East at its intersection with Ranelagh Avenue.

Plaintiff was standing, at the north-east corner of said streets conversing with a friend, Mrs. Kingside, since deceased. They were intending to take the street-car into the city and were awaiting its arrival. There was a practice for the street-car to

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proceed two blocks to the end of the line of railway and then return taking the passengers westward into the city. For convenience, however, when intending passengers were waiting at one of these corners, the conductor, who was also motorman, took the passengers on board, on his way east, instead of allowing them to await his return. Defendant was acquainted with the locality and constantly driving his automobile along Hastings Street. He admits seeing the plaintiff at the corner conversing and that he kept her in sight, as he was approaching the intersection, except for a moment, when his view was obstructed by a rather large telephone pole. However, the object of the plaintiff waiting at the point should have been evident to the defendant, and, in any event, if he was on the look-out, as he was bound to be, he could not avoid seeing her leave the place, where she had been conversing and proceed to cross the road, in order to board the approaching street-car operated by Adam Taylor.

It is contended by the defendant, that the plaintiff was careless, in attempting to so cross the street, in the face of the on-coming automobile. If you lay aside her rights in the matter, this contention has some weight if she saw or heard such automobile. She had the same rights in the use of the street as the defendant.

> Pedestrians are not compelled to scurry out of the way on the sound of a horn, at the peril of being run down, but the drivers must exercise necessary care and prudence to avoid an accident, and must not violate the rights which pedestrians and others have under the common law:

vide Barron's Canadian Law of Motor Vehicles, p. 325.

Still a practice has sprung up of pedestrians, at intersections, where there are no stop and go signals, giving a right of way to approaching automobiles, even though they may be far distant from the crossing. This may doubtless be based partly on courtesy, but more likely, on a safety first proposition. The pedestrians prefer to step back, even if they have clearly started to cross at an intersection, rather than run the risk of being run down by the careless driver of an approaching automobile—perchance over 100 feet away. The danger is too great to insist upon their rights, especially as they have no protection from injury. I might add, if they were prepared to encounter the risk, and asserted their right to continue to cross upon all occa-

sions it would doubtless congest the motor traffic. I am only, however, dealing with the legal rights of those, who use our highways. I have adverted to the rights of pedestrians in *Wood* v. *Powell* (not reported). There may be legislation, but it would be economically impracticable to have the "stop and go" signal system, established throughout a city.

Was the defendant negligent under the circumstances so as to cause the accident, with attendant serious injuries to the plaintiff? Then again, was the plaintiff guilty of contributory negligence?

Judgment

At the close of the trial I reserved my judgment on these points, principally for the purpose of considering what effect it might have on my findings, if I were to come to the conclusion that the street-car operated by Taylor had not come to a full stop, when the plaintiff started to cross Hastings Street to board such car. There was contradictory evidence on this point. A very reliable witness called at my suggestion did not afford any assistance. He led me, however, to a conclusion that the car may have been slowing up and was on the verge of stopping when he heard a scream from one of the passengers, indicating either an impending accident or its actual occurrence. Taylor, the conductor, may have been mistaken in stating, that the car was actually at a standstill, when he invited plaintiff to cross over and come on board. The Assizes intervened, but I have since given the matter further consideration and have come to a conclusion that a definite decision upon this point is immaterial. It would not in any event be of assistance to the defendant, so as to relieve him from responsibility, if the accident were really due to his negligence, *i.e.*, "want of care under the circumstances." He was operating a death-dealing machine on a down grade and liable, if careless, to kill or injure the plaintiff, whom he saw at the corner, apparently, intending to board the approaching car. He was bound to see both the street-car and the plaintiff as he approached. They were both within his view, at the intersection except with the slight obstruction to which I have referred. He contends that he was driving at a reasonable rate of speed and in the 12th paragraph of the statement of defence alleges that the plaintiff ran into the side of his car. Then in the 13th paragraph he asserts that, instead of running

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into the car, she stepped off from the side of the road without looking where she was going and directly in the path of his car. These inconsistent allegations were not proved to my satisfaction. The difficulty which faced the defendant was, that he did not satisfactorily account for his actions from the time when he saw the plaintiff leave the place where she was conversing with her friend, to the time when she came to the edge of the pavement or travelled portion of the highway. I had the benefit of a "view." The plan (Exhibit 1) is deceptive as the paved portion of the road does not abut on the sidewalk. The photo (Exhibit 2) shews an intervening space, to which I have referred, and which formed part of the crossing. To my mind this is an important feature of the case. If the plaintiff had his automobile under proper control, as he approached the intersection, he could as plaintiff was crossing either have stopped his car, or at any rate have avoided the accident. It was not as if the plaintiff, standing on a sidewalk, had stepped off, in front of an automobile. She had, as compared with the total width of the crossing, proceeded an appreciable distance on her way, before she came to the travelled portion of the street and was injured. Taylor stated that the speed of the defendant prior to the accident, was about 35 miles an hour and that defendant, as he came to the point of contact, was not observing the movements of the plaintiff.

I find that defendant was negligent as to speed and also in not keeping a proper look-out and exercising proper care so as to avoid the accident. I had an impression that he might not have slackened on the down grade because he was anxious to pass the intersection before passengers got off the approaching street-car and came around the end of the car in his pathway. Whether he thought of this at the time I cannot say. The discharge of passengers as well as the likelihood of plaintiff crossing should have been present to his mind and rendered him careful, "according to the circumstances."

Then, having found negligence on the part of the defendant causing the accident, is he relieved, and, if so, to what extent by contributory negligence on the part of the plaintiff? The burden rests upon the defendant of proving to my satisfaction that the plaintiff was negligent in crossing the street in such a manner

that it contributed to the accident. I have already referred to the grounds taken by the defendant in his pleading in this connection and his failure to support them by evidence. I accept the evidence of plaintiff, that, prior to crossing the street to board the car, she looked to the right and left. She apparently then felt safe in crossing. Taylor in his evidence corroborates this statement, saying that she was evidently sizing up the situation. At that time I find the defendant was approximately 75 feet to the east and it was, considering the width of the travelled portion of the street at that point, safe for plaintiff to cross and she was not careless in that respect. Her mind is a blank, as to what she saw or did after proceeding to cross the street and before she reached the paved portion of the street. She presumably looked ahead and towards the street-car. This lapse of memory, as to what occurred immediately prior to an accident causing unconsciousness, is not unusual. There is what may be termed a surgical shock, causing amnesia with respect to that portion of the occurrence. I have had evidence to this effect. It is referred to in Taylor's Medical Jurisprudence. If the defendant had stated that the plaintiff, after proceeding to cross had looked in his direction and thus, observing the near approach of his car, had ignored the apparent danger, then, even in the absence of particulars to that effect, I might have considered that there was some negligence on the part of the plaintiff. She had every reason to believe that the crossing could be safely made. She had a right to expect that the defendant or any on-coming automobile driver, coming from the distance, would see her and not come too close to the crossing for safety; further, that he would slacken his speed and have his car under such control that it could be stopped almost instantly. Plaintiff observed all reasonable precautions as to crossing at the intersection. I have thus concluded that the defendant has failed to shew contributory negligence, relieving him in any way from the negligence already found against him. He is thus liable in damages to both the plaintiffs.

Judgment

Plaintiff, Sarah James, suffered severe injuries and, in view of her age, I accept the evidence of Dr. Craig, that they will likely be permanent. She has endured pain and suffering, and, as in all these cases of injury, it is difficult to estimate the

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damages, especially when permanent relief seems far distant. I think a reasonable amount to allow the plaintiff, Sarah James, would be $2,500. Then the plaintiff, William James, should be allowed his payment or liability for hospital treatment and medicines, $382.65, and medical attendance $250. There should also be an allowance for loss through impairment of his wife's domestic duties, $67.50, making altogether $700.

Plaintiffs are entitled to their costs. Judgment accordingly.

Judgment for plaintiffs.

MCDONALD, J. 1932 Nov. 3.

YICK CHONG v. HONG SING CO.

YICK CHONG v. HONG SING COMPANY *ET AL.*

Practice—Judgment—Writ of fi. fa.—Defendants' claim for exemption—Issue—Exemption disallowed—Appeal—Security for costs paid into Court — Appeal allowed without costs — Money in Court subject to charging order.

On the plaintiff obtaining judgment in an action and issuing execution for the amount of his claim, the defendants claimed exemption under the Execution Act. On an issue the defendants' claim being disallowed, they appealed and paid $75 into Court as security for the costs of the appeal. The appeal was allowed without costs to either party. The plaintiff then obtained an order *nisi* charging the $75 in Court for the balance owing on the plaintiff's judgment. On the plaintiff's application for an order absolute:—

Held, that the money paid into Court by the defendants is subject to a charging order in favour of the plaintiff.

Statement

APPLICATION by plaintiff to make absolute a charging order *nisi* upon a fund in Court. In January, 1932, the plaintiff recovered judgment against the defendants for $1,476.95, and a writ of *fi. fa.* was issued and delivered to the sheriff. The defendants claimed exemption under the Execution Act, and on an issue before BARKER, Co. J., the defendants' claim for exemption was disallowed. The defendants appealed and paid $75 into Court as security for the costs of the appeal. On March 31st, 1932, the appeal was allowed on the ground of

want of jurisdiction in the Court below, but without costs to either party. On the 13th of September following the plaintiff obtained an order *nisi* charging the $75 in Court with payment on the balance owing on the judgment. The plaintiff then applied for an order absolute. Heard by McDONALD, J. at Nanaimo on the 19th of October, 1932.

Argument

E. C. McIntyre, for plaintiff: The money paid into Court as security for costs is subject to a charging order: see *Grossenback* v. *Goodyear* (1920), 1 W.W.R. 725; *King* v. *Lanchick* (1922), 31 B.C. 193; *Prat* v. *Hitchcock* (1925), 36 B.C. 142.

Cunliffe, for defendants: The defendants borrowed the money that was paid into Court as security, and the purpose of the security no longer existing, this money should be returned to the person who actually advanced it. In the alternative, if the money is the defendants' property it should be paid to the sheriff for distribution: see section 23 of the Creditors' Relief Act.

McIntyre, in reply, referred to *Canadian Northern Ry. Co.* v. *Peterson et al.* (1914), 7 W.W.R. 741.

3rd November, 1932.

Judgment

McDONALD, J.: In this case I think the plaintiff is entitled to the charging order as claimed. I do not think the defendants can be heard to say that the money in Court belongs to a third party, nor do I think other creditors of the defendants entitled to any claim thereon.

Application granted.

FISHER, J. (In Chambers)

1932

Nov. 14.

MORI v. LION LUMBER CO.

MORI v. LION LUMBER COMPANY LIMITED.

Practice—Costs—Taxation—Four defendants in action—Action dismissed against one defendant with costs—Taxing officer not to apportion the costs—Rule 977.

On a trial in which there were four defendants, the action was dismissed as against one of the defendants with costs, the formal judgment reciting "that the plaintiff's claim against the defendant Genji Yada be and is hereby dismissed with costs to be taxed by the taxing officer and paid forthwith after taxation thereof." The taxing officer ruled that this defendant was entitled to "the whole costs" for any steps in the action which it was necessary for him to take. On the plaintiff's application for a review of the taxation:—

Held, affirming the taxing officer, that in view of the terms of the formal judgment and the wording of rule 977, the successful defendant is entitled to "the whole costs" for the various steps he found it necessary for him to take.

Statement

APPLICATION to review taxation. The plaintiff claimed in the action that three defendants named Yada, by false and fraudulent representations, induced the plaintiffs to purchase shares in the defendant company. The action was dismissed as against Genji Yada with costs, the formal judgment providing "that the plaintiffs' claim against the defendant Genji Yada be and is hereby dismissed, with costs to be taxed by the taxing officer and paid forthwith after taxation thereof." On the taxation, the plaintiff claimed that as all four defendants were represented by the same solicitor, the successful defendant could only recover a proportionate share of the general costs allowed a defendant by the tariff. The taxing officer decided that as there was no direction in the formal judgment apportioning the costs of the various defendants, he had no jurisdiction to segregate, and held that Genji Yada was entitled to "the whole costs" for any steps in the action that it was necessary for him to take. Heard by FISHER, J. in Chambers at Vancouver on the 25th of October, 1932.

Argument

Brown, K.C., for plaintiff: All four defendants appeared by the one solicitor, and the successful defendant can only receive his proper proportion (one-quarter) of the general costs of the

defence: see *Smith* v. *Dale* (1881), 18 Ch. D. 516; *Re Colquhoun* (1854), 5 De G. M. & G. 35; *Mortgage Insurance Corporation* v. *Canadian Agricultural Coal &c. Co.* (1901), 70 L.J., Ch. 684; Daniell's Chancery Practice, Vol. 2, p. 1046; *Beaumont* v. *Senior and Bull* (1903), 72 L.J., K.B. 141; *Ellingsen* v. *Dat Skandinaviske Co., Lim.* (1919), 88 L.J., K.B. 956. The right of this defendant to recover the costs from the plaintiff depends on whether he is liable for the costs of the defendant. See *Winter* v. *Dewar* (1928), 40 B.C. 312; *Nicholson* v. *Peterson* (1908), 8 W.L.R. 750.

Argument

Nicholson, for defendants: In the absence of special direction in the judgment, the taxing officer has no power to segregate, he must follow the judgment: see *Overn* v. *Strand* (1930), 42 B.C. 358. Owing to rule 977 the authorities cited for the plaintiff do not apply.

14th November, 1932.

FISHER, J.: I have come to the conclusion that the application herein, to review a taxation of the defendant Genji Yada's costs, should be dismissed (without costs) on the ground that, in view of the terms of the formal judgment and the wording of rule 977, the taxing officer could not do otherwise than give to the said successful defendant "the whole costs" for the various steps he found it necessary for him to take.

Judgment

Application dismissed.

MURPHY, J.

1932

Dec. 9.

ROYAL FINANCIAL INSURANCE LTD. v. NATIONAL BISCUIT AND CONFECTION CO. LTD.

ROYAL FINANCIAL INSURANCE LIMITED v. NATIONAL BISCUIT AND CONFECTION COMPANY LIMITED.

Contract—Agreement to place insurance with a company—Personal skill and confidence involved in contract—Assignability—Parties—Novation.

An agreement for the purchase of bonds of the defendant company contained a covenant by the defendant that during the lifetime of the bonds the placing of all insurance taken out by the defendant should be under the control of the company purchasing the bonds. The latter company thereafter assigned all its insurance business, including the benefit of all pending contracts, to the plaintiff company, which had been incorporated for the purpose of taking over all said insurance business. The defendant refused to place any of its insurance with the plaintiff company. In an action on the covenant:—

Held, that the rule that a contract which involves in its performance an element of personal skill or personal confidence is not assignable applies to the covenant in this contract, and the action was dismissed.

Statement

ACTION upon an agreement entered into between the Royal Financial Corporation Limited and the defendant company on April 28th, 1930, whereby said corporation agreed to purchase mortgage bonds of the defendant company, one of the considerations for such purchase being that at all times during the life of the mortgage bonds the placing of all insurance against all hazards, risks and liabilities, including fire on the assets of the defendant company up to 80 per cent. of the full insurable value thereof should be under the control and by the direction of the Royal Financial Corporation Limited. In March, 1931, the Royal Financial Corporation Limited caused the insurance department of its business to become incorporated as a separate company, or alternatively caused the plaintiff company to be formed for the purpose of taking over and acquiring all its insurance business, and the Royal Financial Corporation Limited assigned and transferred to the plaintiff company its general insurance business and the good-will thereof, with the full benefit of all pending contracts. Notice of the assignment was given to the defendant, but the defendant refused to place any of its

insurance with the plaintiff. The Royal Financial Corporation Limited assigned in bankruptcy in October, 1931. The plaintiff brought this action for a declaration that it is entitled to the benefits of the said agreement with the Royal Financial Corporation Limited and for damages. Tried by MURPHY, J. at Vancouver on the 6th of December, 1932.

Craig, K.C., and *Darling*, for plaintiffs.
Mayers, K.C., and *A. D. Wilson*, for defendants.

9th December, 1932.

MURPHY, J.: The law applicable to this case is definitely set out in the authorities and was not controverted in argument. It is aptly phrased by Lord Macnaghten in *Todhurst* v. *Associated Portland Cement Manufacturers (1900)* (1903), A.C. 414 at p. 417 as follows:

There are contracts, of course, which are not to be performed vicariously, to use an expression of Knight Bruce, L.J. There may be an element of personal skill or an element of personal confidence to which, for the purposes of the contract, a stranger cannot make any pretensions.

Judgment

The contract in question is Exhibit 1. In my opinion Exhibit 2 cannot be looked at being *res inter alios acta*. It is to be noted that Exhibit 1 is made between two incorporated companies. It is not argued that the above cited principle does not apply to corporations. It is merely submitted, correctly enough in my view that its application to incorporated companies calls for careful scrutiny of the facts. Because Exhibit 1 is made between companies I do not attach much importance to what occurred between Nicholson and McDermid nor to the questions of the latter's age, skill in insurance matters or likelihood of continued connection with the company. What I have to consider is Exhibit 1 and the evidence bearing on the relation between an insured and the agent placing the insurance. A company may have high business integrity, capacity and skill and those dealing with it may reasonably expect that, as a matter of business prudence, if nothing else, such a company will maintain its standards whatever changes in its personnel may occur. That the contract (Exhibit 1) falls within the legal principle above cited and is consequently not assignable is I think abundantly clear from the cross-examination of Crossley,

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one of plaintiff's witnesses. I will not specify details. Almost every direct answer given by him shews that the relation between the insured and the agent placing the insurance involves personal skill and personal confidence, I consider, in the sense in which these expressions are used in the authorities. Then it is argued that clause 6 of Exhibit 1 involves no express duty on the assignor of this contract to act as insurance agent for the defendant. As defendant's counsel pointed out, this argument puts plaintiff out of Court. The assignor could only sue defendant for breach by shewing itself ready and willing to act as such agent which would of course involve performance of all obligations incident to that relation and the assignee stands in the shoes of the assignor in this regard.

An application was made during the argument to add the assignor as party plaintiff. Apart from the objection that the assignor being in bankruptcy leave must be obtained from the Court before any action on its behalf could be instituted, it would be manifestly unfair to grant such application. Defendant may have various defences against the assignor not raised in this action and would be entitled to discovery and possibly other rights against the assignor. Then it is said there has been a novation but to my mind the evidence falls far short of establishing this. A novation involves a new contract and the onus of proving the existence of such contract is on the plaintiff. As to the degree of proof required the case of *Swinson (John) Co., Ltd.* v. *Crystal Palace, Ltd.* (1922), N.Z.L.R. 250 is highly informative. No such proof, as is there outlined as necessary, was adduced on plaintiff's behalf. The action is dismissed with costs.

Action dismissed.

IN RE HOLL: *IN RE* COWPER.

MACDONALD, J.

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IN RE HOLL

IN RE COWPER

Judgments and orders—Order allowing wife to swear husband was dead before certain date—Petition by second husband to rescind order—Status to attack order.

The petitioner sought to rescind an order obtained by his wife allowing her to swear that her former husband was dead for more than seven years prior to the making of the order. The order was obtained solely for the purpose of assisting her in obtaining a government pension. The petitioner alleged that the order was obtained by deceiving the Court, and she had used it so as to lead him to believe that she was free to marry him.

Held, that a person seeking to set aside an order of this nature must shew that he had an interest at the time which was affected by the order, and as he has failed to satisfy the Court that he has now or had at the time the order was made, any interest whatever in the order, or the effect that might result therefrom, the petition should be refused.

Statement

PETITION by John Sedgwick Cowper to rescind an order obtained by Pauline Alice Holl, his present wife, in October, 1930, allowing her to swear that her husband Gerald Francis Holl was dead prior to the 6th of June, 1923. Heard by MACDONALD, J. at Vancouver on the 20th of December, 1932.

Savage, for petitioner.
Ghent Davis, for respondent.

Judgment

MACDONALD, J.: John Sedgwick Cowper seeks by petition to rescind an order obtained by Pauline Alice Holl, his present wife, in October, 1930, allowing her to swear that her husband, Gerald Francis Holl, was dead, at a time prior to the 6th day of June, 1923.

The terms of the order then granted were in accordance with the prayer to the petition of Mrs. Holl which was presented for that purpose. Since this application, to so rescind the said order was before me for consideration, I have given the matter further thought and have come to a decision on one point, which seems to me, to avoid the necessity of considering whether the material upon which the said order was made was proper, or whether there was any deception practised upon the Court at that time.

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Judgment

The view I entertained at the previous hearing, and rather intimated to counsel, was that a person seeking to set aside an order of this nature would require to shew that he had an interest at the time, which was affected by the order. If the order thus attacked affected rights, so possessed by the party now complaining, and perpetuated a wrong thus created, I think the Court should lean towards affording him a remedy. I think the procedure for this party to adopt would be by petition. It would not require an action to be commenced for that purpose. But the difficulty, as I have already mentioned, is as to whether or no this petitioner, who now seeks to rescind the order, had any interest, at the time, which justifies the Court in dealing with the order, aside from the question of the merits.

If I should arrive at a conclusion that this petitioner had such an interest, I might invoke the inherent jurisdiction of the Court in order to set aside the order, if it has been improperly obtained. In other words, I would discuss the merits pertaining to the application, aside from the position of the party applying.

This difficulty as to the interest of the petitioner seems to me one which cannot be overcome. Counsel has presented the argument which seemed best to him, in that connection, and has failed to satisfy me that his client has now, or had at the time the order was made, any interest whatever in the order, or the effect that might result therefrom.

The petitioner was in no way interested, except in a friendly way, towards Mrs. Holl in her endeavours to discover the whereabouts of her absent husband. The correspondence shews that this petitioner rendered every assistance that a friend might under such circumstances. His complaint now is that this order was obtained improperly, but I think the greatest source of complaint on his part, arises from the use of the order, in causing him to believe that it was so effectual in its terms, that he would be free to marry Mrs. Holl, which event occurred some time afterwards. This marriage has been rather unfortunate apparently. There has been litigation as disclosed from the correspondence and material filed upon this application. Counsel for the petitioner can only suggest that the order, which is the subject of attack, is detrimental to his client in either present litigation or litigation that may ensue in the future. So he

seeks to have the order set aside so that such destruction would benefit his client.

Bearing in mind the limited effect of the order in question, it is not clear to me how such rescission of the order would operate in the way contended for. However, such a submission on the part of counsel for the petitioner emphasizes the fact, that the basis of the present application is to assist indirectly in supporting an alleged right acquired by this petitioner, subsequent to the order being made. So, in my opinion, the petitioner is thus in a position and has a *status* which is not sufficient to support the application. His position, in other words, destroys his right to complain of the order.

Judgment

Having reached this conclusion, I do not think any good purpose would be served in my discussing the lengthy material, relating to the contention that deception was practiced upon the Court in obtaining the order. However, in dismissing the application, I will add that the impugned order was obtained solely to assist the applicant therefor, in an effort to obtain a pension from the Dominion Government. It is quite apparent from her letter to the present petitioner that she placed an improper interpretation upon that order. She knew, or is assumed to know from her counsel then acting for her, that in giving my reserved judgment I had carefully stated that the said order "has no effect or bearing upon the question of marriage." With this knowledge, which she was bound to have acquired in view of all the circumstances, she, according to the present petitioner supported by affidavit, led such present petitioner to believe that she was free to marry him and that the order operated for that purpose. The petition is dismissed.

Petition dismissed.

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CANADIAN CREDIT MEN'S TRUST ASSOCIATION, LTD. v. INGHAM

CANADIAN CREDIT MEN'S TRUST ASSOCIATION, LIMITED AND DINNING v. INGHAM.

Fixtures—Logging company—Rails and ties of railway, telephone line and unloading outfit—Purpose and intention of annexation as factor.

A logging company, having bought and paid for railway rails, ties, a telephone line and an unloading outfit, including a donkey-engine, moved them on to a leased premises to be used by it as aids to the removal of timber, and they were so used up to the time of its bankruptcy.

Held, that they were not fixtures belonging to the owner of the fee, under whom said company was a tenant or licensee, but were chattels belonging to the company.

Statement

ACTION by the Canadian Credit Men's Trust Association, Limited as trustee in bankruptcy of Campbell River Mills, Limited, claiming that it is entitled to possession of certain railway rails, ties, a telephone line and an outfit for unloading logs, including a donkey-engine, all of which were used by the Campbell River Mills, Limited, in their logging operations as tenants or licensees in lands owned by the defendant and others. Tried by MURPHY, J. at Vancouver on the 30th of November, 1932.

Griffin, K.C., for plaintiff.
G. S. Clark, for defendant.

21st December, 1932.

Judgment

MURPHY, J.: Plaintiffs claim to be the owners and entitled to possession of certain railway rails, ties, a telephone line and an unloading outfit, the principal item of which is a donkey-engine. The plaintiff Dinning is a party for technical reasons. The real contest is between the Canadian Credit Men's Trust Association and defendant. The former is trustee in bankruptcy of Campbell River Mills Ltd. The disputed properties were bought, paid for and placed where they now are by the Campbell River Mills Ltd. An agreement (Exhibit 1) was entered into between this company and defendant affecting, *inter alia*, the disputed properties but no claim respecting them based on its provisions is made in this action by the defendant, presumably because of its non-registration. As to all the disputed

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Judgment

properties other than the rails and ties on the spur to the booming ground and the unloading outfit, the only defence relied upon is that the disputed properties are fixtures and in consequence, as plaintiffs have no interest in the fee of the lands upon which the said properties were placed by the Campbell River Company and where they now are, plaintiff cannot succeed. This defence is also relied upon in the case of the spur rails and ties and the unloading outfit but in addition as to them it is argued that defendant is entitled to them under the provisions of Exhibit 9. All the disputed properties are either firmly attached to or embedded in the soil or else are firmly attached to trees, poles or piles which are so firmly attached or embedded. They can all be removed without irreparable damage to the land though the surface must necesarily be disturbed to a considerable degree in so doing, particularly in the case of the ties. The railway is built on lands, the fee of which is vested as to various portions of the line in the following persons: The Sumas Dyking Commissioners, the Land Settlement Board, the Crown in right of the Dominion, the Crown in right of the Province, the B.C. Electric Ry. Co., one Leonard and the defendant. The portion built upon lands owned by the defendant crosses six highways, the fee of which would be in the Crown in right of the Province. The Campbell River Company purchased the lands owned by the defendant for him under the provisions of Exhibit 1. This further provides that on the Campbell River Company carrying out all its obligations thereunder defendant is to transfer said lands to that company. The Campbell River Company, in my opinion, constructed the railway, which is approximately 17 miles long, under leave and licence express or implied obtained from the various owners of the fee except possibly in the case of defendant. The telephone line runs for some seven miles along the railway and was built by the said company. It is a proper inference from the evidence I think to hold that this telephone line (where its construction was not expressly authorized by the fee owners) was likewise built under the same permissions as was the railway since it was a necessary adjunct to the operation thereof and to the contemplated timber removal. The unloading outfit likewise constructed by the Campbell River Company under similar leave stands upon ground, the fee of

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CANADIAN CREDIT MEN'S TRUST ASSOCIATION, LTD. v. INGHAM

which is in the Crown. This matter of relationship between the various fee owners and the Campbell River Company is hereinafter more fully discussed. All the disputed properties were placed where they now are to be used by the Campbell River Company as aids to the removal of the timber which that company had purchased from defendant under Exhibit 1 and were in fact so used by it up to the time of the bankruptcy. The utilization of these disputed properties was the only practical means of removing said timber. It is the ordinary practice of timber operators to move the branch lines and sometimes perhaps the main line of their logging railways or portions thereof from place to place in the timber they are cutting during the currency of their operations. When the commercial timber is exhausted all the railway ties and all other aids to the timber removal operations, such as donkey-engines, telephone lines, etc., are severed, if necessary, and carried away by the operators except such portions thereof, if any, as are not worth the cost of removal. According to the evidence the particular timber operation in question herein would be completed in a period of from nine to fifteen years from its inception.

Judgment

Evidence was led by the defence to shew that with regard to the railway in question herein it might, once the timber operation was completed, be left in place to be used for common carrier purposes but this evidence, in my opinion, failed to shew that such use of the railway would be economically possible. No intention to so use it can, in my view, be deduced from the circumstances of this case as proven in evidence either when it was constructed or at the present time. These being the facts, as I find them, the primary question for decision and the one affecting all the disputed properties is, are the disputed properties or any of them fixtures? As will appear from what is said hereafter, it is not, in my view of the case, necessary to differentiate between them. Numerous decisions were cited to me in argument and it would be difficult, if not impossible, to reconcile all of them. The reason for this I think will be found stated in *Spyer* v. *Phillipson,* 100 L.J., Ch. 245, a decision given in January, 1931, the head-note of which reads in part as follows:

The rule of law that anything affixed by a tenant to the freehold passes to the freeholder at the expiration of the tenancy has been gradually, but consistently and largely, relaxed.

True this is a case of ornamentation to a flat and not one dealing with trade fixtures but a perusal of the judgments will I think shew that the statement above cited applies to both classes. In fact Lord Hansworth, at p. 248, referring to cases cited in argument, says:

> Those cases are illustrations of how the law upon this subject has gradually been relaxed in favour of the tradesman, and certainly largely in favour of the tenant.

(meaning, I take it, tenant of a dwelling). The relation of the Campbell River Company to the fee owners, when that Company placed the disputed properties on the lands, was, in my opinion, either that of tenant and landlord or the analogous one of licensee and licensor or possibly in the case of the lands owned by the defendant that of vendee in possession, defendant being the vendor. The reasons for this view are hereinafter stated. The disputed properties of course are not in the dwelling-house class but they are in the class of trade fixtures in the sense that they are things necessary for carrying on the timber operations contemplated by the Campbell River Company when they were put in place. A further statement by Lord Hansworth must be noted. He says (pp. 247-8):

Judgment

> It is to be remembered that this claim on the part of the representative of the tenant is made during the currency of the term. Different considerations apply when the tenant has not attempted to exercise his right until after the expiration of the term.

In the case at Bar the claim was likewise made during the currency of the leases or licences, express or implied, so far as appears from the evidence. There is a provision in the Leonard lease that it is to become void, *inter alia,* on the bankruptcy of the Campbell River Company but this is a stipulation in favour of the lessor and there is no evidence that it has been acted upon so as to make the demise in fact void. Plaintiffs did by Exibit 9 transfer or release to the defendant all their interests in the various agreements, leases and licences held by the Campbell River Company other than the lease to the booming ground but they expressly reserved their claims to the disputed properties as such claims then stood. If I am right in holding that the decision in *Spyer* v. *Phillipson, supra,* justifies the conclusion that the statement set out in the head-note to that case applies to trade as well as to dwelling fixtures then it would seem that the

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Judgment

Court, in deciding the case at Bar, should look for guidance to the more recent decisions dealing with the question involved. The latest authority which I can find, the facts of which approximate most closely to those of the present case, is *Liscombe Falls Gold Mining Co.* v. *Bishop,* 35 S.C.R. 539, decided in 1905. There a mining company, which held a mining licence over waste lands of the Crown, had erected a stamp-mill including a boiler which latter was affixed to the ground, the fee of which was in the Crown. Creditors of the company seized these articles under a writ of *fi. fa.* It was contended by the company that they were fixtures and so not liable to such seizure. The Court held they were chattels. In that case there was no legal relation between the contending parties. They were strangers. The plaintiffs here are certainly in as good, if not a better position. The degree of annexation to the soil was much slighter than in the case under consideration but the decision, as I read it, does not rest on this feature. Davies, J. (as he then was) delivering the unanimous judgment of the Court, says, at p. 541:

The authorities all seem to shew that it is not solely the fact of the chattels being annexed to the soil which determines whether or not they have become part of the soil but that the object and purpose and intention of their annexation must be looked to.

Then on p. 545:

I do not think, however, it is necessary to rest my decision upon that ground [*i.e.,* degree of annexation to the soil] because even assuming the mill and machinery to have become fixtures I am still clearly of opinion that they were within the category of trade fixtures which as between the appellant company and the Crown the former had a right to remove during the existence of the tenancy or holding.

And at p. 547, the judgment proceeds:

Once it is conceded that the relation in which the company appellant stood towards the Crown with reference to this stamp-mill was that of a tenant towards his landlord or any analogous position which justified him in erecting his mill for purposes of a personal nature, such as mining or testing for minerals, then his right to remove the fixtures as being trade fixtures seems clear, and falling within the principle of being "an accessory to a matter of a personal nature" must be considered as personalty and not as interest in land. The stamp-mill in this case was an accessory to the carrying on of mining or testing for minerals on the land and was a matter of a personal nature, mining within the definition given by Lord Ellenborough.

The definition is set out on p. 544 of the case and reads:

Where the fixed instrument, engine or utensil (and the buildings covering the same falls within the same principle) was an accessory to a matter of a personal nature it should be itself considered as personalty."

The relation between the Campbell River Company and the various owners of the fee, with the possible exception of the defendant at the time the disputed properties were placed on the land was, in my opinion, as already stated, either that of tenant to landlord or licensee to licensor. See Exhibits 7, 10, 15, 18, 19, 21, 22, 24, 26 and 32, and the third admission of facts filed by my direction after the case had been argued. These admissions I think shew that the dyking commissioners had authority from the fee owners to grant the Campbell River Company leave and licence to construct the line over such parcels of land as are under the dyke and the fee of which is not in the commissioners. That company's relation to the defendant may have been, and probably was, that of vendee in possession to vendor (see Exhibit 1) but, even if this was so, their position before the passing of the grant would be that of tenants at will. *Vide* Davies, J. at p. 546 of the report of the *Liscombe* case, *supra*.

As to the spur line, whilst there was no express authority from the dyking commissioners to construct it over their land, I think it follows from what is stated in the said third set of admissions that leave to do so is to be implied—*Lancaster* v. *Eve* (1859), 28 L.J., C.P. 235. This applies also to the highway crossings as to which no express licence, as I remember the evidence, was proven.

Judgment

All the disputed properties were accessory to a matter of a personal nature because the only reason they were constructed or placed where they are was to aid the Campbell River Company to carry away the timber they were licensed to cut which is clearly a personal right.

The case of *Spyer* v. *Phillipson, supra*, likewise shews that the degree of annexation (unless removal entails irreparable damage) is but one phase of what is the real question which is, what was the object and purpose of the annexation, meaning not an inquiry into the motive of the person who annexed the fixtures but a consideration of the object and purpose of the annexation as it is to be inferred from the circumstances of the case.

In that case the fixtures could not be removed without doing considerable damage to the dwelling but it was held that whilst the tenant might be liable to an action under his covenant the fixtures were none the less removable. The distinction seems to

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be that if the removal involves irreparable damage to the premises then the fixture is part of the realty but, if it does not, then the degree of annexation is only one of many factors to be considered. See the judgment of Romer, L.J. at p. 250.

Removal in the present case, whilst it will disturb the surface possibly to a considerable extent, will not do irreparable damage to the land.

Viewing the circumstances of the present case, as set out in the evidence, no one could I think seriously argue that these disputed properties were constructed for the purpose of benefiting the various owners of the fee. The circumstances, to my mind, on the contrary, clearly indicate that it was the intention of all parties, including the fee owners, that the disputed properties were to be removed by the Campbell River Company when the timber operation was completed. In the only instance where the contrary might be inferred, that of the dyking commissioners, since the railway might be of some service to them in keeping up their dyke, the agreement expressly stipulates for such removal.

As to the contention that defendant has acquired title to the rails and ties on the spur line and to the unloading outfit because of the execution by plaintiffs of Exhibit 9, the answer is that the lands on which these properties rest are not mentioned therein and if they are to be drawn into it by implication, as to which I express no opinion, then the express reservations in Exhibit 9 in plaintiff's favour would become operative.

Judgment for plaintiff with costs.

Judgment for plaintiff.

McDONALD, J.

1932

Dec. 23.

HOCKING v. BRITISH COLUMBIA MOTOR TRANSPORTATION LTD.

HOCKING v. BRITISH COLUMBIA MOTOR TRANSPORTATION LIMITED.

Negligence—Motor-vehicle—Pedestrian crossing road contrary to city by-law—Run into by taxi-cab—Satisfactory explanation by driver wanting—Liability.

The plaintiff crossed a street near the middle of a block and contrary to the provisions of a city traffic by-law. It was a bright, clear day and she looked both ways for traffic before starting across but on nearly reaching the opposite side of the road she was struck by a taxi-cab driven by the defendant.

Held, that as the defendant did not give a satisfactory explanation as to how the accident happened the Court is bound to draw the inference that he was not keeping that careful look-out which the driver of a motor-vehicle is bound to keep, and that his negligence in that regard was the proximate cause of the accident.

Statement

ACTION for damages for injuries sustained by the plaintiff on the defendant running into her with his car when she was crossing Seymour Street in Vancouver. The facts are set out in the reasons for judgment. Tried by McDONALD, J. at Vancouver on the 20th of December, 1932.

McCrossan, K.C., and *R. W. Kennedy*, for plaintiff.
Craig, K.C., and *Tysoe*, for defendant.

23rd December, 1932.

Judgment

McDONALD, J.: The plaintiff, a young woman employed at Spencer's department store, on the morning of the 12th of September, 1932, a dry clear day, at about 8.45, alighted from a street-car at the corner of Hastings and Seymour Streets in the City of Vancouver and thence proceeded northerly on the west side of Seymour Street to some point south of the lane which crosses Seymour Street about the middle of the block. Upon the evidence I do not feel able to make a specific finding as to just how near she had got to the lane before she turned to cross Seymour Street diagonally in order to reach her destination. The evidence is very conflicting. Her own recollection of the incidents preceding the accident is not clear but in my view of the whole of the evidence I think it is not necessary to fix defi-

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nitely just where she left the sidewalk and stepped out on to the street. Suffice it to say, as I pointed out, that it was at some point south of the lane and at least some considerable distance north of Hastings Street. She states, and I accept her evidence on this point, that before stepping into the street she looked north and south on Seymour Street and saw no motor-car approaching from either direction. Thinking that she was safe, she did not look again and before she had reached the sidewalk on the east side she was struck by the right fender of a taxi-cab driven by the defendant's servant and proceeding northerly on Seymour Street. As in many similar cases, it is difficult to ascertain the exact point where the impact took place but I am satisfied on the whole of the evidence that she was well across the street before the accident occurred. She had not seen the motor-car which struck her nor had any warning been given by the driver of that car, such as sounding the horn as required by section 3 (*g*) of the regulations made pursuant to the Motor-vehicle Act.

Judgment

Plaintiff applied to the learned Chief Justice for an order allowing her to examine for discovery, defendant's driver (who had then left defendant's employ) but that application, being opposed by defendant, was refused and the driver was not called as a witness at the trial.

We have therefore this situation: the plaintiff, seeing no traffic coming in either direction, proceeds to cross a street 48 feet wide between the curbs at a place where she is prohibited by the Vancouver Traffic By-law from crossing the street. She does not look again until she is struck down. The day is bright and clear; there is no other traffic on the street though one motor-car is parked near Hastings Street on the west side of Seymour Street and two or three cars south of the lane on the east side of Seymour Street, and we have no explanation from the driver of the motor-car as to why, under all those circumstances, he ran the plaintiff down. It is contended that the plaintiff is at least guilty of contributory negligence and can at most recover only a portion of her damages. Upon reflection I am not able so to hold. I think under the circumstances outlined the driver is called upon to explain how the accident happened and in the absence of such explanation I am bound to draw the inference that he was not keeping that careful look-out which the driver of

a motor-vehicle is bound to keep and that his negligence in that regard was the proximate cause of the accident. Though Judge Barron in his book on the law of motor-vehicles quotes no authority he does state at p. 388:

> The onus is upon the driver of a car to prove that he could not, by the use of ordinary care, have avoided the accident. The negligence of a pedestrian in crossing a highway without looking, will not relieve the driver from responsibility, even though the pedestrian fails to follow the regular crossing for foot passengers.

It may be that the learned writer has put his propositions a little more strongly than would be justified by the authorities but nevertheless I think his statement is useful to this extent at least, that in the case at Bar the onus has been shifted to the extent that, in the absence of explanation, I must draw the inference above mentioned. It is suggested that had the plaintiff kept a sharp look-out from moment to moment as she crossed the street she would have seen the motor-car coming down upon her and that she might have stepped forward or backward and avoided it. This, it seems to me, as the case stands, is mere speculation and I am not able to find that any act of hers contributed to the accident in the sense of being the efficient cause thereof. We have, on the other hand, evidence which I think I must accept, that it was apparent that the plaintiff had not seen the motor-car and that the motor-car did not "swerve" or alter its course before colliding with her.

Judgment

The plaintiff has proven special damages in the amount of $403. She suffered a broken pelvis which will deprive her, in the opinion of medical men, of the ability to pursue her employment for a period of approximately nine months in all. Her earnings amounted to about $100 a month. She has suffered a great deal of pain and will suffer, not so much from the fracture as from the laceration of the ligaments about the sacroiliac joint. It is suggested that there may be a certain amount of permanent injury but the medical witnesses did not give their opinions that this is certain to result. Under all the circumstances I fix her general damages at $2,500.

Judgment for plaintiff.

COURT OF APPEAL

1932

Oct. 4.

McTAVISH BROTHERS LTD. v. LANGER

McTAVISH BROTHERS LIMITED v. LANGER.

Contract—Sale of block of company shares—Action for payment—Defence of lack of title to part of block and fraud in procuring them.

In an action to compel performance of a contract to purchase 750,000 shares of the capital stock of a certain company, the plaintiff recovered judgment on the trial.

Held, on appeal, reversing the decision of FISHER, J., that the appeal should be allowed on the ground that at least a part of the block of shares for which the plaintiff delivered certificates were trust shares to which the plaintiff had no title.

Per McPHILLIPS and MACDONALD, JJ.A.: The Court will not exercise its discretionary powers to order specific performance when to do so would condone a breach of trust or sanction unconscionable dealings with respect to one of the parties. The agreement must be free from the taint of deception. Nor does it avail to say that only part of the agreement is affected by fraud, thus pointing to modification. It is wholly vitiated and the purchaser is absolved from all obligations under it. Nor is it necessary that fraud should be pleaded. If title is disputed and fraud is disclosed in the course of the evidence adduced in support of the vendor's allegation of ownership, the Court will not enforce the contract: further, the Court will not force a purchaser of shares to take shares, the right to which he may have to contest with third parties.

Statement

APPEAL by defendant from the decision of FISHER, J. of the 13th of January, 1932, and the verdict of a jury in an action for the recovery of $75,750, the price of shares of Alamo Gold Mines Limited sold by the plaintiffs to the defendant. The Alamo group of claims in the State of Oregon were staked in 1900 and after being worked by the then owners for five years were abandoned. In 1925 one Code bought the claims at a tax sale and shortly after, he, with the McTavish Brothers and two engineers named Thomas and Barnes, formed the Alamo Gold Mines Limited for the purpose of taking over the Alamo group of claims and working them. The company was capitalized at 3,000,000 shares of $1 each. This stock was allotted as follows: David Barnes, 600,000 shares; G. H. Thomas, 600,000 shares; W. B. Code, 600,000 shares, and McTavish Brothers Limited 1,200,000 shares, and each shareholder then contributed one-half of his stock to a pool to be sold and the proceeds donated to

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1932

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the company's uses. The Alamo Mines were transferred to the company and Code was to receive $25,000 later, payable in royalties. The company also acquired another group of claims close to the Alamo, known as the Evans group. Thomas first took charge of operations but dropped out in May, 1926, when Barnes continued development work until July, 1927, when on D. N. McTavish visiting the mines, they had a consultation, the result of which was that Barnes left. A mining engineer named W. C. Fellows then took charge, doing development work in the way of cleaning old tunnels at the Alamo Mines and new work on the Evans Group which was a new prospect close by, and from time to time he made reports to McTavish Brothers. Langer first interviewed McTavish Brothers in September, 1926, when certain representations were made to him, including reports by mining engineers made some time previously, and on February 7th, 1927, Langer agreed to subscribe for shares for the purpose of financing operations and advanced $28,660 and shortly after paid a further sum of $35,937 for 250,000 shares. In November, 1927, McTavish Brothers kept Langer informed as to reports and telegrams from Fellows, who was then in charge of the mines, and on November 17th, 1927, Langer agreed by letter to purchase 750,000 shares from McTavish Brothers at twelve and a half cents per share, payable in instalments, and Langer paid the first $15,000. Langer complained that McTavish Brothers did not have 750,000 shares to sell at the time the last agreement for the purchase of shares was entered into.

Statement

The appeal was argued at Victoria on the 23rd to the 29th of June, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Mayers, K.C. (*Walkem,* with him), for appellant: This is a second trial and the jury found in the plaintiffs' favour. This verdict in face of the evidence was perverse. As to the sale of 750,000 shares to the defendant on November 17th, 1927, the McTavishes did not have a good title to the shares they purported to sell to Langer. Secondly, Barnes told the McTavishes in the Summer of 1927 that the mine was worthless, but the McTavishes continued to make favourable representations to

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Langer and never disclosed Barnes's report. Of the 3,000,000 shares, one-half was retained as treasury stock and the other half was divided equally among the five promoters, so that the McTavish Brothers received 600,000 shares, and after disposing of 40,000 shares they transferred the balance of 560,000 shares to another brother, Charles McTavish. Of this they sold 250,-000 shares to Langer in September, 1926, so that when they purported to sell 750,000 shares to Langer in November, 1927, they only had 310,000 shares left, and they had to find 440,000 shares elsewhere to make up the number sold, and this they were unable to do without trespassing on the interests of others. The McTavishes personally had no right to the treasury shares. Thomas and Barnes transferred back to the McTavishes 180,000 shares each but they admitted in the first place they had no right to deal with these shares, and they have failed to shew where they got the 80,000 to make up the 750,000 shares sold to Langer. They are bound to shew proper transfers in writing of the shares sold Langer, and the four people were interested in the shares in Charles McTavish's name, two of them not parties to the action. We say the certificates handed over to Langer were waste paper: see *Wilkinson* v. *Lloyd* (1845), 7 Q.B. 27 at pp. 44-45; *Platt* v. *Rowe* (1909), 26 T.L.R. 49; *Giles* v. *Edwards* (1797), 7 Term Rep. 181. As to entirety of consideration and the parties interested in the subject-matter of the sale see *Chanter* v. *Leese* (1839), 5 M. & W. 698; *Jung* v. *Phosphate of Lime Co.* (1868), L.R. 3 C.P. 139 at p. 142. Charles and his mother, as part owners, must both be parties to the action before the money can be recovered. The witnesses were unreliable and the jury was misled; every statement that could be checked by documents was shewn to be wrong; the jury acted unreasonably. If the plaintiffs make statements that turn out to be false they are responsible: see *McTavish Bros. Ltd.* v. *Langer* (1929), 41 B.C. 363 at pp. 376-7; *Campbell River Lumber Co.* v. *McKinnon* (1922), 64 S.C.R. 396. It was not any specific direction but the whole charge on which the learned judge below failed amounting to miscarriage: see *Hip Foong Hong* v. *H. Neotia and Company* (1918), A.C. 888 at p. 894; *Schultz* v. *Wood* (1881), 6 S.C.R. 585 at p. 596; *Redican* v. *Nesbitt* (1924), S.C.R. 135 at pp. 147 and 156. There was

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material representation here that was untrue: see *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1 at p. 12; *S. Pearson & Son, Limited* v. *Dublin Corporation* (1907), A.C. 351; *Re The Mount Morgan (West) Gold Mine Limited; Ex parte West* (1887), 56 L.T. 622. The jury should have been discharged when one of the plaintiffs volunteered evidence of a subsequent sale of the property: see *Watt* v. *Watt* (1905), A.C. 115 at p. 118; *Grinham* v. *Davies* (1928), 98 L.J., K.B. 703; *Loughead* v. *Collingwood Shipbuilding Co.* (1908), 16 O.L.R. 64 at pp. 68 and 71; *Hyndman* v. *Stephens* (1909), 19 Man. L.R. 187.

St. John, for respondents: The only parties necessary are the parties to the contract: see Fry on Specific Performance, 6th Ed., 678; *Peacock* v. *Penson* (1848), 11 Beav. 355; *Wilkins* v. *Reeves* (1855), 3 W.R. 305; *Harry* v. *Davey* (1876), 2 Ch. D. 721. As to all the parties interested in the subject-matter of the contract being before the Court see *Chanter* v. *Leese* (1839), 5 M. & W. 698; *Jung* v. *Phosphate of Lime Co.* (1868), L.R. 3 C.P. 139; *Sheehan* v. *Great Eastern Railway Co.* (1880), 16 Ch. D. 59 at p. 62. All the seller has to shew is that he is in a position to deliver. A resolution of the directors of this company is not required to transfer shares. Seven hundred and fifty thousand shares were duly transferred to Langer, registered, and delivered. His title was secure: see *Duck* v. *Tower Galvanizing Company* (1901), 2 K.B. 314; *Platt* v. *Rowe* (1909), 26 T.L.R. 49; Lewin on Trusts, 13th Ed., 878. A mere expression of opinion is not a matter on which rescission of a contract can be obtained: see Kerr on Fraud and Mistake, 6th Ed., p. 53; *Bisset* v. *Wilkinson* (1927), A.C. 177; *Cromwell* v. *Morris* (1915), 32 W.L.R. 289; *Jennings* v. *Broughton* (1854), 5 De G. M. & G. 126; *Smith* v. *Land and House Property Corporation* (1884), 28 Ch. D. 7. On the question of non-direction to the jury see *Budd* v. *Canadian Pacific Ry. Co.* (1932) [45 B.C. 161]; 2 W.W.R. 85; *B.C. Electric Ry. Co.* v. *Key* (1931), 3 D.L.R. 587. A new trial will not be granted on non-direction unless substantial justice requires it.

Mayers, in reply, referred to Fry on Specific Performance, 6th Ed., pp. 194, 330 and 410; *Dell* v. *Saunders* (1914), 19 B.C. 500; *Murray* v. *Stentiford* (1914), 20 B.C. 162; *Baillie* v. *Kell* (1838), 4 Bing. (N.C.) 638 at p. 650; *Boston Deep Sea*

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Fishing and Ice Company v. *Ansell* (1888), 39 Ch. D. 339 at p. 352.

Cur. adv. vult.

4th October, 1932.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: It does not appear to me to make any difference so far as the validity of the contract of the 17th of November, 1927, is concerned, whether or not the plaintiffs professed to sell their own individual shares or, on the contrary, to sell treasury shares of the company which they held in trust. I have no hesitation in saying that I think the transaction was one between the plaintiffs individually and the defendant, and the sale of the plaintiffs' individual shares. The plaintiffs did not profess to sell a block of shares composed of both. What they transferred to the defendant was a block of shares partly composed of each, but since they sue in their individual capacity it cannot, I think, be held to be anything but an individual sale. Now it has been clearly proved beyond dispute that 425,000 shares transferred to the defendant were shares of the company held in trust by the plaintiffs. It is not even clear that all of the balance of the shares transferred belonged to the plaintiffs; that some were not drawn from those of others without authority to sell them, but it is certain that the 425,000 shares were subject to trust as appears from the comparison of their share numbers with the share numbers mentioned in the trust. They were clearly trust shares.

I think, therefore, it was clearly established at the trial that the plaintiffs delivered the certificates of shares which they well knew they did not own either in full or in part and to 425,000 of which they had no title. In consequence of this the defendant did not get what he bargained for, and having promptly repudiated he is entitled to resist the plaintiffs' demand (in effect specific performance) for payment.

The appeal should be allowed.

MARTIN, J.A.

MARTIN, J.A.: I agree that this action, which in its essence is one to compel performance of a contract which was really for the purchase of certain individual shares, should, in its exceptional circumstances, as set out in the judgment of the learned Chief

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Justice, be dismissed on the primary ground of lack of title in the individual vendors.

McPHILLIPS, J.A.: This is an appeal from the judgment in favour of the respondents entered upon answers made by the jury upon the second trial had following the decision of this Court, affirmed by their Lordships of the Privy Council, that a new trial be had between the parties. I was of the opinion in this Court upon the appeal following the first trial that fraud was established disentitling the respondents from recovering anything. Possibly in view of the findings of the jury upon the second trial it is not open to find fraud now. The appellant embarked very large sums of money in a mining prospect (not a producing mine at all) upon representations of the respondents, and what is now sought is a still further large sum of money claimed to be due and payable for certain further shares bought by the appellant, it being established now beyond peradventure that the mine is absolutely worthless. Of course the worthlessness of the mine would not be a factor unless it could be said that fraudulent misrepresentations as to its value were made by the respondents, and as to this point I refrain, following the result of the second trial and the answers of the jury, to so hold. Nevertheless the shares which the respondents contracted to sell to the appellant—as set forth in the judgment of my learned brother the Chief Justice of British Columbia and my learned brother M. A. MACDONALD—were not delivered, but as now disclosed other shares, not those agreed to be sold; and further it would appear that there was fraud in dealing with the shares and in their transfer to the appellant. The conclusions that my learned brother the Chief Justice and my learned brother M. A. MACDONALD have arrived at in respect thereof are concurred in by me. That is the respondents in my opinion have utterly failed to make out that the shares and the certificates therefor represented the shares contracted to be sold by the respondents to the appellant and this action is for the money alleged to be due by the appellant to the respondents upon such sale. That being the case—and it is undoubtedly so established in the evidence before this Court—how is it possible to sustain the judgment entered in the Court below? It might be said that

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this is too broad a statement to be made—that at least some of the shares the appellant got were shares that were in compliance with the contract of sale, but even if that were so it would not entitle the respondents to succeed as it was an entire contract and in the circumstances the Court would not enforce it (*Wilkinson* v. *Lloyd* (1845), 7 Q.B. 27 at pp. 44-45; *Platt* v. *Rowe* (1909), 26 T.L.R. 49; *Giles* v. *Edwards* (1797), 7 Term Rep. 181; *Chanter* v. *Leese* (1839), 5 M. & W. 698).

Repudiation of the shares was amply established in the evidence.

I would allow the appeal.

MACDONALD, J.A.: This is the second trial of an action to recover $78,750, the balance alleged to be due on a contract dated November 17th, 1927, for the sale by respondents to appellant of 750,000 shares of the capital stock of the Alamo Gold Mines Limited. This Court after the first hearing ordered a new trial and that judgment was confirmed by the Judicial Committee. On the second trial judgment was obtained by respondents for the amount claimed and from that judgment this appeal is brought. The facts may be found in the report of the first action ((1929), 41 B.C. 363).

Prior to the second trial appellant's statement of defence was amended by adding the plea that

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the plaintiff [respondent] did not own the 750,000 shares . . . and no title passed to the defendant [appellant] under the certificates referred to.

Respondents purported to sell shares they did not own and cannot receive in payment moneys owing to the true owners unless it is shewn—and it was not—that they were acting on their behalf or that the latter were parties to the action. Respondents too were only able to deliver 750,000 shares to appellant by procuring part of them by misrepresentation from other shareholders and this fact being elicited in the course of the inquiry specific performance should not be ordered.

This question of title is not affected by the verdict of the jury. In so far as questions of fact were involved they were not submitted to them; and on the point of law, the question being raised it was necessary to establish ownership. The learned trial judge who dealt with it as a substantive question, apart

from the issues decided by the jury, found that respondents had title to 750,000 shares, or at all events possession and control of the certificates by transfer; that appellant had possession of new certificates issued in his own name thus shewing at least *prima facie* evidence of title (R.S.B.C. 1924, Cap. 38, Sec. 75) and that it then devolved upon him if he wished to dispute the validity of the shares received to plead and prove that they were fraudulently obtained by respondents or that the latter fraudulently purported to sell shares they did not own. With deference I do not agree. If A purports to sell a chattel to B which he does not own he may be acting fraudulently or innocently. B, though not precluded from raising it, is not necessarily concerned with A's conduct. He may rest on the plea of want of title and A failing to establish ownership cannot recover the purchase price; so too if several chattels are sold under an entire contract failure to shew title in part is fatal to its enforcement.

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The oral evidence as to title is involved and I think purposely obscure. There should be no difficulty in tracing title to the shares if the Act was complied with in respect to transfers and supporting resolutions of directors followed by registration vesting title in respondents disclosed. After full inquiry and inspection of documentary evidence I cannot find that in any event respondents had any right to dispose of more than 310,000 shares. With the contract calling for 750,000 it was necessary to secure the balance elsewhere. In the attempt to do so respondents allege a transfer of two blocks of 180,000 shares each from one Barnes and Thomas and title to a further block of 80,000 shares, the origin of which is obscure.

As to the 360,000 shares received from Thomas and Barnes allegedly for the personal use of respondents, D. N. McTavish gave this evidence at the first trial:

Did you have any right to sell any that Thomas turned in, that 180,000? No, sir, we hadn't.

Did you have any right to sell what Barnes turned in? We certainly had not.

These questions and answers are free from ambiguity. They are directed to specific shares not readily confused with others and yet at the second trial he said: "I certainly misunderstood that question at that time." I will not say, notwithstanding my

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difficulty in accepting the explanation, that it was impossible for a mistake of this character to arise but this evidence at least is a factor when considering all the evidence bearing on that point. The answers to these questions were not quite so material on the first trial.

It was submitted that without any consideration Barnes and Thomas presented 360,000 shares to respondents which they in turn transferred to appellant and from which they received not for the use of the Alamo Gold Mines Limited, but for their own benefit about $40,000. D. N. McTavish gave this evidence at the first trial:

You and your brother got for your own use 600,000 shares in the Alamo for which you paid nothing? Yes.

In addition to that you got 360,000 more from Barnes and Thomas? Yes.

For which you paid nothing? Yes.

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From the documentary evidence, the only conclusion that can properly be formed is that these shares were transferred at the request of the respondents for the use of Alamo Gold Mines Limited. While a letter from respondents to Barnes (Exhibit 92) contains the statement that "under the circumstances therefore we [respondents] feel that it is only reasonable that we should have a substantial interest" thus vaguely supporting the suggestion of a personal transfer to reimburse respondents for alleged outlays yet this somewhat obscure phrase, possibly inserted to later support the present plea, is so involved with other statements in the letter indicating that the shares were required to obtain money to carry on operations on behalf of all the shareholders that it should not reasonably be given the interpretation now suggested. If respondents expended their own money for the use of the Alamo Gold Mines Limited and sought reimbursement from the other shareholders one would expect them to explicitly say so, name the amount, giving details; place a value on the shares required to reimburse them and request a transfer of the proper number to meet the alleged outlay. The suggestion to Barnes was that respondent had "consumed" or used their own personal shares for the benefit of the company. If that were true the natural course to adopt would be to induce the company to issue to them compensating shares out of treasury stock. It was a fraud on Barnes to procure his shares in the manner outlined and to use them for personal gain.

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As to the shares held by Thomas no evidence of a transfer to respondents was adduced in the course of the trial but later, after the jury was discharged and on motion for judgment, leave was given to file an assignment dated November 17th, 1927—the day the contract in question was entered into between the parties. I need not discuss the propriety of admitting this evidence over objection at that stage as the considerations outlined in respect to the Barnes stock are applicable to this transfer.

It was still necessary to account for 80,000 shares as the property of respondents to make up the 750,000 sold to appellant and if there is any evidence in the book to shew where it came from or how it was transferred to respondents for their personal use I cannot after much research find it. I am not overlooking the claim that commissions on the sale of shares were paid for by stock. As to this we have no definite records.

MACDONALD, J.A.

Is a contract to sell 750,000 shares enforceable when the vendor has a right to dispose only of 310,000; acquires 360,000 by subterfuge, if not fraud, and in respect to 80,000 fails to give any satisfactory explanation? I think the question suggests its own answer. The Court will not exercise its discretionary powers to order specific performance where to do so would condone a breach of trust or sanction unconscionable dealings either with respect to one of the parties to the contract or in respect to third parties. The agreement must be free from the taint of deception. Nor does it avail to say that only part of the agreement is affected by fraud, thus pointing to modification. It is wholly vitiated and the purchaser is absolved from all obligations under it. Nor is it necessary that fraud should be pleaded. If title is disputed and fraud is disclosed in the course of the evidence adduced in support of the vendors' allegation of ownership the Court will not enforce the contract.

Further apart from fraud appellant is entitled to have the action dismissed if it is shewn that respondents cannot establish title to the shares sought to be conveyed. The Court will not force the purchaser to take shares, the right to which he may have to contest with third parties. In order that title may be traced the Act requires (R.S.B.C. 1924, Cap. 38, Sec. 73) that each share (the personal estate of the holder) shall be distin-

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guished by an appropriate number. The register must shew the class of shares held by each member distinguished by numbers (section 66 (*a*)) and in case of transfer particulars thereof (section 66 (*f*)) so that it may be apparent to the directors when called upon to register a transfer that the transferor is dealing with his own personal property. The directors too may and should demand reasonable evidence to shew the right of the transferor to make the transfer (Table A 20 (*b*)). These requirements were ignored.

As to the contention that appellant having received certificates is precluded from objecting to the title whatever may be said so far as creditors of the company might be concerned it has no application to a dispute between the vendor and the purchaser. I would allow the appeal.

Appeal allowed.

Solicitor for appellant: *Knox Walkem.*
Solicitor for respondents: *C. W. St. John.*

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REX v. SUE SUN POY

Habeas corpus—Conviction under The Opium and Narcotic Drug Act, 1929 —Detention for deportation—Right of appeal—Deportation order made prior to termination of imprisonment—Validity—R.S.B.C. 1924, Cap. 52, Sec. 6—Can. Stats. 1929, Cap. 49—R.S.C. 1927, Cap. 93, Sec. 22 (2).

Where, pursuant to section 26 of The Opium and Narcotic Drug Act, 1929, an alien, on the termination of his imprisonment imposed on conviction under the Act, is detained pending deportation and he applies for *habeas corpus*, but is refused release, an appeal from such refusal lies to the Court of Appeal under section 6 (*d*) (vii.) of the Court of Appeal Act, the proceedings being civil and not criminal.

An accused was convicted of having opium in his possession and sentenced to two and a half years' imprisonment on the 29th of October, 1929. A Board of Inquiry under section 22 (2) of the Immigration Act held a special sitting in the penitentiary on the 27th of May, 1930, when, after the accused had been examined an order was made for his deportation upon the expiration of his sentence and a warrant by the deputy minister of immigration for his deportation was issued on the 27th of March, 1931. On his release from the penitentiary on the 24th of December, 1931, accused was detained by the immigration authorities for deportation. An application for his release upon a writ of *habeas corpus* with *certiorari* in aid was dismissed.

Held, on appeal, reversing the decision of McDONALD, J. (MACDONALD, C.J.B.C. *dubitante*), that the Board of Inquiry, in holding a sitting, examining the accused, and issuing an order for his deportation prior to the termination of his sentence, acted prematurely and wholly without jurisdiction because it essayed to exercise a power of adjudication before it had acquired it. The deportation order is therefore void and accused should be released.

Statement

APPEAL by Sue Sun Poy from the order of McDONALD, J. of the 22nd of February, 1932, dismissing his application for discharge from the custody of the immigration authorities of Canada under a writ of *habeas corpus* with *certiorari* in aid. He came to Canada in 1917 when he was seventeen years old, and with the exception of three short visits to China has at all times resided in this Province. He was married in Hong Kong in 1922, his wife coming to Canada with him and still residing here. On the 28th of October, 1929, Sue Sun Poy was convicted of having drugs in his possession under section 4 (*d*) of The Opium and Narcotic Drug Act, 1929, and sentenced to two

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and a half years' imprisonment. The Board of Inquiry under the Act held a special sitting in the penitentiary at New Westminster on the 27th of May, 1930, and after examining Sue Sun Poy the presiding officer held that he was an alien and liable to deportation under section 26 of The Opium and Narcotic Drug Act, 1929. An appeal to the minister of immigration was dismissed and a warrant for his deportation was issued at Ottawa on the 27th of March, 1931. He was released from the penitentiary on the 24th of December, 1931, and later taken into custody by the immigration authorities.

The appeal was argued at Victoria on the 5th of July, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

O'Halloran, for appellant.

Moresby, K.C., for respondent, raised the preliminary objection that there was no jurisdiction to hear the appeal, on the ground that the proceedings for deportation arise out of a criminal charge: see *Jungo Lee* v. *The King* (1926), S.C.R. 652 at p. 653; *Rex* v. *Jungo Lee* (1927), 38 B.C. 313; *Rex* v. *McAdam* (1925), 35 B.C. 168; *Ex parte Alice Woodhall* (1888), 20 Q.B.D. 832; *In re Tiderington* (1912), 17 B.C. 81.

Argument

O'Halloran: *Jungo Lee* v. *The King* does not apply as it is restricted to section 36 of the Supreme Court Act and *Rex* v. *McAdam* was on a charge of rape and can be distinguished. In this case accused was released from custody at the expiration of his prison term. He served his time and deportation is not part of the sentence: see *In re Immigration Act and Pong Fook Wing* (1923), 33 B.C. 47. Deportation is a civil consequence of the charge: see *Rex* v. *Loo Len* (1923), 33 B.C. 213; *In re Wong Shee* (1922), 31 B.C. 145; *The King* v. *Jeu Jang How* (1919), 59 S.C.R. 175; *Rex* v. *Loo Len* (1923), 33 B.C. 448. As to what constitutes a criminal charge see *In re Clifford and O'Sullivan* (1921), 90 L.J., P.C. 244; *Rex* v. *Nat Bell Liquors, Lim.* (1922), 91 L.J., P.C. 146 at p. 166; *Nadan* v. *Regem* (1926), 95 L.J., P.C. 114; *Chung Chuck* v. *Regem* (1929), 99 L.J., P.C. 71 at p. 74.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The preliminary objection is overruled.

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O'Halloran, on the merits: This man was domiciled in Canada, and came here in 1917 where he has lived ever since. The deportation order in this case was made some time before the termination of the sentence, and was therefore a nullity: see *Rex* v. *Loo Len* (1923), 33 B.C. 448 at p. 450; *Jungo Lee* v. *The King* (1926), S.C.R. 652.

Moresby, referred to *Rex* v. *Woo Fong Toy* (1926), 38 B.C. 52 at p. 53.

MACDONALD, C.J.B.C. (oral): The majority of the Court think that the order is defective, and must be set aside, on the ground that the inquiry required by the Immigration Act was held prematurely, that it should have been held after the term of the prisoner's sentence had expired; and that therefore the order made is a nullity and must be set aside.

Of course, if that is the proper view of it—I am not expressing my own opinion at the moment—then there is no object in going on with the rest of the points which Mr. *O'Halloran* wishes to discuss, because the first one decides the appeal. The decision of the first question decides the question finally in this Court.

MACDONALD, C.J.B.C.

Personally I am not much in favour of cutting short an argument where there are several points to be argued. But as Crown counsel has admitted that as soon as the Court has come to the conclusion that the first objection is fatal to the appeal, that is an end to the case. Mr. *Moresby* having admitted that he cannot advance anything that would affect our decision upon that point, it would be futile to go on with any other.

On that ground the order for the deportation must be set aside. I am not dissenting from that view, but I should have been willing to have heard the whole argument in the case, so that I could reserve it for the purpose of looking into the authorities carefully. The authorities to which we were referred may be capable of the view that they are not opposed to the view suggested by Crown counsel that where the statute directs the deportation, the reference to the Immigration Act is one relating to procedure and not to a finding by the Board that the appellant is or is not subject to deportation. But I am overruled by the Court in ordering the argument to proceed.

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MARTIN, J.A.: In support of this appeal from the order of Mr. Justice D. A. McDONALD dismissing the application of the appellant to be discharged, by proceedings in *habeas corpus* and *certiorari,* from his detention for deportation by the controller of Chinese immigration at Victoria, several grounds are submitted; and objection was also taken *in limine* by respondent's counsel to our jurisdiction to hear this appeal and the cases of *Jungo Lee* v. *The King* (1926), S.C.R. 652; and (1927), 38 B.C. 313, and *Rex* v. *McAdam* (1925), 35 B.C. 168 were chiefly relied upon. But we were all of opinion that in the first case cited the Supreme Court was concerning itself alone with its own statutory jurisdiction under the particular language of the relevant section of the Supreme Court Act Amendment Act, 1920, Cap. 22, dealing with appeals to it "in proceedings for or upon a writ of *habeas corpus* arising out of a criminal charge" and quashed the appeal on the ground that proceedings for deportation of the present class do "arise out of a criminal charge" because they are necessarily based on a conviction under The Opium and Narcotic Drug Act, 1929; and it is to be noted that in *The King* v. *Jeu Jang How* (1919), 59 S.C.R. 175; 27 B.C. 294, Justices Duff (p. 178) and Anglin (p. 181) said clearly that *habeas corpus* proceedings founded on deportation by the Immigration Board of Inquiry which are not based on convictions, do not "arise out of a criminal charge." The full text of the relevant section of the Supreme Court Act, R.S.C. 1927, Cap. 35, Sec. 36, shews the distinction by the following bracketed exception therein from the general jurisdiction conferred by sections 35-6, *viz.*:

> . . . (except in criminal causes and in proceedings for or upon a writ of *habeas corpus*, *certiorari* or prohibition arising out of a criminal charge, or in any case of proceedings for or upon a writ of *habeas corpus* arising out of any claim for extradition made under any treaty).

This language emphasizes the radical distinction between the three prerogative writs mentioned and "criminal causes," and it is only when those writs "arise out of a criminal charge," or that of *habeas corpus* additionally "out of any claim for extradition . . . ," that the civil jurisdiction of the Supreme Court over them is taken away, though their inherently civil nature remains unchanged.

Our jurisdiction in *habeas corpus,* however, does not depend

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upon any such provision respecting the circumstances out of which such writs "arise" but upon the question, under section 91(27) of the B.N.A. Act, as to whether or no the writ is "a procedure in (a) criminal matter" itself, not one "arising out of a criminal charge," which different and broader language has a much wider scope and implication.

By section 6 of our Court of Appeal Act, R.S.B.C. 1924, Cap. 52, we are given general jurisdiction over "the following matters, or in any proceeding in connection with them. . . . (vii.) *Habeas corpus*," etc.

It is for this reason that our decision in *Rex* v. *McAdam, supra,* invoked by the respondent's counsel, does not support his submission, because whatever may be said of it (and in view of the special circumstances mentioned in my judgment therein and of the conflicting decisions of the Quebec Court of Appeal in the later case of *Regimbald* v. *Chong Chow* (1925), 38 Que. K.B. 440, and the prior one of *Rex* v. *Labrie* (1920), 31 Que. K.B. 47; 35 Can. C.C. 325; 61 D.L.R. 299; I think, with every respect, that it is open to review), it is based upon the ground that the writ itself was "a criminal matter," dealing as it did with the liberty of one who was in prison on a charge of rape under the Criminal Code, therefore the decision, right or wrong, affords no assistance to the respondent. The distinction between the wide language in the Supreme Court Act and that of the B.N.A. Act was pointed out by the Supreme Court itself in the passage in its judgment in *Mitchell* v. *Tracey and Fielding* (1919), 58 S.C.R. 640 at 650, cited by me in *McAdam's* case at p. 177, *viz., per* Mignault, J.:

I would, therefore, conclude—and I also rely on the reasoning of Fitzpatrick, C.J. and of Davies and Anglin, JJ. in the *McNutt case* [(1912)] (47 S.C.R. 259; 10 D.L.R. 834)—that the words "criminal charge" in subsection (a) of section 36, and in subsection (c) of section 39, are used in a wide and not a restricted sense. No question whatever as to the power to legislate with respect to criminal law under the "British North America Act" arises here, and no consideration of the respective powers of Parliament and of the Legislatures with regard to criminal or penal matters can be of any assistance in the construction of the sections of the "Supreme Court Act" to which I have referred, and which undoubtedly, however wide may be their application, are *intra vires* of the Canadian Parliament.

After much consideration in prior cases this present question came precisely before us for our determination in the two cases

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of *In re Immigration Act and Pong Fook Wing* (1923), 33 B.C. 47, and *Rex* v. *Loo Len* (*No. 1*) (1923), 33 B.C. 448; (1924), 1 W.W.R. 733; and *Rex* v. *Loo Len* (*No. 2*) (1923), 33 B.C. 213, 215, and finally in *Rex* v. *Jungo Lee,* 37 B.C. 318; (1926) 2 W.W.R. 734; and we held in all three that we had jurisdiction over such proceedings in *habeas corpus* as the present.

As has been shewn there is nothing in the two later cases of *Jungo Lee* and *McAdam* in real conflict with these decisions and it is fortifying to find that they are in exact accord on this jurisdictional point with the said later decision of the Court of Appeal of Quebec in the *Regimbald* case, *supra,* upon sections of the relevant statutes which are identical in present essentials.

It only remains to be noted that the remark of HUNTER, C.J.B.C. in *Rex* v. *Jungo Lee* (1927), 38 B.C. 313 at p. 314, to which our attention was directed, as to the effect of the Supreme Court decision upon our jurisdiction, was based upon an obvious misapprehension of the statutes in point.

MARTIN, J.A.

I agree, therefore, with my learned brothers that the objection to our jurisdiction should be overruled.

Coming then to the merits, the first ground of appeal, raised for the first time in the many cases of this kind that have come before us, is that the said order for deportation of the 27th of May, 1930, is wholly invalid as being made without jurisdiction. It appears that the appellant was convicted on 28th October, 1929, and sentenced to two and a half years' imprisonment and while he was still serving his sentence, in fact had only served seven months of it, the specially constituted Board of Inquiry, consisting of one immigration officer appointed under section 22 (2) of the Immigration Act, Cap. 93, R.S.C. 1927, held a special sitting in the penitentiary at New Westminster on the said 27th of May, and after examining the convict made the said order complained of: his actual term of imprisonment expired on the 24th of December, 1931, and he was immediately "detained" in custody "with a view to [his] deportation" by order of the minister of justice (under section 43) dated the 8th day of November, 1929, and pursuant to that order, "delivered to the controller of Chinese immigration at Vancouver" pur-

suant to a warrant of the minister of immigration dated the 27th of March, 1931, ordering the said controller

to receive the said Mah Poy, or Sue Sun Poy, or Shu San Poy, and him safely to keep and to convey through any part of Canada, and him to deliver to the transportation company which brought him to Canada, with a view to his deportation to the port from which he came to Canada.

Section 26 of The Opium and Narcotic Drug Act, 1929, Cap. 49, provides that:

26. Notwithstanding any provision of the Immigration Act, or any other statute, any alien, whether domiciled in Canada or not, who at any time after his entry into Canada is convicted of an offence under paragraphs (*a*), (*d*), (*e*) or (*f*) of section four of this Act, shall, upon the expiration or sooner determination of the imprisonment imposed on such conviction, be kept in custody and deported in accordance with the provisions of the Immigration Act relating to enquiry, detention and deportation.

The relevant provisions of the Immigration Act are sections 40-43, under the heading "Deportation of Prohibited and Undesirable Classes," and it is submitted that no power is conferred to hold the necessary inquiry by the Board before the "expiration or sooner determination of the imprisonment imposed," and that the scope of the inquiry and its conditions precedent are set forth in the said judgment of the Supreme Court in *Jungo Lee's* case, *supra*, p. 654:

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The scope of any enquiry under the Immigration Act in such a case must be limited to ascertaining officially that the person in question was an alien, that he had been convicted after his entry into Canada of an offence within the ambit of s. 25 and that the period of imprisonment imposed upon him on such conviction had expired or been determined.

This language shews clearly that the inquiry is not at all a mere matter of form or that "deportation follows automatically . . . upon the expiration of the term of imprisonment," as was said by HUNTER, C.J.B.C. in *Rex* v. *Woo Fong Toy* (1926), 38 B.C. 52. The correct view of the original adjudicating duty imposed upon the Board, was taken, if I may say so, by our brother MCPHILLIPS in *Rex* v. *Loo Len* (*No. 1*), *supra*, p. 450, three years before the remarks of HUNTER, C.J.B.C., who overlooked them in *Woo's* case.

It is a manifest impossibility that the third requirement laid down by the Supreme Court for the due exercise of the Board's jurisdiction in its inquiry can be satisfied while the convict is serving his sentence, and it is, to my mind, impossible to gather such an intention from the sections in question. On the contrary, the inference is all the other way because many things

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might happen after and in the course of the imprisonment which would render it most undesirable that an inquiry should be held prematurely, *e.g.*, the convict might at any time during the duration of his term receive a full pardon, or become insane, and therefore could not be put upon trial, or die, and even up to the last moment of the inquiry when duly held after his term was ended or determined, and while the necessary facts were being "officially ascertained" before any order could lawfully be made against him, he would have the right to bring evidence to prove at that eleventh hour by facts just discovered that, after all, he was not an alien, but was born in Canada, and to accelerate the inquiry by beginning to hold it immediately or shortly after he was in prison on a two and a half years' sentence would not only handicap him gravely in his search for evidence at that premature time but also deprive him of the two and a half years in which he might become entitled to the possible benefit, for any purpose, of that period of time in his favour; the law, *e.g.*, in that time might be changed again and the defence of domicil against deportation restored to him as it stood under sections 40 and 43 of the Immigration Act before the change first effected therein by section 25 of the amending Act of 1923, Cap. 22.

In view of the importance of the question I have given it much consideration, with the result that there is, to my mind, no escape from the conclusion that the Board of Inquiry acted in the matter prematurely and wholly without jurisdiction because it essayed to exercise a power of adjudication before it had acquired it, and therefore its order based upon no foundation is wholly null and void, on principles too well known to be repeated here—*cf. e.g.*, *Rex* v. *Labrie, supra,* and *The Leonor* (1916), 3 P. Cas. 91; (1917), 3 W.W.R. 861, and cases therein cited.

In this view of the matter it is unnecessary to consider the other grounds of the appeal which, therefore, should be allowed and the appellant set at liberty forthwith.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. (oral): This case is a most important one, and has brought about the submission of a number of points which, if established, would set aside the order under which the deportation is claimed to be laid. It seems to me that, in view

of our previous decisions, the inquiry before the expiry of the sentence was an ineffective determination of the Board, in fact a nullity. It was not held in conformity with the statute. We considered that point in the case of *Rex* v. *Loo Len (No. 1)* (1923), 33 B.C. 448; and at pp. 450 and 451 I had occasion to consider the question.

In the Supreme Court of Canada Chief Justice Anglin dealt with the precise point, in *Jungo Lee* v. *The King* (1927), 1 D.L.R. 721 at p. 722, in these words:

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> The scope of any enquiry under the Immigration Act in such a case must be limited to ascertaining officially that the person in question was an alien, that he had been convicted after his entry into Canada of an offence within the ambit of s. 25, and that the period of imprisonment imposed upon him on such conviction had expired or been determined.

Now we have it established before us, and it cannot be gainsaid, that the term of imprisonment had not expired at the time the Board presumed to act. It must in my opinion be held that it was a void act on the part of the Board.

I may later, in accordance with the importance of this matter, put my judgment in writing. I would allow the appeal.

MACDONALD, J.A.

MACDONALD, J.A. (oral): I think that the appeal should be allowed, for the reasons given by Chief Justice Anglin, in that part of his judgment just quoted by my brother MCPHILLIPS.

Moresby: May I ask that the members of the Court who are reserving judgment, deal also with the motion to quash this appeal?

MACDONALD, C.J.B.C.: The ground is this, the Court holds it was a civil matter pending after the sentence had expired, and there is an appeal to this Court in civil matters.

The appeal is therefore allowed.

O'Halloran: Allowed with costs, and also costs of the motion?

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: Yes, you get the costs, and the costs of the motion or preliminary objection; they are not separate costs, they are all in the same field. All that has taken place will be included in the one bill.

Appeal allowed.

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RE RILEY AND CHILDREN'S AID SOCIETY v. CORPORATION OF THE VILLAGE OF MISSION.

Infants Act—Infant belonging to village—Maintenance—Village municipality—Whether "municipality" within the Act—R.S.B.C. 1924, Cap. 112, Sec. 80, Subsecs. (1) and (8)—R.S.B.C. 1924, Cap. 183.

On an application to enforce an order made against the Village of Mission under section 80 (8) of the Infants Act, for the maintenance of a child belonging to the village:—

Held, that the Village of Mission is a "village municipality" within the Village Municipalities Act and the question is whether the Village of Mission is a "municipality" within the meaning of the Infants Act. As the word is not defined in the Infants Act the Interpretation Act applies and the definition of "municipality" there does not include "village municipality." A village municipality is therefore not a "municipality" within the meaning of that word as used in the Infants Act, unless under section 7 of the Village Municipalities Act it has been declared to be a municipality under the Infants Act, and the application is dismissed.

Statement

APPLICATION by the Children's Aid Society under section 80, subsection (8) of the Infants Act, to enforce an order made against the Village of Mission under section 80, subsection (1) of said Act for the maintenance of a child belonging to the village. Heard by MORRISON., C.J.S.C. in Chambers at Vancouver on the 7th of December, 1932.

McTaggart, for petitioner.
A. S. Duncan, for the Village of Mission.
Pratt, for the Attorney-General of British Columbia.

19th December, 1932.

Judgment

MORRISON, C.J.S.C.: An order having been made against the Village of Mission under section 80 of the Infants Act for the maintenance of this child and payment having been refused, the Children's Aid Society applies to enforce the order under subsection (8) of section 80.

The Village of Mission, whilst disclaiming any intention of evading on technical grounds any responsibility thrown upon them by the Legislature, submit that they have no power to expend moneys as requested.

Mr. *McTaggart* on behalf of the applicants submits that upon a proper interpretation of the word "municipality" it includes "village municipalities." I cannot agree. I adopt Mr. *Duncan's* very exhaustive submission which is substantially as follows:

The question is whether or not the Village of Mission is a "municipality" within the meaning of the Infants Act. The word not being defined by the Infants Act, the Interpretation Act must be looked to. Subsection (28) of section 24 of the Interpretation Act defines "municipality" in the following words:

"Municipality" includes every municipal area or corporation incorporated as a city, city municipality, district municipality, or township municipality, by or under any general or special Act of the Legislature, and "municipal" shall have a corresponding meaning.

It is to be noted that "village municipality" is not mentioned in the subsection. The definition is definite and names the various kinds and classes of municipalities included.

Lord Esher in *Sharpe* v. *Wakefield* (1888), 22 Q.B.D. 239 at p. 242 says:

The words of a statute must be construed as they would have been the day after the statute was passed, unless some subsequent statute has declared that some other construction is to be adopted or has altered the previous statute.

Judgment

It is difficult to imagine that the Legislature could have had in mind at the time of the passing of the Infants Act its application to a village municipality a thing which was not then in existence.

The applicant suggests as a ground for including "village municipalities" within the definition that they are not excluded by it. It must in view of the definition affirmatively shew very strong evidence of an intention on the part of the Legislature to include villages within the definition. The Village Municipalities Act was passed long after the Infants Act and was passed for the purpose of enabling small areas to govern themselves within certain limits and restrictions. As originally passed in 1920 (chapter 65) it went no further than to provide for the incorporation of village municipalities to have "such rights, powers and privileges and be governed in such manner as is set out and specified in the Letters Patent." Subsequently a schedule similar to Schedule "A" of the Companies Act was

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added to the Act which could be adopted as applicable to the village applying for incorporation, in whole or in part. The powers and liabilities of village municipalities are very restricted and clearly evidenced by the Act. The following might be noted as illustrative of the limitations:

The Village Municipalities Act gives no jurisdiction whatsoever with reference to schools or to administration of justice; villages are not permitted to borrow on debentures; by-laws of villages must be filed with the inspector of municipalities; villages have no power to construct waterworks, tramways, irrigation systems and sewers, nor to regulate public utilities; the procedure governing elections is set out in the Village Municipalities Act and is different from that of a municipality under the Municipal Act; the qualifications for voters are different from the qualifications of voters in municipalities; no power is given to villages with reference to protection of children.

The intention of the Legislature to prevent the classification of villages as municipalities under the Municipal Act is evidenced by the special provision in the Village Municipalities Act specifically making certain statutes or parts of statutes applicable to villages, namely, the Land Registry Act, Part XXI., of the Municipal Act (Inspection), Provincial Park Act, and Part V. of the Highway Act. By the Letters Patent issued to the Village of Mission on incorporation, certain other Acts were made applicable, namely, the Taxation Act (Part I.), Municipalities Aid Act, Hospital Act, Superannuation Act, Trades Licence Act and section 108 Government Liquor Act.

Judgment

The intention of the Legislature would seem further borne out by the fact that power was taken in the Village Municipalities Act to provide for bringing villages within the provisions of any other Acts which might from time to time seem advisable. This would not be necessary if applicant's contention were correct. Subsection (*c*) of section 7 of the Village Municipalities Act giving such power is as follows:

The Lieutenant-Governor in Council may make regulations, applicable generally to all village municipalities, or applicable specially to one or more village municipalities:—

(*c*.) Declaring whether or not a village municipality shall be deemed to be a municipality within the meaning of any other Act of the Legislature, or of any provision of such Act.

It is to be noted that the rights, powers, privileges and manner of government are not necessarily the same in all village municipalities. Subsection (2) of section 2 of the Village Municipalities Act is as follows:

(2.) The Letters Patent may, by reference thereto, adopt as applicable to the village municipality incorporated thereby all or any of the provisions as to rights, powers, privileges, and manner of government contained in the Schedule to this Act; and in so far as the Letters Patent do not exclude or modify the provisions contained in the Schedule, those provisions shall apply to the village municipality so incorporated in like manner and to the like extent as if they were set out and specified in the Letters Patent.

Section 7 of the Act gives power to the Lieutenant-Governor in Council to "make regulations applicable generally to all village municipalities or applicable especially to one or more village municipalities. The above-mentioned subsection (*c*) of section 7 of the Village Municipalities Act must infer that a village municipality shall not be deemed to be a municipality within the meaning of any other Act of the Legislature unless specifically provided. Under and by authority of the above subsection orders in council have been passed making the Village of Mission a municipality under the Milk Act, section 465 of the Municipal Act and the Health Act.

Judgment

The intention of the Legislature is further clarified by the fact that in the following Acts village municipalities are specifically mentioned: Mothers Pension Act, Public Institutions Indemnification (Municipalities) Act, Town Planning Act, Fire Marshal Act, and Noxious Weeds Act.

It might be well to consider for the purpose of assisting in determining the intention of the Legislature with reference to the Acts in question the result that would entail in the event of a declaration by this Court that the word "municipality" as used in the Infants Act and as defined in the Interpretation Act including a village. A village would have under the Juvenile Courts Act duties in connection with the administration of justice while at the same time it is forbidden by the Village Municipalities Act any jurisdiction as to administration of justice. It would have two different election procedures, one now provided in the Village Municipalities Act and the other pursuant to the Municipal Elections Act. It would be empowered to borrow money on debentures under the Local Improve-

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ment Act, and forbidden to do so by the Village Municipalities Act. The result would be chaotic.

It is further distinctly set out in the Village Municipalities Act that the provisions of the Municipal Act shall not apply, except as specified in the Letters Patent. Such an enactment is a very forceful distinction between village municipalities and, with the exception of cities having private charters, all the other municipalities in the Province. No statute should be so construed as to reduce another to an absurdity and no words should be read into a definition of such finality as a definition set out in the Interpretation Act, which would have that effect.

The Lieutenant-Governor in Council may at any time it is deemed proper by order in council declare the Village of Mission a municipality under that Act as power has been reserved under section 7 of the Village Municipalities Act to do so. If it is felt by any party interested that the village should come under the Infants Act a method provided by the Legislature is available to accomplish such purpose and such method should be followed.

Application dismissed.

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Negligence — Construction of ditches by municipality without providing outlet—Overflow—Faulty construction—Lands rendered unfit for truck gardening—Unprecedented rainfall—Right of municipality to convey water to nearest waterway—Duty of owner to maintain his drains—Evidence of land surveyors and engineers—R.S.B.C. 1924, Cap. 179, Sec. 297.

The plaintiff, who carried on truck gardening on his lands within the defendant municipality, brought action against the municipality for damages, claiming that through faulty construction of ditches carrying surface water to a point close to his property where no provision was made for carrying it away, the water overflowed the ditches and entering his property rendered it unfit for market gardening and destroyed his crops.

Held, that in order to succeed the plaintiff must shew that the defendant brought water on his lands, which has done damage to him and in this he failed. The evidence discloses that the natural flow of water on the area in question was in the same direction as that taken by the ditches, and the ditches as constructed retarded rather than accelerated the flow on to the plaintiff's lands. The damage to the plaintiff's lands would appear to be due to unprecedented rains during the year in which his crops were destroyed.

Held also, that the evidence of engineers experienced in topographical work, with proper plans shewing topography of country in vicinity of *locus*, with details of contours and explanatory models was entitled to more weight than evidence of land surveyors lacking adequate details.

Held also, that plaintiff's damage, if any, was caused or accentuated by failure of the plaintiff to maintain his drains.

Statement

ACTION for damages to the plaintiff's lands through overflow of water from ditches which the plaintiff claims were improperly constructed by the municipality. The plaintiff owns two lots in the Municipality of Burnaby, containing a number of acres and described as lots 11 and 12 of lot 83, group 1, New Westminster District, where he lives and carries on truck gardening, the land being well adapted for that purpose. The municipality constructed a ditch on Balfour Street, leading from Spruce Street in a southerly direction, and draining a large area, the ditch terminating about 175 feet from the plaintiff's property, the ground sloping from there southerly to the south boundary of

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the plaintiff's land, the plaintiff's dwelling-house and cultivated land being at the bottom of the slope. The plaintiff claims that no provision was made for carrying the water from the point where the municipality's ditch terminates, that the water overflows the ditch and percolates through the plaintiff's land, choking up his drains, rendering the soil sodden and unfit for truck gardening. The defendant contends that the water was conveyed to the nearest and most convenient well-defined natural waterway and that section 297 of the Municipal Act is a bar to the plaintiff's action, also that the plaintiff's alleged damages were caused by the plaintiff's own negligence in not properly draining his lands, and in permitting his underdrains to become choked up. Tried by GREGORY, J. at Vancouver on the 11th to the 20th of April, 1932.

Donaghy, K.C., for plaintiff.
McQuarrie, K.C., for defendant.

GREGORY, J.: In this case I do not think it is necessary to deal in detail with the evidence, but I will make some short reference to it. I may say at the outset I have no hesitation in coming to the conclusion that the action should be dismissed, and that there should be judgment for the defendant.

Judgment

The plaintiff, to succeed, must shew that through some act of the defendant it has brought water upon the plaintiff's land. To succeed in full he must shew that it brought water which has done damage to his land. The first witness who was called to prove that was the plaintiff himself, and the plaintiff is so prejudiced and reckless and unreliable—in fact he was described by his own counsel, during his examination, as hopeless. That might have meant stupidity only, but he is so reckless that I am not able to rely upon his statements. He begins his action by claiming $3,000 damages—$2,000 damage to his land, and not one tittle of evidence is offered to support that claim of $2,000.

Even if the land has been very wet then there is no evidence to shew that it was damaged or injured or affected permanently so that, of itself, is out of consideration.

Then he claims $1,000—nearly $1,000—some $900 odd for damage to his crop and strawberries and raspberries. The best

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evidence that he can give as to the crop he had been raising only amounts to $500 a year. That included everything—the entire proceeds from his farm—if you would call it a farm.

He kept no record of his crops as he was required to do by his agreement with the Soldiers Settlement Board, so he was only trusting to memory, and as I say I cannot rely on him. He had an idea apparently, that he had about two and a half acres under cultivation, but the evidence shews that he did not have more than one and a half acres under cultivation. He said he earned his entire living off that land, but it was shewn that he received a very substantial sum—not so much on his own story, according to his own receipts from the farm, but a very substantial sum from the municipality itself I think the year preceding.

I might say this for him—one would have expected his neighbours to give some opinion as to his crops and failure. He called two or three of them, and one did undertake to say something about them. Mr. Turner was one who said he had good crops previously; but Mr. Turner also said there had been a blight on raspberries in the Fraser Valley all throughout 1931, and this land is in the Fraser Valley. But Mr. Loftus said he did not see them, and one of them was away during the summer time—I have forgotten which one, and perhaps he might be excused in that way.

Judgment

As I have said, there was unquestionably a very excessive rainfall that year, quite unprecedented—in the early part of the year—in fact unprecedented throughout the whole year, and in the months of January and February it had been far more than it had been according to the records in any previous year and for the first six months it was more. And so the low lying portion of the plaintiff's land, lying to the north of his cultivated portion, was bound to have a great deal of extra water, coming down upon his cultivated portion. And so, in my opinion, his damage, if any, came from that.

The plaintiff bases his claim on what we have been calling the extension to the east ditch on Balfour Street. The evidence is conflicting as to where that east ditch extension ended. Mr. Cornwall said he was there on the 7th of November, and he took full notes and it ended at the point shewn on Exhibit 6. The other witnesses do not agree with that, but there is this to be

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said with reference to Mr. Cornwall. He makes a plan of that, and he shews that ditch, straight, clean looking ditch, the same as the rest of the ditch along Balfour Street. We went out and saw it, and it is admitted now that that so-called unauthorized extension is not truly represented by Mr. Cornwall's map. We had a proper map of it later on.

Mr. Chester, who lives right near there—the nearest person to it, says he was there, and he must have been there frequently; and he said he saw the plaintiff there frequently with a shovel, and he said he saw the plaintiff there late in the fall of 1931. I think he went on to say—he was not sure, but he thought in November or December, but it might easily be, when he did see him would have been before the 7th of November. It was before the 7th of November—because he said that extension only amounted to cleaning out the obstructions which were in it.

Admittedly the plaintiff's western drain—I will not say it is insufficient in size—he does not admit that—but that is testified to by a man whose reputation I have every confidence in and I have no difficulty in accepting his statement. He says it was caved in. And the evidence is clear it was not down to hardpan. And he says in the evidence or in the statement of claim that it was caused by the excessive water brought there by the defendant. I cannot see if the excessive water blocked that ditch why it did not block the one on the northeast, as we call it. So that drain was not functioning that year when this damage was done, if there was any damage done, and it is not right to say that the defendant has caused it.

The main question in dispute at the trial was the natural flow of the water running down over the plaintiff's land and down Balfour Street. It is admitted that there is a natural watercourse which would take the water coming down Balfour Street to the northwest corner of the plaintiff's property. The plaintiff says they brought it further over, and brought it down—the plaintiff brought to support his opinion a firm of Provincial land surveyors—Cornwall, and what was the other one?

[*McQuarrie*: Underhill.]

Underhill said he was a partner of Cornwall's, and that was the first one—and the second one I think he said he was from the same office. Underhill said he was a registered engineer,

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but Cornwall did not make any such claim, and I do not remember with regard to the other one.

Now, what did they bring to support their contention? The only thing they brought here was Exhibit 6, and the exhibits which we had during the latter part of the trial with reference to those test holes. Exhibit 6, one only has to look at it to know that it is absolutely insufficient to enable any person to tell what the natural flow of the water would be coming on the plaintiff's land. It is so limited in area. He has put four contour lines on his map, extending as far as the eastern boundary of the lane on the west of Balfour Street, and the western boundary of the lane on the west of Balfour Street. I am speaking of a street not named on the map, but it is in the middle of Exhibit 6.

There are some other lines above that—contour lines—but they only shew what everybody knows, without any contour map at all, out there: the natural water drainage down Balfour Street from Spruce. That is what he gives us. But the defendant has brought engineers—men who are practising as engineers, and not practising as land surveyors—but who are practising as engineers, and who have had experience in topographical work. And they bring plans. There are two at least shewing the topography of the whole country around there, and the country which it would drain into, or from this natural watercourse which the defendant's engineers shew on their map, and that gives us a better opportunity of judging where the water would naturally fall. They have done more than that. They have produced a plaster model of a portion of the plaintiff's land—the portions where they say the water would come on, and they have produced a very carefully made cardboard—I do not know what to call it—what is the number of that exhibit?

Judgment

[The Registrar: Exhibit 17.]

Exhibit 17. And the plaintiff's engineers do not question any of these plans. Attention was drawn to a variation in two contour lines between two of the maps. And Mr. Swan pointed out those were contour lines considerably north of the culvert.

Now, the defendant's witnesses—and I am making no reflection on the plaintiff's truthfulness or veracity or desire to tell the truth—please let that be thoroughly understood, that I do not question the sincerity of the plaintiff's engineers for a

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moment, but I am satisfied I can more safely rely on the testimony of the defendant's engineers. They give good reasons for their opinions and they produce contour maps which support them, and that is not the case with the others. They agree that the water would take the same course that it would have taken if the ditch had not been dug, but the water in the ditch would not reach the natural watercourse so early. They say the effect of it has been to retard it, so that it does not reach it, but I do not think that there is any evidence that I can rely upon to shew the water has been deposited on the plaintiff's land in such a way that it is going to go down over his cultivated part; and that was what he undertook to prove at first, that it did.

The first Mr. Underhill who was called very distinctly said that if there had been no test ditch there—and it is agreed now, I think, that that test ditch intercepts any water that would come down, and naturally carry it back to where it would naturally go in the course of nature—but he said without that test ditch he would not say that any of the water would reach the plaintiff's cultivated land. That test ditch is there now, and as far as the present condition is concerned, it is guarding and protecting the property; but of course that was dug after the action was launched.

I do not think that there is anything more that I can usefully add. I have expressed my general idea which is governing me in my opinion, and there is no time, and it is not necessary to give a long written judgment setting this out in detail.

I might say this, that I do not accept the evidence with regard to what we have been speaking of as the extension of the extension—the 70 or 80 feet—I do not accept or conclude that it was built by the municipal engineer. There is no evidence to justify me in coming to the conclusion that it was built by the municipality at all, and I think that the action therefore must be dismissed, and there will be judgment for the defendant.

Action dismissed.

REX v. CHAN SAM.

COURT OF APPEAL

1932

Oct. 24.

REX *v.* CHAN SAM

Criminal law—Charge of being in possession of opium—Opium dross found on accused—Whether included in "opium"—Can. Stats. 1929, Cap. 49, Sec. 2, Subsecs. (i) and (k).

By subsection (*i*) of section 2 of The Opium and Narcotic Drug Act, 1929, " 'Opium' means and includes crude opium, powdered opium, and opium prepared for smoking, or in any stage of such preparation," and by subsection (*k*) of said section " 'prepared opium' includes dross and all other residues remaining when opium has been smoked."

Two policemen found the accused with two packages of opium dross in his pockets. On speedy trial under Part XVIII. of the Criminal Code for unlawfully having in his possession a drug, to wit: opium, contrary to said Act, the charge was dismissed.

Held, on appeal, reversing the decision of LAMPMAN, Co. J., that dross is included in opium within the meaning of said subsections and the accused is guilty of the charge as laid.

APPEAL by the Crown from the decision of LAMPMAN, Co. J. of the 29th of July, 1932, dismissing a charge against Chan Sam of unlawful possession of opium. On the 25th of June, 1932, two constables of the Royal Canadian Mounted Police found the accused in a bunkhouse near the Empire Cannery at Esquimalt with an opium-pipe in his hand and a lamp burning on the table, and on searching him they found two packages of yen shee in his pockets, yen shee being the Chinese name for opium dross. Opium dross is the residue remaining in a pipe when prepared opium is smoked, and it contains a considerable percentage of morphine. It was held on the trial that "preparation of opium" means something made for a certain purpose from opium and not the remains of opium after it is burnt, and the accused was discharged.

Statement

The appeal was argued at Vancouver on the 24th of October, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

R. A. Wootton, for appellant: Two packages of opium dross were found on the accused and an opium-pipe. The charge was possession of opium. It is submitted under subsections (*i*) and (*k*) of section 2 of The Opium and Narcotic Drug Act, 1929,

Argument

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"dross" comes within the definition of opium: see *Rex* v. *Fung Fang Yuk* (1923), 32 B.C. 311.

Clearihue, for respondent: It must be proved that dross is a preparation of opium: see *In re Immigration Act and Mah Shin Shong* (1923), 32 B.C. 176; *Regimbald* v. *Chong Chow and Hung Duck and Moyco* (1925), 38 Que. K.B. 440 at p. 447. It has not been shewn that he comes within the ambit of the statute: see Maxwell on Statutes, 7th Ed., p. 227; Craies's Statute Law, 3rd Ed., pp. 192 and 443. Dross does not come within the definition of opium and it has been so held in the Court below: see *The Queen* v. *Pearce* (1880), 5 Q.B.D. 386 at p. 388.

Wootton, replied.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: I think the appeal should be allowed. There is no doubt in my mind that this man was in possession of opium. You may call it dross or call it prepared opium, but he was in possession of opium. Now, if he was in possession of prepared opium he is guilty. If he is in possession of dross he is guilty, and just whether it is one class or the other does not seem to me to matter at all. He was either guilty of possessing prepared opium or he was guilty of possessing dross, and both are within section 2, subsection (*k*). I can see no difference between finding that a man is guilty of having opium in his possession if it is a preparation of opium, and a man who has dross in his possession under the statute which says prepared opium shall include dross. It seems to me perfectly clear that the learned trial judge has taken an erroneous view of the case in law and that we ought to set the matter right by allowing the appeal.

MARTIN, J.A.

MARTIN, J.A.: The question is simply whether the definition of prepared opium in section 2 (*k*) includes dross, and I have no doubt that it does. The schedule says "Opium or its preparations." Now, what is the substantial difference between prepared opium under subsection (*k*), opium prepared under subsection (*i*), and opium preparations in the schedule? I am unable to discover any. They are intended, obviously, to be synonymous terms, because once opium is prepared it becomes an opium preparation within the schedule, and in subsection

(*k*), in addition to the joint meaning conferred upon prepared opium or smoking opium, the joint or alternative meaning, there is a special and peculiar one placed upon prepared opium which says that it shall also include dross. There is no definition of what dross is. And then it goes on to refer to still another class and states what opium is after it has been smoked. It appears clearly from the evidence—I have read it all through—that dross is a preparation obtained by heating opium, either as a result of smoking it or otherwise. And it is also clear that dross is something which is produced either in smoking or in combustion and is more harmful than prepared opium. There is really no difficulty, in my opinion, about this matter and the offence is clearly within the statute not only in words but in spirit and therefore, the appeal, in my opinion, should be allowed.

MARTIN, J.A.

McPHILLIPS, J.A.: I am of the view that the appeal should be allowed. The learned judge, in his report, puts the matter in this form: The accused was charged with being unlawfully in possession of a drug, to wit, opium, contrary to The Opium and Narcotic Drug Act, 1929, and was convicted on a charge of smoking opium, that at the time there was found in his possession a substance called dross which is the refuse or residue of opium after it has been smoked, and he held that that was not opium. Now, turning to the statute, we find opium to be defined in section 2, subsection (*i*): "'Opium' means and includes crude opium, powdered opium, and opium prepared for smoking, or in any stage of such preparation." It is not going too far to assume that when he was smoking opium he had opium prepared for smoking in his pipe; and then when we turn to section 12 of the Act, every person who smokes opium shall be guilty of an offence, and that would be the offence upon which he was convicted.

MCPHILLIPS, J.A.

As to what he was smoking being that which is aimed at by the statute, it seems to me that, with every deference to the very able argument of Mr. *Clearihue,* while in an analytical way it may be possible to see some vision of frailty or possible vision of frailty in the language, yet it clearly disappears when we look at section 2, subsection (*k*). How can there be any two opinions

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upon the effect of the statute law as we have it? Prepared opium is smoking opium—and I of course assume that that was the class of opium he had in his pipe—means the product of raw opium prepared by a series of special operations, especially by dissolving, boiling, roasting or fermentation, designed to transfer and form it into an extract suitable for consumption, and prepared opium includes dross and all other residues of opium when opium has been smoked. The evidence here makes it clear to my mind that that which was left would be dross. It is true the analyst, under cross-examination, seemed to have some hesitation in saying the exact components of that opium when it had been smoked, but when we have the statute we have got a parliamentary definition of it: It includes dross and all other residues remaining when opium has been smoked. And when you have a parliamentary definition, so far as the Courts are concerned, we are unable to do other than follow the language of Parliament. As long as we do no violence to the language which Parliament has used, we keep within our proper line of decision. To my mind we do not do any violence, but we conform to it.

I would allow the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: I agree.

Appeal allowed.

Solicitors for appellant: *Wootton & Wootton.*
Solicitors for respondent: *Clearihue & Straith.*

RITHET CONSOLIDATED LIMITED v. WEIGHT.

COURT OF APPEAL

1932

Nov. 1.

RITHET CONSOLIDATED LTD. *v.* WEIGHT

County Courts Act—Cause of action—Splitting demands—Jurisdiction—R.S.B.C. 1924, Cap. 53, Sec. 35.

Section 35 of the County Courts Act provides that "It shall not be lawful for the plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the County Courts," etc.

C. M. purported to sell a car to the defendant under a conditional sale agreement for $2,800, $1,000 payable at once and the balance in monthly payments of $100 each for eleven months, and a $700 payment at the end of the twelfth month, the plaintiff signing twelve promissory notes for the subsequent payment in favour of C. M. The $1,000 payment was made and C. M. then assigned the conditional sale agreement to the plaintiff, and after endorsing the defendant's notes, handed them over to the plaintiff. The first two notes were paid by C. M. to the plaintiff, but none of the others being paid the plaintiff brought two actions in the County Court, one on the first eight notes that were not paid of $100 each, and a second on the last two notes of $100 and $700 respectively, and recovered judgment.

Held, on appeal, upholding objection to the jurisdiction of the Court below, that where promissory notes relating to the sale of one specific article are all overdue and in the hands of one person it is a division of the cause of action contrary to said section 35 for that person to bring successive actions on said notes.

APPEAL by defendant from the decision of LAMPMAN, Co. J. of the 7th of June, 1932, in two actions brought by plaintiff as holder of certain promissory notes made by the defendant in favour of Consolidated Motors (Victoria) Limited, on the 18th of November, 1929, said notes being endorsed by Consolidated Motors (Victoria) Limited in favour of the plaintiff. The plaintiff company had been financing Consolidated Motors, and on October 30th, 1929, one Wallis, managing director of Consolidated Motors, brought to one Cooke, the accountant of the plaintiff company, an invoice shewing the purchase of a car by Consolidated Motors, and the plaintiff advanced $1,850 and took a bailee receipt. Shortly after Wallis brought to Cooke a conditional sale agreement signed by the defendant for the sale of the car for $2,800, of which $1,000 was payable forthwith, and the balance in monthly payments of $100 each for eleven months, and a payment of $700 a month later, twelve promis-

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sory notes being signed by the defendant for the deferred payment, and he turned in an old car in lieu of the cash payment of $1,000. The conditional sale agreement was assigned to the plaintiff company and the promissory notes were endorsed by Consolidated Motors and handed to the plaintiff. The first two notes were paid by Consolidated Motors to the plaintiff. It then became known that the motor-car in respect to which the bailee receipt was given never existed and that the transaction was a fraud by Wallis for which he was afterwards convicted and sent to prison. The plaintiff brought two actions in the County Court, one on the first eight notes of $100 each, and the second on the last $100 note and the $700 note. He recovered judgment in both actions.

The appeal was argued at Vancouver on the 31st of October and 1st of November, 1932, before MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

O'Halloran, for appellant: Action should have been brought in the Supreme Court for the full amount claimed. They divided the amount due in two parts and brought the two actions in the County Court. There is no jurisdiction to do this and the actions should be dismissed: see *In re Aykroyd* (1847), 1 Ex. 479 at p. 488; Annual County Courts Practice, 1932, p. 89; *Bonsey* v. *Wordsworth* (1856), 18 C.B. 325. Having succeeded in one action he abandons the excess: see *Vines* v. *Arnold* (1849), 8 C.B. 632; *In re Hill* (1855), 10 Ex. 726.

Lowe, for respondent: Section 35 of the County Courts Act does not apply here: see Halsbury's Laws of England, Vol. 8, p. 459, secs. 998-9; *Brunskill* v. *Powell* (1850), 19 L.J., Ex. 362. Rithet & Co. came in as holders in due course: English & Empire Digest, Vol. 17, p. 466; *Wickham* v. *Lee* (1848), 12 Q.B. 521; *Hartley* v. *Ayurst* (1848), 11 L.T. Jo. 150.

O'Halloran, replied.

MARTIN, J.A.

MARTIN, J.A.: Since adjourning the case yesterday the Court has been going further into the question of jurisdiction, and we are unanimously of opinion that it would be highly desirable, if we could arrive at a firm view on that question, to give judgment upon it now, which would obviate the necessity of further expense and time in argument; and after having given

it further consideration we are all of the opinion that what is being done here is a division of the cause of action contrary to the provisions of section 35, and therefore the objection to the jurisdiction must be sustained.

MARTIN, J.A.

The principal cases are those which were referred to yesterday, and it is unnecessary to discuss them again. The *Aykroyd* case in particular was relied upon by Mr. *O'Halloran,* and, as explained in the *Brunskill* case, it was relied upon chiefly by Mr. *Lowe,* and in giving application to those judgments it appears to us that where you have, as here, promissory notes relating to the sale of one specific article, all overdue so far as this case is concerned, overdue and in the hands of one person, in so far as these notes are in the hands of one person it would be a division of the cause of action for him to split the actions and institute successive suits in order to get one overdue debt which was in his hand. That, of course, does not relate at all to any notes that may be in other hands, but we simply confine the decision to the case where a man has notes in his possession, and all overdue, in relation to the sale of one subject-matter, as we have here.

The result then is, the objection to the jurisdiction is sustained, and the appeal will be allowed.

Counsel have stated that both these cases depend on the same objection. The same ruling will follow in the second case.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree.

MACDONALD, J.A.

MACDONALD, J.A.: I agree.

Statement

Subsequently, on motion made on the 16th of November, and before judgment had been entered, the Court gave special leave to the respondent to submit further appellate authorities on the question of jurisdiction, being of opinion that it was "in the interest of justice" to do so, under the circumstances, though the indulgence was granted with reluctance because said authorities should have been cited on the argument when the matter had been gone into at length. On the 5th of December the appeal came on for further consideration as aforesaid before the same Bench.

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RITHET CONSOLIDATED LTD. *v.* WEIGHT

Argument

Reid, K.C., for respondent, cited *Re Clark* v. *Barber* (1894), 26 Ont. 47; *Re McDonald* v. *Dowdall* (1897), 28 Ont. 212; *Harvey* v. *McPherson* (1903), 6 O.L.R. 60; *Re McKay* v. *Clare* (1910), 20 O.L.R. 344 and *Re McGolrick* v. *Ryall* (1895), 26 Ont. 435.

O'Halloran, for appellant, cited *Richards* v. *Martin* (1874), 23 W.R. 93, wherein there were two separate and distinct demands of liability and of account, and submitted that no ground was disclosed in the cases now cited for disturbing the judgment already pronounced.

Judgment

Per curiam: We affirm our prior judgment, and adopt the principle of the *Clark* v. *Barber* case, applied in *McDonald* v. *Dowdall* (p. 214), as applicable to the circumstances of the present one, wherein also "the whole sum is past due and collectable," arising as it does out of one sale of one article with the whole purchase price overdue, as represented by the various notes all held by the plaintiff, the total indebtedness of which could have been set up and pleaded in one general count on the conditional sale agreement (if the question should turn on that), and we prefer the decision in the *Clark* case to that in *Harvey* v. *McPherson* should there be any real difference between them in principle upon the dissimilar facts. There is no magic in the giving of promissory notes, falling due successively, to pay for the purchase price of the same article by instalments, and the difference in principle between actions upon such notes and those founded upon, *e.g.*, successive bonds to obtain the same result of payment by instalments, is not apparent; and *cf. Re Gordon* v. *O'Brien* (1886), 11 Pr. 287, for a case of improper division into three actions of claims for four monthly rents overdue under one contract.

The appeal is allowed and the action dismissed.

Reid, K.C., asked the Court to declare that the dismissal of this action be without prejudice to the bringing of another.

Per curiam: We do not think that we should add anything to our judgment.

Appeal allowed.

Solicitor for appellant: *C. H. O'Halloran.*
Solicitors for respondent: *Moresby, O'Reilly & Lowe.*

FAMOUS CLOAK AND SUIT COMPANY LIMITED v. THE PHŒNIX ASSURANCE COMPANY LIMITED.

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Nov. 10.

FAMOUS CLOAK AND SUIT CO. *v.* THE PHŒNIX ASSURANCE CO.

Insurance, fire—Loss of profits insured—Policy—Construction—Arbitration —Award.

It was provided in a fire-insurance policy for $10,000 against loss of profits, that "If during the term of this policy, such merchandise or any portion thereof shall be destroyed or damaged by fire, this company shall be liable for any loss of profits and/or commissions in respect of such merchandise which may result from such fire, to be ascertained as follows, *viz.*, (a) The amount of the fire loss occasioned by damage to or destruction of the merchandise for which the company or companies insuring the same are liable shall first be ascertained as determined by adjustment; (b) The loss of profits insured under this policy shall be based on the amount of said fire loss "as determined under the above paragraph (a); (c) The loss of profits as determined under paragraph (b) shall not exceed the amount of profits which the assured would have realized immediately preceding the fire in the ordinary course of the assured's business from or out of the sale of such merchandise which has been damaged or destroyed."

On March 19th, 1930, a fire occurred on the assured's premises and the parties proceeded to determine the amount of the loss by arbitration, as provided in the policy. The arbitrator found that the fire caused damages to the extent of $49,000 and awarded an amount equivalent to the average net profit made by the plaintiff on the sale of its merchandise during the year ending January 31st, 1930, *i.e.*, the sum of $2,182.95. A motion to set aside the award was dismissed.

Held, on appeal, affirming the order of MACDONALD, J., that on the sale of merchandise a merchant cannot arrive at his "profit" until he has deducted the expenses incurred in earning it. It is the intention of the policy that overhead expenses in carrying on the business must be deducted in arriving at the insured's "profits" and the arbitrator reached a right conclusion.

Statement

APPEAL by plaintiff from the order of MACDONALD, J. of the 15th of September, 1932, dismissing an application to set aside an award made by *C. H. Locke*, Esquire, arbitrator, determining the loss of profits under a fire-insurance policy. By the policy the Phœnix Assurance Company Limited agreed with the Famous Cloak and Suit Company Limited to insure said company to the maximum amount of $10,000 against loss of profits on finished merchandise sold or unsold, in a three-story building on Hastings Street in Vancouver and occupied by the plaintiff company. It provided that

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If during the term of this policy such merchandise or any portion thereof shall be destroyed or damaged by fire, this company shall be liable for any loss of profits and/or commissions in respect of such merchandise which may result from such fire, to be ascertained as follows, *viz.*,

(a) The amount of the fire loss occasioned by damage to or destruction of the merchandise for which the company or companies insuring the same are liable shall first be ascertained as determined by adjustment;

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

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

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

Statement

On March 19th, 1930, a fire occurred on the premises causing damage to the extent of $49,000 to the stock of merchandise on hand. This sum was agreed upon as a proper adjustment of the fire loss and represented the damage done to the stock on hand. The evidence disclosed that during the assured's business year terminating on January 31st, 1930, merchandise costing $426,586.26 was sold on the premises for $599,526.49, shewing a gross profit of $172,940.23. The operating expenses amounted to $155,933.14, and the net profit of the year's business was $19,007.09. The percentage which the net profits bore to the laid down cost of the goods being 4.45 per cent. The arbitrator concluded that if the assured is awarded an amount equivalent to the average net profit made by it on the sale of its merchandise during the year ending January 31st, 1930, substantial justice would be done and he awarded the assured the sum of $2,182.95, being 4.45 per cent. of $49,000.

The appeal was argued at Vancouver on the 9th and 10th of November, 1932, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

J. W. deB. Farris, K.C., for appellant: This is an insurance of the profits on goods that were burned. The word "profits" must be construed and the arbitrator found this to be "net profits." We submit he is not entitled to go into the question of "business" as such. When an insurance company uses language in a policy that is not clear it must be construed against

them: see *Fowkes* v. *The Manchester and London Life Assurance and Loan Association* (1863), 122 E.R. 343 at p. 346; *Moorhouse* v. *Colvin* (1851), 15 Beav. 341; *Savill Brothers, Lim.* v. *Bethell* (1902), 71 L.J., Ch. 652 at pp. 657-8. The burden of proof with reference to clause (c) of the policy is on the defendant: see *The Glendarroch* (1894), 63 L.J., P. 89 at p. 91; *Smith* v. *Nevins* (1925), S.C.R. 619 at p. 638.

Donaghy, K.C., for respondent: The question is whether "overhead" should be taken into account, and if it should the award is right. The word "profits" means "net profits" and overhead should be taken into account: see *Vulcan Motor and Engineering Co.* v. *Hampson* (1921), 3 K.B. 597 at p. 604; *Castellain* v. *Preston* (1883), 11 Q.B.D. 380 at p. 389; *Dryer* v. *Birrell* (1883), 10 R. 585 at p. 598, and on appeal (1884), 9 App. Cas. 345 at p. 354; *London and Lancashire Fire Insurance Co.* v. *Bolands Ltd.* (1924), A.C. 836 at p. 838.

Farris, replied.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The appeal will be dismissed. It is a very difficult case, as so many of these insurance cases are. Of this I am perfectly certain, that the profits to which the appellant claims to be entitled must be considered in reference to the overhead expenses of selling. We cannot say that the plaintiff can segregate the destroyed articles, as Mr. *Farris* endeavoured to do yesterday by the illustration of the coat, and say that the profit in that case would have been the difference between the cost of the coat and the amount that was received for it. That ignores altogether the overhead expense in carrying on the business, and that, I am quite sure, is not the intention of the policy. I am not prepared to go into all the details of the matter. That is the general principle which I feel we are bound to apply to this case, that as to the profits provided for in this policy there is a difference between the cost of the article and the selling price, that is to say, overhead, must be considered.

I think the learned arbitrator has come to the right conclusion.

MARTIN, J.A.

MARTIN, J.A.: There is no doubt much to be said in favour of the clear and forceful way in which Mr. *Farris* has presented the case for the appellant, but notwithstanding that, and even bearing in mind that the learned arbitrator has not put forward

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Mr. *Farris's* contention in the way he has put it before us, and even assuming a misapprehension in that respect, and assuming further that Mr. *Farris* did present it to him as he presented it here, as he has told us, and doubtless is the fact, yet nevertheless, having regard to the whole matter and after careful consideration of the award, I have no doubt that upon the true construction of this policy and the definition of the manner of ascertainment as set out in the paragraphs on pages 77 and 78, particularly paragraph (c), it is impossible, in my opinion, to be able to say with any certainty that the arbitrator has not reached the right conclusion, and therefore the appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: My opinion is that the appeal should be dismissed. Firstly I would say this, that I see no error upon the face of the award, if I were called upon to analyze it for that purpose, but it is well known in matters of arbitration that if there is a question of law arising which is pertinent to the later award made, the correct course is to apply to a judge—have a reference to a judge on the question of law. In this particular case no application was made for a reference, and apparently the whole question here asked to be considered is one of law, because questions of fact are not open. We have had addressed to us an argument based wholly upon law. If a reference had been had and passed upon, then the arbitrator would have had guidance. In this particular case he had no guidance upon the point of law. Counsel for the company apparently took the risk of getting an award in his favour, but when the award is not in his favour, now it is said that the award is wrong in law. I consider that it is not now open. That matter was very closely gone into by myself in *The Corporation of the City of Cumberland* v. *Cumberland Electric Light Company* (1931), 43 B.C. 525 at pp. 531-36. It is too late after the award to raise this point. The judgment of this Court was approved by the Supreme Court of Canada in (1931), S.C.R. 717, 718. It is too late in this case after the award has been made to raise the point of law; therefore I think the only course to be adopted on the authorities is to dismiss the appeal.

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MACDONALD, J.A.: While giving full consideration to the submissions of appellant's counsel, I have no doubt about the ordinary business meaning of the word "profits" when used in mercantile affairs. I cannot conceive how the difference between the cost price of goods and the selling price can fairly be regarded as "profit" without taking into account all outlays necessarily expended in securing the amount received on the sale of the goods. I think the view expressed by Scrutton, L.J., in *Vulcan Motor and Engineering Co.* v. *Hampson* (1921), 3 K.B. 597 at p. 605, while the facts are different and it may be regarded as *obiter,* is yet logical and sound.

Nor do I think any difficulty arises because the policy deals with "profits" or "commissions" on merchandise and not on the business itself. The fact remains that profits on the sale of merchandise cannot be ascertained without charging up the cost of merchandising. One cannot say he has a profit until he deducts expenses incurred in earning it. I think, too, that if there is any reasonable doubt as to the true construction of the word "profits" in the main clause (although I personally do not think there is a doubt), it disappears on referring to clause (c).

I would dismiss the appeal.

Appeal dismissed.

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

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COLDICUTT v. COLDICUTT

COLDICUTT v. COLDICUTT.

Judicial separation—Cruelty—Condonation and reconciliation—Trivial acts revive past cruelty—Memorandum of agreement of settlement of marital differences after close of pleadings signed by parties but not acted upon—Effect of.

On a petition by the wife for a decree of judicial separation on the ground of cruelty, beginning the 11th of August, 1931, and continuing with intervening condonation and reconciliations until July 5th, 1932, after the pleadings were closed a memorandum of settlement drawn by a solicitor was entered into by the husband and wife on the 23rd of September, 1932. The terms of the settlement were not carried out but previous to the trial respondent moved to amend his answer to plead the agreement as a settlement of the differences between the parties, and as an estoppel, and the petitioner replied denying that she was bound thereby, as the respondent had elected to treat the agreement as a nullity and had not acted upon it.

Held, that this document was without effect as it was a mere statement of intention regarding their future conduct and had not been acted upon and therefore did not preclude the petitioner from obtaining her remedy. The original cruelty was revived by slight acts of cruelty which occurred on the 5th day of July, 1932, thereby entitling the petitioner to a decree of separation and the custody of her children.

Statement

PETITION by a wife for judicial separation from her husband on the ground of cruelty. The facts are set out in the reasons for judgment. Heard by MACDONALD, J. at Vancouver on the 14th to the 16th of November, 1932.

Argument

Marsden, for petitioner, referred to *Pollock* v. *Wicks and Stokes* (1926), 21 Sask. L.R. 359 at p. 371; *Balcombe* v. *Balcombe* (1908), P. 176; *Moss* v. *Moss* (1916), P. 155.

G. F. H. Long, for respondent, referred to *Hooper* v. *Hooper* (1863), 3 Sw. & Tr. 251; Halsbury's Laws of England, Vol. 16, p. 540, sec. 1096; *Stanes* v. *Stanes* (1877), 3 P.D. 42.

Judgment

MACDONALD, J.: Magdalene Jane Coldicutt, the petitioner herein, seeks to obtain a judicial separation from her husband, Samuel Herbert Coldicutt, on the ground of legal cruelty entitling her to such remedy.

In her petition, she states, somewhat at length, the course of their married life, dealing principally with acts of cruelty

extending over a considerable period. It is a distressing case, and I am endeavouring to shorten my remarks, as no good purpose will be served by relating at length the various matters that arose during the married life of these parties, and which necessitated the petitioner leaving her husband repeatedly, the final departure taking place in the month of July of this year. In order to enable her to satisfy the Court as to the correctness of her statements as to misconduct on the part of the husband, she was required, with reluctance presumably, to bring her daughter to give evidence in support of her position.

Cases of this kind give me great concern, and if I thought, even at the present moment, as I am giving judgment, that any effort on my part towards a reconciliation would be successful, I would adjourn my judgment, having that end in view. I am satisfied, however, that such a course would not attain the object thus sought to be gained, and that eventually I would have to give judgment in the matter.

There is considerable contradiction, as to whether cruelty took place or not. It has been very aptly remarked by Phillimore, L.J., in delivering judgment in the case of *Moss* v. *Moss* (1916), P. 155 at p. 161:

Judgment

"When a wife comes into Court to complain that she cannot live with her husband because of acts of violence to her, and of a course of conduct that has placed her life or health in danger, she thereby opens up an inquiry into the whole history of her married life. Although acts of violence committed at an earlier period, and which have not prevented her from living with him, or going back to him after they have been separated, cannot be made the sole condition of an action of separation, they may form the subject of investigation and proof, with a view to determine what is the true issue in the case, whether the wife can with safety to person and health live with him now."

And again in the same judgment I quote as follows:

These cases are decisions on Scotch law. But they are authorities for us.

Meaning, in the English Courts, which would be applicable to this Province.

For in truth when a course of conduct is to be considered it is impossible altogether to dissociate present conduct from the past, and acts not so grievous in themselves may nevertheless operate grievously on the mind of the sufferer either as recalling past acts of violence or as causing fear of their recurrence.

I refer to this latter quotation because it has been contended, with some considerable force, by counsel for the respondent that the last act of cruelty, which was alleged by the petitioner, was of

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a trivial nature, and should not, of itself, operate so as to entitle the petitioner to a decree for judicial separation. This does not result, however, in having my mind diverted to the condition of affairs that existed for years prior to July of this year. I was surprised by the respondent, in giving his evidence, stating to me, under oath, that the black eyes, which would prove beyond question cruelty suffered by the wife, were in no way due to his actions, and that he was not aware how she had obtained such a condition. The awkward position is put before me, on the part of the respondent, that he, the husband, was allowing his wife, who led a decent life, not being addicted to drink, to have black eyes, a bruised neck and bruised arms, without his making an effort to find out, what person or persons had been guilty of so ill-treating his wife. It led me, however, to the conclusion that her statement in this connection was correct, that he was the cause of her condition. It also led me to the conclusion that the statements made admitting guilt on his part on several occasions, particularly to his brother-in-law and to his father-in-law, were correct, and that he, at that time, in a repentant mood, did admit that he had ill-treated his wife to the extent that I have shortly outlined.

Now these acts of past years, when condonation and reconciliation had taken place, would be, as it were, wiped out. I find that they did so occur, and it brings the matter down then to the question, as to what occurred in July of the present year. The husband and wife had become reconciled on several occasions; upon two of these, they went to the trouble of having a document drawn. The query would be, why the document, unless there had been something of a serious nature which had transpired, necessitating such an event taking place. Upon one occasion, there was a lawyer engaged to draw up a formal document reciting that the differences had ceased and that they were once more reconciled.

So, at the beginning of this year, the situation was that the petitioner and respondent were living together, presumably making an effort to act as married people should to one another. The petitioner says that in both January and February there were quarrels accompanied with violence. However, matters had been adjusted, and there is no doubt that, after these

months, there had been a reconciliation which would amount to condonation, and thus form a defence. But in July, the month to which I have referred, an altercation took place between the husband and wife. The husband says it arose over a letter written by the father-in-law with respect to some moneys due to him. Whatever the cause was for the quarrel, the question is, did it result in violence on the part of the husband such as would be considered as legal cruelty, that is, placing her in fear of her life or limb? I so find, and I accept her evidence in that connection, based upon not only the contradiction to which I have referred, but also upon the improbable statements made by the respondent with respect to his prior acts, principally with respect to the condition of his wife and beyond question, when she was in the Y.W.C.A. Hostel shewing bodily injury.

When you have to test credibility, you cannot look into the minds of witnesses and decide which is telling the truth; you have to consider the surrounding circumstances and other statements made in connection with the case, and thus form a standard by which you can judge whether a witness is telling the truth or not. There is no standard for probabilities, but, guided by affairs of everyday life, when you find a daughter, on the morning in July, crying out to the nephew of her father to come downstairs and assist, and that nephew, declining to do so, it is easy for one to form a conclusion that there was a quarrel going on at any rate, between the husband and wife, in which the nephew candidly admitted that he did not wish to take part. But it must have been a serious matter, or the daughter would not have called upon this person, whom you might almost term a stranger. She was impressed with the idea that her mother was being ill-treated to the extent of being injured by the father, and, as she said herself, and I accept her statement, this had occurred repeatedly during the married life—a most deplorable state of affairs, as I have mentioned, and I do not think any purpose would be served by my further enlarging upon the situation.

Judgment

I find that legal cruelty on the part of the husband did occur in July, and that the petitioner was quite warranted in leaving her husband, and unless the settlement, to which I will refer in

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a moment, would operate to the contrary, the petitioner is entitled to a judicial separation.

Then, after the answer had been filed by the husband, denying all these allegations of cruelty, a friend of his and a member of the same society, was sought by the petitioner to intervene. She, for months, had not received any assistance from her husband towards the support of herself and her children. She did wrong in leaving her solicitor and thus embarking upon a movement of that kind; she is quite candid in so admitting, in giving her evidence. The least that a client can do is to remain loyal to the solicitor, and expect, in return for that, loyalty on the part of the solicitor. I speak somewhat feelingly on this matter, because only once during the many years that I was practising, did an occurrence such as this take place, as far as my experience was concerned, and I felt it more perhaps, than any other incident that had occurred during those long years. It is the duty of a solicitor to be true and honest and loyal to his client, and that reciprocally the same loyalty should be given on the part of the client. However, in this case, no reflection whatever, as I mentioned at the close of Mr. *Beck's* evidence, rests upon him. He was acting in the best interests of all concerned, and called, on the telephone, the solicitor for the petitioner to see what his costs would be, and he, in his turn, in order to assist the transaction, reduced his costs below the amount to which he might otherwise be entitled.

Judgment

Now, if that settlement, so arrived at, had been carried out, or had been entered into in good faith, there would be no trouble, but, just as had occurred in the previous transactions between these parties, it was not carried out. It was made apparently to be broken. Whether it was ever intended to be carried out, I am very doubtful. Mr. *Beck,* also was doubtful. He thought, in other words, that he was simply being treated in a way that was unfair, considering the association that existed between himself and the respondent. That is a matter, however, for them to deal with between themselves. The question for me to determine is, was this document, executed under these circumstances, binding to such an extent that the petitioner becomes thus disentitled to the redress, which would otherwise follow from my previous finding?

If this had been an ordinary action, and the same events had happened, I think I am quite correct in saying that a document so signed, of that nature would have no effect, but, once the document becomes operative, and is acted upon, then it becomes binding. Until that event has happened, it is much in the same position as being in escrow. It stands between the parties, and will be carried into effect in the future, but, until carried into effect, as I have already stated, it has no force, nor is it binding between the parties. The respondent, in that respect, was quite candid; in fact, he was very definite that when the wife did not come to his bed and board once more that the agreement of settlement, or whatever it might be termed, was at an end. The evidence of Mr. *Beck,* as to what took place, is material in deciding the point that I have already discussed.

I refer particularly, as to the binding effect of this settlement, to the view taken by the Court in several cases which have been cited, and particularly that of *Balcombe* v. *Balcombe* (1908), P. 176. There are also other cases along the same lines.

I consider this document, termed a settlement, never had any force or effect, except as a mere statement between the parties, as to what they might do in the future. It was never acted upon, and has no force whatever such as would disentitle the petitioner to her remedy of a judicial separation.

Judgment

The result follows that the petitioner is entitled to a decree of judicial separation, and the custody of the two younger children. I am making no order as to the other one, because I think it is useless to make an order in these days awarding the father or the mother custody of a child—a young lady, you might term her—of nineteen years of age. In fact, I have in mind a case where application was made for *habeas corpus,* and was refused, because it was shewn that the party sought to be thus taken from the custody of either father or mother was sixteen years of age, and the Court considered it, as I consider it in this case, futile to order custody.

The petitioner is entitled to her costs.

Petition granted.

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McDonald v. Cocos Island Treasures Ltd.

McDONALD v. COCOS ISLAND TREASURES LIMITED.

Practice—Garnishee order—Application to set aside—Necessity of entering appearance before application.

If a defendant in an action has not entered an appearance, he is not entitled to move to have an attaching order obtained by the plaintiff set aside, and the objection to his right to so move cannot be cured by a subsequent entry of appearance.

Victoria (B.C.) Land Investment Trust, Ltd. v. *White* (1920), 27 B.C. 559 applied.

Statement

APPLICATION to set aside an attaching order. The plaintiff brought action for $1,125 in wages and personal injuries while in the employ of the defendant company. The defendant did not enter an appearance and the plaintiff attached the sum of $1,012.86. The further facts are set out in the reasons for judgment. Heard by MACDONALD, J. at Vancouver on the 17th of November, 1932.

C. F. MacLean, for plaintiff.
Campney, for defendant.

Judgment

MACDONALD, J.: The plaintiff sues to recover $1,125 for wages, and has also a separate claim for personal injuries.

On October 22nd, 1932, the plaintiff, by garnishing process attached the amount of $1,012.86. The defendant then launched an application to set aside the attaching order on several grounds. The application coming on for hearing, the objection is taken by counsel for the plaintiff that the defendant did not appear in the action and, consequently, had no right to make application to set aside such attachment order. This objection being so taken, counsel reserved the point that he is not appearing on the application, except simply for the purpose I have indicated.

Counsel for the plaintiff relies upon the judgment of MURPHY, J. in *Victoria (B.C.) Land Investment Trust, Ltd.* v. *White* 27 B.C. 559; (1920), 1 W.W.R. 272, the contention being that the defendant has no *status,* not having entered an appearance. Counsel for the defendant contended that the case referred to

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was inapplicable but, in any event, appearance in the meantime had been entered, and this would have a curative effect on his application. If the objection is well founded, I think that the right to make the application must have existed at the time of its inception, and that it cannot be cured by a subsequent act of entering an appearance.

Dealing, then, with the main objection, it seems to me that the case of *Victoria (B.C.) Land Investment Trust Ltd.* v. *White* is applicable. In any event, the procedure as to the appearance is dealt with in the Annual Practice, 1932, p. 127, and, I think, fully covers the ground. I quote as follows:

> Appearance is the process by which a person against whom a suit has been commenced submits himself to the jurisdiction of the Court. Until, therefore, the defendant enters his appearance he is not entitled to take any step in the action.

I stop at this point, to consider whether the application thus made by the defendant would come within the purview of this statement of the law. He is not, by the application, really taking a step in the action but, in defence of the result that may be obtained by the plaintiff in the action, he is, in effect, doing so because he is endeavouring to deprive the plaintiff of a security in the shape of the attaching order, which he seeks to retain as against the defendant.

I read further:

> If he wishes to compromise the action, or pay the amount of the plaintiff's claim without appearing, his only course is to pay the plaintiff or his solicitor according to the directions on the writ where it is for a liquidated demand. He is not entitled, for example, to pay the money into Court before entering appearance. The only exception to this rule of practice is where he desires to set aside the writ or service of the writ for irregularity for which he is specially authorized to apply without entering an appearance;

and reference is made to r. 30 of Order XII.

I think this extract from the Annual Practice should be accepted literally. It is intended as a guide as to the procedure to follow, and the effort of the Court should be to have procedure uniform, and not initiate any new procedure, and thus, as far as this application is concerned, create an exception where the defendant seeks to set aside an attachment order.

In my opinion, therefore, the objection is well taken, and the application is refused.

Application refused.

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AGNEW v. HAMILTON

AGNEW AND AGNEW v. HAMILTON.

Landlord and tenant—Apartment flat—Porch at back used by tenants—Invitee—Railing on porch gives way when leaned against by tenant—Tenant falling is injured—Hidden defect—Liability of landlord—Repairs.

The defendant owned a building facing Broadway West in Vancouver. On the ground floor were three stores facing the street, with a staircase running from the street to the floor above where there were two apartments, one on each side of a hall that ran from the top of the stairs to a porch at the back of the building, from which there was a back stairs to the ground. The plaintiffs rented one of the apartments and the arrangement between the landlord and the tenants was that the tenants would use the hall and porch in any way they chose with the understanding that they should keep them clean. Mrs. Agnew used the porch for drying clothes and dusting carpets, and as she was shaking a carpet over a railing against which she was leaning, the railing gave way and she fell sixteen feet to the ground below, sustaining severe injuries. An action against the landlord for damages was dismissed.

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

Per MACDONALD, C.J.B.C. and MARTIN, J.A.: That the agreement with the landlord was that the plaintiff tenants could use these conveniences (stairs, hallway and porch) in any way they chose, the only requirement being to keep them clean and they and one other adjoining tenant had the exclusive right to the use and occupation thereof: said porch was really part of the contract of renting, and the landlord was not responsible for the accident.

Per MACDONALD, J.A.: That there was a collateral supplemental agreement between the landlord and the tenants to use the porch for domestic purposes, bringing about the relationship of licensor and licensee. The licensor should take reasonable care to keep the place safe, and in view of the evidence reasonable care was taken, having regard to the purpose for which the rail was placed there.

Statement

APPEAL by plaintiff from the decision of MACDONALD, J. of the 13th of June, 1932 (reported, *ante*, p. 147), dismissing an action for damages owing to the plaintiff, Mrs. Agnew, falling from a porch at the back of a building in which she lived with her husband, the railing having given way as she leaned against it. The building, belonging to the defendant, faced on Broadway West. There were two stores on the ground floor and a stairway led from the street to the floor above, where there were

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two apartments, one on each side of a hall that led from the front stairs to a porch at the back of the building, for which there was another stairway to the ground. The tenants of the apartments were allowed to use the hall, stairways and porch on the understanding that they were to keep them clean. The porch was used for drying and cleaning clothes, and the plaintiff, Mrs. Agnew, was shaking a carpet over the railing of the porch at the time it gave way and she fell to the ground sixteen feet below and was badly injured.

The appeal was argued at Vancouver on the 29th and 30th of November, 1932, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Grossman, for appellant: The railing on the porch constituted a trap for which the landlord was responsible. We rented the apartment only, but we had the right to use the porch. Our demised premises ended with the outer wall: see *McPherson* v. *Credit Foncier Franco Canadien* (1929), 3 W.W.R. 348; *Fraser* v. *Pearce* (1928), 39 B.C. 338. From the facts it must be inferred that the landlord is liable for repairs: see *Cavalier* v. *Pope* (1906), A.C. 428.

O'Brian, K.C., for respondent: There was no agreement to repair. The porch was periodically inspected and this was a defect that could not be discovered. The railing was subject to constant pressure by the plaintiff and it was not constructed for the purpose of standing pressure of this nature. The weakness in the railing was due to natural deterioration: 7 Can. B.R., pp. 668-9; *Gordon* v. *The Canadian Bank of Commerce* (1931), 44 B.C. 213; *Watt* v. *Adams Bros. Harness Mfg. Co., Ltd.* (1927), 23 Alta. L.R. 94 at p. 105. No reasonable inspection would disclose this defect: see *Pritchard* v. *Peto* (1917), 2 K.B. 173; *Heake* v. *City Securities Co. Ltd.* (1932), S.C.R. 250. The plaintiff being there as a licensee only, the defendant is not under any liability: see *Ivay* v. *Hedges* (1882), 9 Q.B.D. 80; Halsbury's Laws of England, Vol. 21, p. 392; *Hime* v. *Lovegrove* (1905), 11 O.L.R. 252; *Taylor* v. *People's Loan & Savings Corporation* (1930), S.C.R. 190 at p. 193; *Graham* v. *Commissioners Niagara Falls Park* (1896), 28 Ont. 1 at p. 7; *Sutcliffe* v. *Clients Investment Co.* (1924), 2 K.B. 746.

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Grossman, in reply, referred to *Dunster* v. *Hollis* (1918), 2 K.B. 795; *Trott* v. *Kingsbury* (1923), 3 W.W.R. 1061 at p. 1064, and *Robert Addie & Sons* (*Collieries*) v. *Dumbreck* (1929), A.C. 358.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: I think the learned judge was right in his conclusion. He had the advantage, of course, of seeing the *locus* and going over all these points carefully and came to the conclusion that the owner and the two tenants at different times came to an understanding that they could have the use of these hallways, stairways, porch and railings and let them into possession of them. All that the two tenants were to do was to arrange between themselves, but they could use these conveniences in any way they chose, the only requirement being that they should keep them clean. If that be so, they were really part of the contract of renting. They entered into verbal leases. We have nothing to tell us what the terms of these leases were except what has been developed in this case by what they afterwards did, and what they afterwards did was to use these conveniences in common and keep them clean in common. The landlord apparently had nothing to do with them—did not interfere in any way. The inference I draw, and I think it is the inference the learned trial judge drew, was that he had given them up to those two tenants and that they were in occupation of them during all this time. Of course, if they were so, the landlord is not responsible for the accident complained of.

There might be another view of it. Mr. *O'Brian* took the point that these tenants were licensees. I do not think so. They are what I have already said, that is to say, I think the use of these conveniences was part of the rental. But even if we assume for a moment that they were licensees, the plaintiff's wife, Mrs. Agnew, was using this railing in a way which it was never intended to be used. It was simply put there as a guard against the edge of the porch so that no person would inadvertently walk over the porch and fall down. She used it for the purpose of shaking her rugs and she leaned against it very heavily apparently when it broke. That was not the purpose for which it was erected and I think when she made that

use of it, she was not making the use it was intended. The railing had been put there originally, it had been constructed well and according to standard practice according to the builders who were witnesses and I think including the building inspector for Vancouver City. There was no original defect in it, and the only defect in it at the time it fell was that the nails had become rusted and broke off under the pressure of Mrs. Agnew when she came against it. There was no evidence that there was any sign of weakness in that rail, that there was any signs that the nails had become rusted, so that the landlord if he on making an inspection or the painter who did made an inspection would be unable to see any defect, therefore, it was not a defect known to the landlord.

MACDONALD, C.J.B.C.

As far as the phrase, "ought to have known" is concerned, I discard that altogether, because I think it has no application to a case of this kind. So that, in either view of the case, the landlord is not responsible for what happened. It is unfortunate, of course, for Mrs. Agnew that it should have happened, but we must be careful not to express our sympathy for one party at the expense of the other. We must decide it according to law, and I think the learned trial judge came to a very sensible conclusion when he decided as he did. The appeal should, therefore, be dismissed.

MARTIN, J.A.

MARTIN, J.A.: The special facts in this case as found by the learned trial judge, after having had a view of the premises, are that the porch in question was a part of the demised premises and that it was so considered and treated by the two tenants in their exclusive joint user, with the landlord's consent, and that they could have excluded anyone else from occupying it. Since the learned judge so viewed the evidence, and there is ample upon which that view can be justified, there is, in my opinion, an end of this appeal, and, therefore it should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: On one phase of the question I am not clear and would have asked to have had the case reserved in order that I might look into it, but as I understand I am the only one who desires that, that the majority of my learned brothers—in fact all my learned brothers are in a position to deliver their judg-

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ment at the present time, I do not think, as my judgment, whichever way it might go at the end had it been reserved would not alter the position, I do not ask it to be reserved on my account. However, I wish to say on one feature of the case on which I have no doubt, that is, that the plaintiff was in the position of a licensee, and as to the question what was incumbent upon the landlord to do in the case at Bar, that as I say I am not just at the moment prepared to pass judgment on, but I would simply say that I will not dissent from what I understand is the majority judgment of this Court.

MCPHILLIPS, J.A.

McPhillips, J.A.: I am of the opinion that the appeal should be allowed, and without the slightest hesitation, in my view of the law. The plaintiff's case has been made out both upon the facts and the law. The question of "invitee" and "licensee" has been very often referred to and has some complications, but what is the case we have here? A very simple case of landlord and tenant—duplex apartments—a case of two apartments, side by side, with a front and a rear entrance, and I am clear upon the evidence that the landlord never gave up control of the rear entrance and the surrounding area of that rear entrance and staircase—the accident taking place at the rear entrance at the head of the staircase on the second floor consequent upon the failure of the barrier whereby the wife of the tenant was precipitated to the ground below and suffered serious injuries.

It seems to me it would be absurd to say that the landlord did not retain control—he had to do so to ensure to the lessees of each apartment the full use of the rear entrance and what has been termed the porch.

Then let us go to the original construction of this building. Courts are not bound by civic inspectors, building inspectors or anything that they may do or write in the matter. Courts are not bound by scientists, physicians or others. The Court has to look at the facts and apply the law. To think that it was thought to be a sufficient barrier for safety to nail a small scantling up against the side of the building and then driving nails in on the slant, that was what was done. That was the situation of things for something over twenty years, and no evidence

whatever that it was examined. We know what our climate is —exposed to wind and weather, changes of temperature and so on, no examination in the way of examining the scantling as to dry rot or decay and as to the state of the nails and condition of the wood—no inspection by the landlord of that nature or kind. The inspection that is shewn as being made was merely perfunctory. This lady in the discharge of her household duties was engaged in shaking a rug—a small rug over the barrier mentioned. This lady only weighed about 118 pounds according to the evidence. One can form an idea what a light thrust it would be against that barrier if her weight was pressed against it. What strength would she be exercising in shaking a small rug? None whatever. The truth of the matter was, there was dilapidation; it was shewn on the evidence that the rust in the nails and the condition of the wood was such that after it gave way it was little to wonder at affording no security whatever and it was a concealed trap. This defect was a concealed trap, it was not obvious or open, so that this lady could have observed it. What is the idea of the barrier? The idea of it is no doubt protection; and what a snare it was in this case. The learned judge could not by a view which he took acquaint himself with anything that would be a matter of advantage except to see the original wood and nails after the barrier broke away and there is no evidence of this. The barrier deludes the tenant and his wife, it outwardly had the appearance of security to them, when on the other hand owing to rot and decay it was a snare and a delusion, no protection whatever. That is this case and if it is proposed to carry this case any further, I shall take occasion—or I might even independent of that—take occasion to put my judgment in writing. The pressure just now is too great owing to the very long list of appeals. In my opinion and with great respect to the learned judge in the Court below the conclusion arrived at by him was wrong—the judgment should be reversed and the appeal should be allowed.

MCPHILLIPS, J.A.

MACDONALD, J.A.: I am not disposed to adopt the view that this porch formed part of the demise; that is, that the landlord in addition to renting the suite to this tenant also rented the porch. I think the better view is that a collateral supplemental

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agreement was made by the landlord with two tenants (one the appellant) that they should have the use of this porch and other parts of the building for domestic purposes, *viz.*, for storing or other uses of that kind. That being so the relationship between the landlord and the plaintiff (the wife) was that of licensor and licensee. It was the duty of the licensor to take reasonable care not to expose the licensee to hidden danger. He should take reasonable care to keep the place safe. In view of all the evidence, including inspection, I think reasonable care was taken, having regard to the purpose for which the guard rail was placed there. It was only thirty inches high, with upright supports and a two by four piece of timber across the top. Obviously it was never intended to serve any other purpose than to act as a guard, and it was negligence to place the weight of the body against it from time to time.

I would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Grossman, Holland & Co.*
Solicitor for respondent: *C. M. O'Brian.*

LaSALLE EXTENSION UNIVERSITY v. LINLEY.

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LaSalle Extension University v. Linley

Practice—Foreign company—Security for costs—Carrying on business—Company—"Residence"—County Court Order XVIII., r. 1 (a).

The plaintiff, a foreign corporation with head office in Chicago, U.S.A., but registered as an extra-provincial company in British Columbia with an office in the City of Vancouver, brought action in the County Court against the defendant on two promissory notes. On the defendant's application for security for costs it appeared that the only assets of the plaintiff company in British Columbia were $10,000 in outstanding book accounts of uncertain value, and the plaintiff was ordered to furnish security in the sum of $50 for the defendant's costs of the action.

Held, on appeal, affirming the decision of Ellis, Co. J., that the order below was properly made.

Per Martin, J.A.: The question turns upon the consideration to be given Order XVIII., r. 1 (*a*) of the County Court Rules, and in the case of a company where it has more residences than one, the rule applies and the Court may order security to be given. In order to exclude jurisdiction of the Court the residence within the Province must be the sole one.

Per Macdonald, J.A.: The *situs* of this company is clearly outside the Province even although also located within the Province. A company may have a residence or be located in more than one place. Whether or not, therefore, it "resides" within the Province it has a residence beyond it and is therefore within the rule and security for costs should be given.

Statement

APPEAL from an order for security for costs. The plaintiff is a body corporate having its head office in the City of Chicago, U.S.A., and is registered as an extra-provincial company in British Columbia, having its registered office at 801 Georgia Street in the City of Vancouver. The plaintiff brought action in the County Court against the defendant for $300, the balance due on two promissory notes. The defendant applied under Order XVIII. of the County Court Rules for an order that the plaintiff do give security for the defendant's costs, on the ground that the plaintiff resides out of British Columbia. It was ordered that the plaintiff give security for the defendant's costs in the sum of $50. The plaintiff appealed.

The appeal was argued at Vancouver on the 11th of October, 1932, before Macdonald, C.J.B.C., Martin, Galliher, McPhillips and Macdonald, JJ.A.

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Bray, for appellant: The affidavit in support is on information and belief and does not state the grounds thereof as required by Order XV., r. 3. This is the same as rule 523 of the Supreme Court Rules, and the source of the information must be given with grounds of belief: see Annual Practice, 1932, p. 690; *In re United Buildings Corporation and City of Vancouver* (1913), 18 B.C. 274 at p. 289; *The King* v. *Licence Commissioners of Point Grey, ib.* 648.

Argument

George Duncan, for respondent: An affidavit in support is generally necessary but not in this case, where it appears in the plaint that the plaintiff's head office is in Illinois: see Annual Practice, 1932, p. 1416. A company may have more than one place of residence: see Masten & Fraser's Company Law, 3rd Ed., 122-3; *Swedish Central Ry. Co.* v. *Thompson* (1925), A.C. 495. The cases of *Bank of Toronto* v. *Pickering* (1919), 46 O.L.R. 289, and *Ehmka* v. *Border Cities Improvement Co.* (1922), 52 O.L.R. 193 at 196, were cited but the Companies Act overrides these decisions, and an order for security may be given where it appears that the plaintiff company may not be able to pay: see *The Kilkenny and Great Southern and Western Railway Company* v. *Feilden* (1851), 20 L.J., Ex. 141 at p. 143; *Canadian Railway Accident Co.* v. *Kelly* (1907), 16 Man. L.R. 608.

Bray, replied.

Cur. adv. vult.

17th October, 1932.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C. (oral): I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A. (oral): This case, in which we reserved judgment, raises an important question respecting the giving of security for costs by a company in the County Court, not in the Supreme Court, because there is a distinction in the statutes, as pointed out by Mr. *Bray*, in that the section relating to the giving of security in general is confined to the Supreme Court alone. It is obviously, from the case submitted, a matter which should be rectified, because there is no reason, of course, why litigants in the County Courts should not obtain the same protection as those in the Supreme Court. But the matter has now to be dealt with as it stands under the statute.

The question turns upon the consideration to be given to Order XVIII., r. 1 (*a*) of the County Court, which says that security for costs may be ordered in the following case: "Where the plaintiff resides out of British Columbia."

The section to which I just referred is the general section of the Companies Act, B.C. Stats. 1929, Cap. 11, Sec. 249, and it does not relate to the County Court, as I find from the interpretation section 2, which says "Court means the Supreme Court" instead of extending it to include the County Court: therefore, as I said, the latter is excluded.

The other section of the Companies Act upon which Mr. *Bray* relied is section 179, which says that—

Subject to the provisions of this Act and the laws of the Province, an extra-provincial company registered under this Act may within the Province carry on business in accordance with its certificate of registration, and for that purpose exercise the powers contained in its charter and regulations.

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Mr. *Bray's* submission was that, carrying on business—when it can be said that when a company is "carrying on business" within a Province—in itself constitutes, in the ordinary meaning of the expression, "a residence" within the Province, and therefore the company must be taken to reside in the Province, and as it has a residence within the Province, the fact that it may also have a residence outside the Province would not debar it from the benefits of the one within it.

I have given careful consideration to the matter, and also to a number of cases in addition to those cited by Mr. *Bray,* and which I had better cite for reference because they are very important, and the leading one is *Newby* v. *Von Oppen et al.* (1872), L.R. 7 Q.B. 293, where there is a very instructive judgment of the Court of Queen's Bench delivered by Blackburn, J., wherein it is clearly laid down that where a person is carrying on business it therefore acquires a residence within the meaning of the Act. That decision, which is the leading one, is fortified by succeeding cases, being decisions of the Court of Appeal, *e.g., Haggin* v. *Comptoir d'Escompte de Paris* (1889), 23 Q.B.D. 519; *Dunlop Pneumatic Tyre Company* v. *Actien-Gesellschaft fur Motor, &c. Co.* (1902), 1 K.B. 342; and *Okura & Co. Limited* v. *Forsbacka Jernverks Aktiebolag* (1914), 1 K.B. 715.

It is therefore established that the main submission that resi-

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dence is in general satisfied by the carrying on of business is correct, and that the essentials postulated by Lord Collins in the *Dunlop* case (pp. 346-8) have been satisfied here, and if the matter ended there then there would be no doubt that this order should not be supported. But the difficulty we are met with is this, that those cases, while they establish the jurisdiction of the Court in an initial manner, are not entirely conclusive on the present question, because, as is pointed out in one of them, the expression "plaintiff" may have the aspect of ordinary "individuality," and not "concrete entity"—p. 346. And when one looks at the present rule it is apparent that it is not primarily so projected, although it does include a company, because it does not take into consideration the fact that the company, as Blackburn, J., and also Lord Collins (p. 348) said, may "reside" by carrying on business, in two places at once; and see Mathew, L.J., at p. 349. What we are met with here is the respondent's submission that it is not enough for a company to shew that it has a residence within British Columbia, because the fact that it has also another residence without enables the Court to make the order for security.

I may say it gave me considerable difficulty to arrive at the conclusion that this last submission is correct, though it is not altogether to my satisfaction. But looking at the statute and the rule, I feel it impossible to say, though not without doubt, that, contrary to the opinion that prevailed below in the case of a company where it has more residences than one, the rule in question here does apply, and the Court may order security to be given. It seems that this is pushing the statute to the furthest limit of its construction—I think there is no doubt about that—but at the same time, it is at least more than desirable that such a construction can, as is fairly open, be given than to hold that it was the intention to exclude the jurisdiction of the Court where the residence within the Province was not the sole one. It was aptly said in the *Newby* case (296) that "there may be two domiciles and two jurisdictions."

I therefore agree in the dismissal of the appeal, though, as I say, not without some doubt, but it is not sufficient to warrant my dissent.

GALLIHER, J.A.

GALLIHER, J.A. (oral): I would dismiss the appeal.

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McPHILLIPS, J.A. (oral): I would dismiss the appeal.

A great volume of litigation goes on in the County Court, and it has its distinctive practice. I think the first thing that gives one pause is that it is a registered company importing in that foreign residence. And again, considering the policy of the law, even if it is a domestic company in proper cases an order may be made for security.

Then it has been suggested at this Bar that the company has some large assets in the shape of debts owing to it in this Province. The cases referred to by Mr. *Duncan* shew that that is not a class of assets obviating the necessity that security be directed. The assets must be of a real nature, such as real estate, something tangible. I should fancy that these debts owing to it are rather intangible in any case, and my conclusion upon the whole matter is that a case was properly made out for an order to be made that security be given. I am therefore of the opinion that the order made by the learned judge in the Court was properly made, and this appeal should be dismissed.

MCPHILLIPS, J.A.

MACDONALD, J.A.: This is a simple rule of practice (Order XVIII., r. 1 (*a*) County Court Rules) and if it is possible to interpret it as applied to the facts of this case to carry out the purpose of the rule it should be done. Obviously it is important that a foreign company with a registered office in this Province should provide security for costs unless it has sufficient assets in this Province to make such an order unnecessary. Many of these extra-provincial companies carry on business here in a single room with perhaps one agent and with few assets. In such a case obviously the foreign company should not stand in a better position in this respect than an individual out of the jurisdiction launching an action here.

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If of course the foreign company has sufficient assets in the hands of the local company the judge in the exercise of his discretion should not make an order. Here the only assets are $10,000 in outstanding book accounts. Their actual value is not stated and the judge might very well regard them as uncertain and perhaps largely uncollectable. At all events, having exercised his discretion, we should not interfere.

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The only question therefore is whether or not the rule applies. It is as follows:

"Security for costs may be ordered . . . where the plaintiff resides out of British Columbia," meaning in this case "where a company resides out of British Columbia." The word "resides" as used in this rule and as applied to a company need not be interpreted technically. It refers to a company "located" beyond our jurisdiction. The *situs* of this company is clearly outside the Province even although also located within the Province. A company may have a residence or be located in more than one place. Whether or not, therefore, it "resides" within the Province it has a residence beyond it and is therefore to my mind within the rule. This interpretation carries out the purpose of the rule and should be given effect to.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *Thomas E. Wilson.*
Solicitor for respondent: *Francis Layton.*

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Husband and wife — Constitutional law — Deserted wife — Application for order against husband—Magistrate—Powers of—Prohibition—R.S.B.C. 1924, Cap. 67, Sec. 4—B.C. Stats. 1862, Cap. 116—B.N.A. Act, Sec. 96.

On the issue of a summons against a husband under the Deserted Wives' Maintenance Act, the husband applied for an order *nisi* to shew cause why a writ of prohibition should not issue to the police magistrate to prohibit him from proceeding on the summons on the ground that the Deserted Wives' Maintenance Act is *ultra vires* the legislative powers of the Province, the Legislature having no power to appoint any person to deal with the matters in question, and the appointment of a magistrate as prescribed in said statute is *ultra vires* the Province and contrary to section 96 of the British North America Act. The application was dismissed.

Held, on appeal, affirming the order of MORRISON, C.J.S.C. on another ground, *viz.*: that as the Act entitled "An Act to protect the Property of a Wife deserted by her Husband" passed by the Colony of Vancouver Island on July 10th, 1862, contained the principle which is now embodied in the Deserted Wives' Maintenance Act by which the Chief Justice of Vancouver Island and magistrates were given jurisdiction to make orders protecting the earnings and property of the wife from claims by the husband, the additional duty of deciding such questions was thereby imposed upon magistrates and so on that ground the application was properly dismissed.

Statement

APPEAL by defendant from the order of MORRISON, C.J.S.C. of the 6th of June, 1932, dismissing a motion for an order *nisi* to shew cause why a writ of prohibition should not issue to *George R. McQueen*, Esquire, deputy police magistrate in Vancouver, to prohibit him from proceeding on a summons issued under the Deserted Wives' Maintenance Act.

The appeal was argued at Vancouver on the 18th of November, 1932, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

J. A. MacInnes, for appellant: The question is the right of the Province to clothe a magistrate with authority to adjudicate under the Deserted Wives' Maintenance Act. The Province cannot say who shall be a judge: see *Roskiwich* v. *Roskiwich* (*No. 2*) (1931), 3 W.W.R. 614, and on appeal (1932), S.C.R. 570; *In re Small Debts Act* (1896), 5 B.C. 246; *Rousseau* v.

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Rousseau (1920), 3 W.W.R. 384; *Burk* v. *Tunstall* (1890), 2 B.C. 12; *Re McLean Gold Mines Limited and The Attorney-General for Ontario* (1923), 54 O.L.R. 573; *Attorney-General for Ontario* v. *Attorney-General for Canada* (1925), A.C. 750. The attempt to give a magistrate the power to adjudicate on a matrimonial matter is constituting him a Supreme Court judge, as matrimonial matters are confined to the Supreme Court: see *Slanec* v. *Grimstead* (1932), 3 D.L.R. 81 at p. 93; *O. Martineau & Sons, Ld.* v. *Montreal City* (1932), A.C. 113.

Argument

A. H. MacNeill, K.C., for respondent: Under an old Act of 1862, passed by the Colony of Vancouver Island, forming part of what is now British Columbia, before Confederation (C.S.B.C. 1877, Cap. 116, No. 9) magistrates were empowered to make orders protecting the wife's property from her husband. The magistrate has therefore jurisdiction: see also *Regina* v. *Bennett* (1882), 1 Ont. 445 at pp. 458 and 462; *Regina* v. *Bush* (1888), 15 Ont. 398; *Ex parte Williamson* (1884), 24 N.B.R. 64; *Reg.* v. *Sweeney* (1912), 1 D.L.R. 476 at pp. 480-1; *Ganong* v. *Bayley* (1877), 17 N.B.R. 324.

MacInnes, replied.

Cur. adv. vult.

28th November, 1932.

MACDONALD, C.J.B.C. (oral): We have had little time to consider the case and having regard to the importance of it not only in the present case but also in relation to magistrates and Workmen's Compensation Boards and other analogous cases, I have been unable to give it the attention I should have taken. I find, however, that before British Columbia came into the Union, there was a statute of Vancouver Island, which was then a separate colony, in 1862, containing the principle which is now embodied in our Deserted Wives' Maintenance Act in which magistrates were given jurisdiction to make orders protecting from any claims of the husband the earnings of the wife. At that time the husband had the right to her earnings and in that way the statute was a deprivation of his right to these earnings. It simply imposed upon magistrates an additional duty of deciding such questions. I think the order of the magistrate should be sustained.

MACDONALD, C.J.B.C.

MARTIN, J.A. (oral): A difficult and important question of curial jurisdiction has been raised by this appeal arising out of the language used in the British North America Act, sec. 96, wherein it is provided that the National Government shall appoint the judges of the Superior, District and County Courts in each Province, excepting those of the Probate Courts in Nova Scotia and New Brunswick, and the same language is practically repeated in section 100 providing for their salaries and also those of the judges of the Admiralty Courts.

MARTIN, J.A.

It has been recently said by the Privy Council in the case of *O. Martineau & Sons, Ld.* v. *Montreal City* (1932), A.C. 113, 121-2, where the subject has been elaborately dealt with, that modern legislation has "accentuated the difficulty in defining in this matter the frontier between Provincial and Dominion territory," *i.e.,* in the appointment of the judges.* Fortunately, from the view that I am enabled to take, it does not become necessary to enter into a consideration of the very difficult question as to what is meant by the expression Superior, District, and County Court judges, but I might be permitted just to say this, by way of warning, that the expression "District Courts" might well be taken to denote something, not only from the juxtaposition of the language but the subject-matter, that lies between the Superior and the County Courts; and in order to understand what the Fathers of Confederation had in view when that was inserted, historical consideration would have to be given to the state of judicial affairs in Canada at the time of Confederation, because there are numbers of different kinds of Courts which might well have been in the consideration of the legislators of that time. Just to give an example by way of illustration, the Fathers of Confederation—including very many able lawyers, one of them afterwards a distinguished judge of this Province, Mr. Justice GRAY—would have, of course, a wide knowledge of the curial circumstances relating to the great Nation to the south of them, and, indeed, it is more than common knowledge that the Federal District Courts of the United States have jurisdiction throughout the various districts of that great country, which would be something that our legislators

*NOTE.—Compare also *Procureur General de la Province de Quebec* v. *Slanec,* 54 Que. K.B. 230; (1933) 2 D.L.R. 289.—A.M.

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would have in view, and I shrink from saying, with any attempt at definiteness, what might be considered to be the full import of that expression. There are, for example, Small Debts Courts, Surrogate Courts, Division Courts, Magistrates' Courts, and all that sort of thing, which are in general *status* below County Courts, and they are not mentioned in the statute at all, yet there seems to be a disposition in some of the cases to bring them under the expression "District Courts" and it is in that aspect that I wish to sound a word of warning. For example, take the striking illustration in our own country, another Federal illustration, the Exchequer Court of Canada, which is one of the two National Courts of our country (the other being the Supreme Court), the Admiralty Districts of which are divided up into immense areas, one of the greatest of them being the Admiralty District of this Province, over which I have the honour to preside. Now, that is only called a district, but it is an immense and very important one, which goes to shew that the word "district" used in this relation to one of our Federal Courts is a judicial division that has really no relation to inferior tribunals. Other examples might be given, but it is unnecessary to do so, except that I might give this last one as an illustration of another jurisdiction, because it is so well known to us here, *viz.*, that the judges of the County Courts of this Province are, with respect to various matters within their legal divisions, given the local jurisdiction of the higher tribunal, the superior trial Court, called the Supreme Court of this Province.

It will be sufficient then, having drawn attention to that, to pass to what really, very fortunately, we are able to base our decision on, and upon the very firmest ground, *viz.*: that the subject-matter of the Provincial statute which is now before us was in fact the subject of legislation before Confederation, in the old united colonies of Vancouver Island and British Columbia (which union took place in 1866) and has been carried through from Colonial to present Provincial times. I am reading now from the consolidated statutes of 1877, Cap. 116, to shew that even so far back as the 10th of July, 1862, there was passed a pre-Confederation statute of Vancouver Island entitled "An Act to protect the Property of a Wife deserted by her Husband," wherein there appear all the essentials of the juris-

diction over the subject-matter which we find in the Act at present attacked.

It should be borne in mind, as pointed out in the decision of the Full Court of Manitoba, in *Merchants Bank* v. *Carley* (1892), 8 Man. L.R. 258, that at the time that Act was passed the earnings of the wife were the property of the husband, yet what was effected by it was that the wife was protected against her husband by the procedure there adopted, and on application to the Chief Justice, or to the various magistrates, or justices in Petty or Quarter Sessions, she could be protected against his creditors by having part of his estate appropriated to her maintenance "as if she were a *feme sole*." There is no distinction in principle between depriving him of his estate in her favour and directing him to make a payment because the result is that something which was his own property became hers, in order to support herself in the case of desertion. It was very frankly stated by Mr. *MacInnes* in his interesting argument that if the Court could be satisfied that there was a Court for dealing with the present subject-matter we could not sustain his very interesting submission, which has given me much consideration.

MARTIN, J.A.

I am, therefore, of the opinion that the appeal should be dismissed upon the ground that there was a tribunal in existence before Confederation which had all the essentials of that which is at present the subject of this discussion.

I might also refer, as shewing the existence of modern concurrent tribunals of this nature, to the recent very interesting decision in the King's Bench Division of *Rex* v. *Middlesex Justices, ex parte Bond* (1932), 74 L. Jo. 293, the last issue; 49 T.L.R. 18; and as shewing the expanded situation of District Courts, the decision in *Bradley* v. *District Justice of Bray* (1932), I.R. 386; the constitution of District Courts of the United States is very well set out in Bouvier's Law Dictionary.

GALLIHER, J.A.: At the close of the argument in this case, I was not quite clear in my mind as to what the result should be. Mr. *MacInnes* made a very able argument in the matter. However, I have in the interval looked into the matter, and particularly am I impressed by the statute which my brother MARTIN has just mentioned and by the proceedings that could

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be taken under that, and I have satisfied myself that the appeal should be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion, the appeal should be dismissed. It is to be noted that the learned counsel for the appellant has not challenged the validity of the Deserted Wives' Maintenance Act as such, but his argument is directed to this, that the magistrates who are given authority to make orders under the provisions of the statute are not clothed with proper authority, that is, they are not judges of any named Court under the British North America Act, and further they are not appointed by the Federal authority as magistrates.

The Act was first enacted in principle as long ago as 1901. I had the honour myself to introduce the legislation in the Legislature of British Columbia. It met with some opposition and was somewhat debated, but the most of the opposition really resolved itself around the maximum amount the magistrate would be able to impose, and this was fixed at not exceeding $20 a week. I think in the Province of Ontario at that time a somewhat similar statute only allowed $20 a month. I am only speaking from recollection. Conditions here were very dissimilar to that of Ontario. The Act was amended from time to time, and then expanded a great deal in 1919, but as I say the principle of the legislation was first enacted in 1901; therefore, we have got some 32 years of the existence of this statute law, never challenged before to my knowledge in any respect, even today not challenged as to its effect, but only challenged in this rather remote way, that the magistrates who are exercising the authority are not clothed with proper authority from the Government of Canada, and they are exercising a jurisdiction which was imposed in named Courts in the British North America Act.

With respect to that, I think it is well known—at least, it was well considered at the time of Confederation (1867) that there always would be inferior Courts, Courts that do not come within the nomenclature as contained in the British North America Act.

The jurisdiction that the Legislature conferred upon the magistrates under the Deserted Wives' Maintenance Act is an inferior jurisdiction really, and in my opinion the right of action which a wife has under the Deserted Wives' Maintenance

Act is not one that she could *simpliciter* apply for and obtain summary remedy in any one of the named Courts in the British North America Act. Further, it is one of those summary remedies which never was contemplated should be exercisable by the named Courts and a very small sum of money is being dealt with, not more than $20 a week, and above and beyond all that there was and is today crying need and necessity for the legislation. What justice could be handed out to a deserted wife, abandoned by her husband as so many of them are leaving the wife stranded with children, that you should say to her coolly, "Oh, well, now, you can bring an action for divorce, you can bring an action for separation, you can bring an action for alimony," and this poor lady without means at all asking for bread is handed a stone—an expensive lawsuit and debarred from summary remedy. That would be unthinkable, and the Legislature would have been recreant in its duty to the people to leave conditions in that way; therefore 32 years ago the Legislature of British Columbia determined that it would legislate to alleviate the sufferings of the wife abandoned by her husband and would provide an easy, quick and inexpensive method whereby she would receive immediate sustenance and aid to meet the situation of distress that she was in. That was the meaning of the law and that is what is being carried out today. And I might say that I have very little patience with these points that are taken from time to time to thwart legislation. They would tear Confederation asunder and it has got almost too common of late. Here we have a crying matter of necessity for our people, and it has worked well for 32 years, and if there was no other reason, I would base my opinion upon that alone. But then my learned brother MARTIN has dealt in an illuminating manner with other aspects of the case and demonstrated how even at the time of Confederation—at least, anterior to Confederation here there was legislation in this Province entitling magistrates to deal with questions as between husband and wife—in favour of the wife in a manner even more extensive than the particular matter we have before us, but of the same nature and effect in principle. I certainly think that no case has been made out at all which would warrant the disturbance of legislation that has been in existence—of

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course, that is not being asked really—but to disturb the operation of legislation that has been in existence for 32 years and no complaint in respect of it, no public opinion in opposition to it, but public opinion always favouring it.

I would dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: I find, after full consideration, that Mr. *MacInnes* was right in conceding that if there was jurisdiction in a magistrate before Confederation to make this order, and as I would add to his submission, orders of similar import, then this appeal should be dismissed.

Appeal dismissed.

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Insurance, automobile—Insurance against liability for injuries—Insured's car driven by another with his consent—Passenger injured in accident—Passenger obtains judgment against driver for damages—Execution unsatisfied—Action by insured as trustee for driver—B.C. Stats. 1925, Cap. 20, Sec. 24.

H. insured his car in the defendant company, and left it with R., giving him permission to use it for his own purposes. R., with T. B. as a passenger, ran into a lamp-post and T. B. received injuries from which he died nine days later. W. B. as administrator of T. B.'s estate, brought action against R., recovered judgment for $1,000, and a writ of execution was returned *nulla bona*. H. then brought action on behalf of R. against the defendant company under the policy for the amount of the judgment obtained by W. B. against R., and recovered judgment.

Held, on appeal, reversing the decision of FISHER, J. (MCPHILLIPS, J.A. *dubitante*), that the plaintiff as the assured cannot sue as trustee for R., there being neither a legal nor an equitable trust, and the action should be dismissed.

Vandepitte v. *Preferred Accident Insurance Company of New York*, 102 L.J., P.C. 21; 49 T.L.R. 90; (1932), 3 W.W.R. 573; (1933), A.C. 70; 1 D.L.R. 289, followed.

Statement

APPEAL by defendant from the decision of FISHER, J. of the 22nd of February, 1932, in an action to recover $1,200 on an accident-insurance policy. The plaintiff insured his automobile in the defendant company in October, 1929. In the following March he left Vancouver and placed his car in the hands of one George Rennie, who was given permission to use the car for his own private purposes. On the 25th of October, 1930, when Rennie was driving the car with Thomas H. Boyd as a passenger, he collided with the curb and a lamp-post on the south side of Hastings Street in Vancouver, and as a result of the collision Thomas H. Boyd suffered injuries from which he died nine days later in the Vancouver General Hospital. On the 21st of April, 1931, William Boyd as administrator of the estate of Thomas H. Boyd, recovered judgment against George Rennie in the County Court for $1,000, but this judgment remained unpaid. The said William Boyd then brought action against the defendant company under section 24 of the Insurance Act, but this

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action was discontinued on the 6th of November, 1931. The plaintiff then brought this action on behalf of George Rennie to recover on his insurance policy the sum for which Rennie is liable to William Boyd as administrator of the estate of Thomas H. Boyd, deceased.

J. L. Lawrence, for plaintiff.
Bull, K.C., and *Ray,* for defendant.

12th March, 1932.

FISHER, J.: The plaintiff sues on behalf of one George Rennie under a policy of automobile insurance issued by the defendant as insurer to the plaintiff as the named insured. It would appear that, on or about the 21st day of April, 1931, one William Boyd, as administrator of the estate of Thomas Harper Boyd, deceased, obtained a judgment against the said George Rennie in an action for damages in the sum of $1,000 and costs, which said judgment still remains unpaid. Such action by Boyd was based upon the alleged negligence of the said George Rennie who was at the time legally operating for private or pleasure purposes, with the permission of the plaintiff, the motor-car belonging to the plaintiff and referred to in said insurance policy. Subsequently the said William Boyd instituted an action against the defendant under section 24 of the Insurance Act, B.C. Stats. 1925, Cap. 20—which was discontinued pursuant to an order of the Court dated November 6th, 1931 (Exhibit 16) reading as follows:

FISHER, J.

THIS COURT DOTH ORDER that this action be and the same is hereby discontinued and that the plaintiff do pay to the defendant the costs of this action after taxation thereof;

AND THIS COURT DOTH FURTHER ORDER that the plaintiff shall not bring any further action against the defendant in respect of his claim in this action until after payment of the said costs.

The costs referred to in the said order of November 6th, 1931, have not been paid and it is first submitted on behalf of the defendant that the present action should therefore be dismissed and reference is made to a portion of the evidence of Edward L. Hornbrook, the plaintiff herein, in which he states that he had gone to see his solicitor in this action upon the suggestion of the said William Boyd and that he proposes to pay all the money over to Boyd in the event of his recovering judg-

ment. Doubtless the ultimate result in the event of the plaintiff recovering judgment would be, as proposed, *viz.*, that Boyd would receive payment of his judgment as in this way George Rennie would be indemnified against his existing liability on the judgment. The action however that I am asked to dismiss is one expressly brought by the plaintiff on behalf of the said George Rennie against whom the Boyd judgment still stands. If, therefore, I find that otherwise the action is maintainable by Hornbrook on behalf of Rennie I cannot see that the action should be dismissed on the ground suggested or that Rennie's right to be indemnified with respect to the Boyd judgment against him should be at all affected by the action previously taken by Boyd or by the declared intention of the present plaintiff if successful to see to the prompt payment of the Boyd judgment which no doubt is the real cause of the trouble to the parties concerned including Rennie and is likely to continue to be so unless and until paid.

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It is further contended, however, on behalf of the defendant that negligence and legal liability by reason thereof on the part of Rennie for the damages must be established and has not been established in the present case as against the defendant insurer simply by the production of the judgment obtained by Boyd against Rennie. *Continental Casualty Co.* v. *Yorke* (1930), S.C.R. 180 is relied upon. In reply counsel on behalf of plaintiff refers to *McKnight* v. *General Casualty Insurance Co. of Paris, France* (1931), 44 B.C. 1 where MACDONALD, J.A., at pp. 11-12, says, in part, as follows:

Continental Casualty Co. v. *Yorke* (1930), S.C.R. 180 was relied upon by appellant on two grounds (a) that it must be established that the respondent legally incurred a liability by reason of his negligence and (b) that the production of the judgment obtained is not sufficient proof of that fact. These contentions are said to rest on the judgment of Lamont, J. at p. 185. In dealing with the prerequisites when the insured sues the insurer he states: "She must, in my opinion, in order to succeed, have established (1) the agreement to indemnify; (2) that the bodily injury to another insured against had been inflicted by her automobile and (3) that she was legally liable in damages to the respondent for the injuries received by her." Respondent established the contract to indemnify by production of the policy. . . . "A person who has covenanted to indemnify another against liabilities and actions in respect thereof is, as between himself and the party indemnified, estopped from disputing the judgment in an action against the latter, not because he is a privy, but because that is the true meaning of the contract": Halsbury's Laws of England, Vol. 13, p. 347.

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In the *Yorke* case the action was, not by the insured but by the judgment creditor, between whom and the insurer there was no privity of contract. She had a bare right to sue conferred only by the statute and there was no contractual relation between the parties to the suit. If it is necessary to establish any further respondent's liability, *i.e.*, that the judgment was obtained because of negligence, I think the fact that appellant took over the conduct of the defence, acted for respondent until the adjourned hearing, obtained knowledge of all the facts and then retired on the ground, not that respondent was not liable because of negligence, but that he was intoxicated (thus affirming the policy except as to one point) it cannot now be heard to insist that in the present action all the facts in the former action should be traversed to shew that the judgment secured properly followed from the evidence adduced. In *Parker* v. *Lewis* (1873), 8 Chy. App. 1056 at p. 1059 Sir G. Mellish, L.J. stated at p. 1059: "It is obvious that when a person has entered into a bond, or bought land, or altered his position in any way on the faith of a contract of indemnity, and an action is brought against him for the matter against which he was indemnified, and a verdict of a jury obtained against him, it would be very hard, indeed, if, when he came to claim the indemnity, the person against whom he claimed it could fight the question over again, and run the chance of whether a second jury would take a different view and give an opposite verdict to the first." However, I do not think that the *Yorke* case, concerned with different parties, in different relations, intended to decide that this requirement is necessary where there is a contract between the parties to the suit to indmnify against a legal liability such as the judgment against respondent represents. The terms of the policy govern and it discloses a contract to indemnify. "The insurer agrees to indemnify the insured against all loss or damage which the insured shall become legally liable to pay for bodily injury caused to any person or persons by the ownership, maintenance or use of the automobile."

The present action is not based upon the statute but upon the contract to indemnify made between the parties to the action and I think the *Yorke* case is distinguishable along the lines suggested by MACDONALD, J.A. in his judgment in the *McKnight* case and that, as indicated in the passage set out from the *Parker* v. *Lewis* case, when the plaintiff comes to claim the indemnity the person against whom he claims it cannot fight the question over again and run the chance of whether a second Court would take a different view from that of the first Court when the defendant, as here, had a chance to be heard before the first Court through being duly notified of the proceedings as is apparent from the evidence more particularly hereinafter referred to.

This brings me to the consideration of the contract between the parties hereto. Counsel on behalf of the defendant relies on section 8 of the statutory conditions reading in part as follows:

(1) Upon the occurrence of an accident involving bodily injuries or death, or damage to property of others, the insured shall promptly give written notice thereof to the insurer, with the fullest information obtainable at the time. The insured shall give like notice, with full particulars of any claim made on account of such accident, and every writ, letter, document or advice received by the insured from or on behalf of any claimant shall be immediately forwarded to the insurer.

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

With reference particularly to the requirements of statutory condition 8 (1), as above set out, counsel cites *Barlow* v. *Merchants Casualty Insurance Co.* (1929), 41 B.C. 427 where it was held that under said section 8 the insured must give notice of the commencement of the action and send in documents he received, otherwise no action lies. In the present case the accident happened on October 25th, 1930, during the plaintiff's absence from Vancouver but Rennie promptly saw F. R. Broderick, who was acting as insurance adjuster for the defendant company and written notice of the accident with full particulars was given and, on October 29th, 1930, Broderick wrote Rennie as follows (Exhibit 12):

FISHER, J.

Further to your call upon us today, in connection with the automobile accident which occurred at about 11.20 p.m. on October 25th last in the 700 block on Hastings Street East, we have to inform you that after investigating the circumstances of the accident, we are unable to recommend the Toronto Casualty Fire and Marine Insurance Company to accept any liability whatsoever under any of the coverages of its Policy No. AUU-2641 issued to Mr. Edward L. Hornbrook on October 26th, 1929. We have advised Mr. Hornbrook accordingly.

Mr. Hornbrook was advised by letter of the same date (Exhibit 3). Some further correspondence took place between Messrs. Rennie and Broderick and in a letter dated December 4th, 1930, the latter said that he could only repeat what he has already stated in his letter of October 29th, 1930. Then on the 23rd of February, 1931, Rennie was served with plaint and summons in an action by Boyd and in a letter to the local manager of the defendant company, dated March 27th, 1931

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(Exhibit 18), Mr. *J. H. Macleod*, solicitor, called as a witness at the trial, states how the matter then stood, the letter reading in part as follows:

As solicitor for George Rennie, the above-named defendant, I beg to enclose plaint and summons in action No. A. 485/1931, between William Boyd as plaintiff and the said George Rennie as defendant, which was served upon the defendant on the 23rd February, and also copy of the dispute note thereto which I filed as his solicitor. These documents will speak for themselves. . . . Mr. Rennie reported the accident on October 27th, 1930, to your adjuster, Mr. F. R. Broderick, who, on the 29th October wrote him a letter stating that after investigation of the circumstances your company could not accept any liability. Subsequently, about March 2nd, I called upon Mr. Broderick with the plaint and summons herein, and asked that your company defend this action. He refused to accept any responsibility in the matter, so that I was then compelled to enter a dispute note on behalf of the defendant, who requests that you should assume the responsibility for the defence herein.

I should be glad to hear from you in the matter, and should also like to have a copy of the Policy No. AUU-2641 which Southard Motors inform me they returned to you.

On March 30th, 1931, the solicitors for the defendant company wrote to Mr. *Macleod* as follows (Exhibit 19):

FISHER, J.

Your letter of the 27th instant addressed to the manager of the Toronto Casualty Fire & Marine Insurance Company and enclosures have been handed to us. The company takes the position that it is under no obligation to defend or indemnify Mr. Rennie in any way. You have undertaken the defence of the action by filing a dispute note and there is, so far as we can see, no reason why the Insurance Company should intervene.

We return you herewith the plaint and the copy of the dispute note which you handed to us.

Then on April 17th, 1931, Mr. *Macleod* writes the manager of the defendant company again as follows (Exhibit 20):

As solicitor for George Rennie, the above defendant, I beg to notify you that the trial of this action takes place before His Honour Judge Cayley, in the County Court of Vancouver, on Tuesday next, the 21st day of April.

In my letter to you of the 27th March, I requested that your company assume the defence of this action pursuant to your policy of insurance No. AUU-2641 issued in the name of Edward L. Hornbrook, in respect of automobile B.C. Licence No. 96-222/1930. However, your solicitors have since written to me denying liability and refusing to intervene in the action.

I am writing you now so that there may be no question as to my client's rights being protected under the terms of the policy.

Under the circumstances, as above recited, I hold that the requirements of section 8 (1) and (2) were sufficiently complied with.

With reference to said section 8 (3) counsel on behalf of the defendant cites *The Preferred Accident Insurance Co. of New York* v. *Vandepitte* (1932), S.C.R. 22. It would appear that the policy referred to in the *Vandepitte* case contained clauses similar to those contained in the policy in question herein in which it was provided by the clauses described as "insuring agreements" in part as follows:

Section A—The insurer agrees to indemnify the insured against all loss or damage which the insured shall become legally liable to pay for bodily injury (including death resulting therefrom) caused to any person or persons by the ownership maintenance or use of the automobile. . . .

In respect of the preceding sections A and B the insurer further agrees with the insured:— . . .

(5) To indemnify in the same manner and under the same conditions as the insured is hereby entitled to indemnity, any person or persons while riding in, or legally operating the automobile, and any person, firm or corporation legally responsible for the operation thereof; but upon condition that such use or operation is with the permission of the insured; or if the insured is an individual, with the permission of an adult member of the insured's household other than a chauffeur or domestic servant; provided that the indemnity payable hereunder shall be applied, first, to the protection of the insured and the remainder, if any, to the protection of the other persons entitled to indemnity under the terms of this section as the insured shall in writing direct.

In the *Vandepitte* case, *supra,* it was held by the Supreme Court of Canada that the respondent plaintiff was not entitled to recover judgment against the (appellant) defendant for the amount recovered in the judgment against Berry's daughter as the latter was not "insured" within the meaning of section 24 of the Insurance Act and that the action thereby authorized lay only if the judgment debtor (being in such case Berry's daughter) was insured or had a right to recover indemnity from the insurer. I think however one should note exactly how the matter is put by the Court. Duff, J. in his judgment, at pp. 25-6, says, in part, as follows:

Here the father, R. E. Berry, was responsible for his daughter's act, under s. 12 of c. 44 of the British Columbia Statutes of 1926 and 1927, but the respondent elected to proceed against the daughter. No judgment having been recovered against the father the conditions never arose, under which, alone, by the terms of the policy, the insurance company could be called upon to indemnify him in respect of his liability to the respondent. It would, I repeat, be a monstrous injustice to impose upon the insurance

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company, by statute, a liability to the daughter or to persons injured by the act of the daughter, which the daughter could not enforce directly, or indirectly, in the absence of some such enactment, and a construction leading to that result ought not to be accepted unless the language employed is so clear as to leave no reasonable way of escape. The respondent bases her claim upon two alternative contentions. The first is that Miss Berry was entitled to require the insurance company to indemnify her in respect of the judgment recovered against her, either directly or indirectly, by calling upon her father to take proceedings under the policy. . . .

Then, after referring to a clause similar to 5 above and relied upon "by which the indemnity under section E becomes available for the benefit of the classes of persons mentioned in it," Duff, J. goes on as follows:

"It may be that a trust would arise in consequence of a written direction by the insured under this clause; but until there is such a direction, at all events, it seems clear that the named insured is entirely master of the situation, and under no enforceable obligation to require the company to indemnify any one of the classes of persons described. Indeed until a direction in writing is given, he is not entitled to require the insurance company to provide indemnity in respect of any liability other than his own.

Then at p. 31 Newcombe, J. says:

FISHER, J.

I construe the policy to have effect only as between the parties to it, namely, R. E. Berry and the company; and while it may be that the former, according to the covenant, may recover from the insurer, presumably for the benefit of a person driving his car with his permission, I find nothing to convince me that the insured can be compelled to exercise such a right of recovery or to undertake the duties and responsibilities of a trustee, unless by his consent or by reason of his having become the custodian of indemnity belonging to his daughter.

In the present case it is one of the parties to the policy, *viz.*, the named insured that is exercising his rights to recover thereunder from the other party for the benefit of a person driving his car with his permission. The claim is not based upon the right of Rennie to require the defendant insurance company to indemnify him in respect of the judgment rocovered against him either directly or indirectly by calling upon Hornbrook to take proceedings under the policy. The present action is not under said section 24 of the statute by one entitled to damages as was so in the *Vandepitte* action but is, as stated, by the insured himself who has given the required direction in writing. It is not a case therefore where the question arises whether the named insured is entirely master of the situation and under no

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enforceable obligation to require the company to indemnify any one of the classes of persons described. The insured himself as plaintiff is here requiring the defendant company to indemnify Rennie. The defendant agreed with the plaintiff to indemnify any one of the classes of persons described, whereof I find Rennie to be one, "in the same manner and under the same conditions as the insured is hereby entitled to indemnity" subject to the proviso as set out in clause 5 above. If defendant company in the present case were being called upon to indemnify the plaintiff then it would appear that the judgment would have to be against the plaintiff but here the defendant company is being called upon by the plaintiff to indemnify Rennie pursuant to its agreement as aforesaid and in such case, in my opinion, the judgment recovered against Rennie makes the indemnity provided by the policy available to him and entitles the plaintiff, according to the covenant, to recover from the defendant and to require the defendant to provide indemnity in respect of the liability of Rennie.

FISHER, J.

My conclusion on the whole matter is that the plaintiff is entitled to judgment against the defendant for the amount claimed with costs. Order accordingly.

From this decision the defendant appealed. The appeal was argued at Victoria on the 20th of June, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Alfred Bull, for appellant: Boyd brought action on behalf of deceased's estate but discontinued and he then induced Hornbrook to bring this action. *The Preferred Accident Insurance Co. of New York* v. *Vandepitte* (1932), S.C.R. 22 is conclusive and this action cannot be maintained. There was no judgment against the insured (*i.e.*, the plaintiff) but against Rennie, and the policy does not impose on the insurance company a liability to Rennie or persons injured by him: see judgment of Duff, J. at p. 25 in the *Vandepitte* case; *Barlow* v. *Merchants Casualty Insurance Company* (1929), 41 B.C. 427. They cannot simply put in the previous judgment against the negligent person, they

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must prove negligence again: see *Continental Casualty Co.* v. *Yorke* (1930), S.C.R. 180; *Century Indemnity Co.* v. *Rogers* (1932), 2 D.L.R. 582 at p. 587. The action is collusive, and in effect an action by Boyd, and he is in breach of the order as to costs in the first action he brought. There was breach of statutory condition 8 requiring notice of the accident to the company. The case of *Williams* v. *Baltic Insurance Association of London, Ld.* (1924), 2 K.B. 282, does not apply to this case.

Argument

J. L. Lawrence, for respondent: In the *Vandepitte* case (1930), 43 B.C. 161, the point that the insured's daughter, who was driving the car, could maintain an action was not overruled in the Supreme Court. As to proving negligence *de novo* see *Continental Casualty Co.* v. *Yorke* (1930), S.C.R. 180. We proved the circumstances and complied with what was required in the *Yorke* case. There was a full statement of the accident: see *Magrath* v. *Sydenham Mutual Fire Ins. Co.* (1923), 3 D.L.R. 44. They refused to come in and defend after receiving due notice, and they cannot now deny the judgment obtained for damages. On the claim that there was collusion between Hornbrook and Boyd see *Duffield* v. *Scott* (1789), 3 Term Rep. 374; *Jones* v. *Williams* (1841), 7 M. & W. 493; *Parker* v. *Lewis* (1873), 8 Chy. App. 1035 at p. 1059; *London Guarantee and Accident Co.* v. *Davidson* (1925), 36 B.C. 301; *Schoenfeld* v. *Pilot Automobile and Accident Insurance Co. Limited* (1930), 65 O.L.R. 29 at pp. 31-2.

Bull, in reply: There cannot be a judgment on the policy unless there is a judgment against the insured.

Cur. adv. vult.

7th December, 1932.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C. (oral): I think that in this case I cannot do better than to follow the judgment of the Privy Council. We have to refuse the application to amend. There is a distinction between this case and *Vandepitte* v. *Preferred Accident Insurance Company of New York,* 49 T.L.R. 90; (1932) 3 W.W.R. 573. In this case, the named insured has brought the action and has brought it on behalf of George

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Rennie, the man liable to pay the damages. In the *Vandepitte* case, the action was brought by Alice M. Vandepitte, not a party named in the insurance contract. There is that distinction. The Privy Council have chosen to go very thoroughly into the whole matter in the *Vandepitte* case. I suppose they realized the difficulties which arise under policies of this kind, and have covered the question which is important in this case, namely, whether the plaintiff could sue as trustee. They have dealt with that from two standpoints, first, was there a legal trust, and they say no; was there an equitable trust, and they say no, and this after fully discussing the merits of the case. That, to my mind, disposes of this case. It may be their expressions of opinion on this question of trusteeship are *obiter*, but I cannot consider that as an answer in this lower Court. It is the judgment of the highest Court, and is the opinion of the judges of that Court. It is futile to say it is *obiter*, because when the Privy Council says it we are bound by it, but whether *obiter* or not, it disposes of the case. I cannot find any reason on the facts of this case to distinguish it from what has been said in that case.

MACDONALD, C.J.B.C.

MARTIN, J.A.: This is a case with unusual, not to say peculiar, circumstances and the judgment entered against the defendant company (appellant) is appealed from on several grounds, the first being that Rennie the person in possession of the motor-car, with the consent of the owner (the present plaintiff respondent) at the time of the accident, was not an "insured" within the meaning of section 24 of the Insurance Act, Cap. 20 of 1925; and, second, that there is no proof that the present plaintiff "incurred liability for injury" thereunder because of a judgment recovered against Rennie for alleged negligence in driving said car.

MARTIN, J.A.

Considering the second point first; it was, in my opinion, under the present circumstances, incumbent upon the plaintiff to establish his liability for the alleged negligence of Rennie to whom he had entrusted the car for his own private use as he might feel disposed, in accordance with the judgment of the Supreme Court of Canada in *Continental Casualty Co.* v. *Yorke*

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(1930), S.C.R. 180, as recently considered and explained in *Century Indemnity Co.* v. *Rogers* (1932), S.C.R. 529 at 536, which cases, as I understand them, lay it down that in actions grounded on the statute, as this really is, the proof of recovery of the judgment alone is not evidence that the damage was caused by negligence, and that in order to establish liability against an insured owner, based on the requirement in said section 24 that an execution has been returned unsatisfied (which is the cause of action set up here by this statement of claim, and to which the parties are thereby confined and also by the course of the trial—*Century* case, *supra,* p. 536) it is necessary to prove by evidence *de novo* that the collision, with resulting damage, was due to the negligent operation of the motor-car.

MARTIN, J.A.

In this case the evidence offered by the plaintiff leading presumably to that end falls so far short of it that if a jury had returned a verdict of guilty thereupon it would have been manifestly perverse, because there is not only nothing in evidence to shew that Rennie's driving was inconsistent with due care and caution, but it is in evidence that the proceedings against him in the police Court terminated in his favour, and in his own letter, to the insurance adjusters, put in by the plaintiff (Exhibits 13 and 14) he disclaims "all responsibility of the accident."

I have not overlooked the observations of our learned brother M. A. MACDONALD in *McKnight* v. *General Casualty Insurance Co. of Paris, France* (1931), 44 B.C. 1 at 11-12, cited by the learned judge below, but the circumstances of that case differ radically from this: *e.g.,* said section 24 was not applicable and could not be and was not invoked by the plaintiff (p. 10) while herein it is made the foundation of the action, and the plaintiff McKnight, the person insured primarily, was also the person who drove the car at the time of the accident and against whom judgment had been recovered for having negligently done so.

This second ground, therefore, should be decided in favour of the appellant, which renders it unnecessary to consider the remaining grounds. It should, however, be noted that in the statement of claim it is alleged, par. 7, that "the plaintiff sues

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on behalf of the said George Rennie," though his right to do so, on the facts herein, is not alleged or proved, and such a manner of assuming the legal right to step into Rennie's shoes on this bare allegation is not supported by any authority, despite which that unfounded *status* is recognized and given effect to by the learned judge below in his reasons for judgment (after saying that "the present action is not based on the statute") though Rennie is not a party hereto: other obvious anomalies result from such a situation which it is unnecessary at present to pursue.

It follows that the appeal should be allowed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: With regret, I find myself in the position of having to allow this appeal. The judgment in the *Vandepitte* case is so comprehensive in its terms that it would appear to be decisive in this case. We are very familiar with what is known as *obiter dicta,* but when the ultimate Court of Appeal of the Empire lays down principles of law, it is a difficult thing for any of the Courts below to advance the possibility of it being merely *obiter dicta.* We well know the House of Lords' decisions are only capable of being affected by statute law, and the Privy Council decisions cannot be viewed as being of less import; they are binding throughout the Empire. In the present case there are substantial differences which would have in my opinion, modified the opinion of their Lordships of the Privy Council as delivered by Lord Wright, if the facts of this case had been before him. Here we have the insured suing as well as one of the class coming within the Automobile Insurance Policy sections A and B (5):

> To indemnify in the same manner and under the same conditions as the insured is hereby entitled to indemnity, any person or persons while riding in, or legally operating the automobile . . . with the permission of the insured.

In section A the indemnity of the insured (the plaint of Hornbrook) was against

> all loss or damage which the insured shall become legally liable to pay for bodily injury (including death resulting therefrom) caused to any person or persons by the ownership maintenance or use of the automobile.

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In this action the insured is one of the plaintiffs and the person also insured under the terms of the policy, Rennie, is also a plaintiff he being also insured as being a person coming within "any person . . . " under sections A or B (5), and the plaintiff Rennie driving the car of the insured his co-plaintiff, with his permission, injured a person who later died, whilst driving the car of the insured, and the administrator of the estate of Thomas Herbert Boyd deceased, recovered a judgment against Rennie for the sum of $1,000.

MCPHILLIPS, J.A.

In *Canadian Klondyke Mining Co.* v. *Smith* (1912), before the Supreme Court of Canada, reported in 35 B.C. 359, n., there were two points taken in the appeal, and upon one point alone the appeal as dealt with by the Supreme Court of Canada could be sustained. Therefore, I considered that the second point, which was absolutely conclusive upon the case which was afterwards before us, could be deemed *obiter dicta,* I deemed it right to say that in my opinion that it was *obiter dicta* and that I was not bound by it. It was a serious step to take when we consider the fact that the Supreme Court of Canada is the final and ultimate Court of Appeal in Canada. However, my learned brothers thought that they were bound to follow the view of the Supreme Court of Canada. It went to the Privy Council—*Seguin* v. *Boyle* (1922), 1 A.C. 462 at 480—there is no need of going into all the particulars. Passing to p. 481 we have the language of Lord Shaw where he deals with this matter of the decision of the Supreme Court of Canada, and agrees that it was *obiter dicta,* and concludes by saying:

> In these circumstances their Lordships agree with the conclusion come to by the learned judge MCPHILLIPS, J.A. rather than with that arrived at by the other learned judges who deferred to the *dicta* in the *Smith Case* already dealt with.

Lord Shaw earlier in the judgment held that the decision of the Supreme Court of Canada on the point was unsound. That was a very extraordinary situation, and in a way we are also in the same position here today in regard to this judgment. I have given the matter long and anxious consideration, and I think I am not entitled, with this judgment of their Lordships of the Privy Council before me, to disagree with the judgment which

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has been proposed by the learned Chief Justice and agreed to by my learned brothers. I do not dissent but I may be said to be *dubitante*. I wish, though, to say this—Rennie was entitled to drive this automobile; he took it out and an accident took place absolutely within the terminology of the contract for which the company took a premium, and they refused payment contrary to their contract. I have no hesitation in saying it is an unconscionable thing when a contract is dealt with in that way. I would also draw attention to what Lord Wright said in *Vandepitte* v. *Preferred Accident Insurance Company of New York* (1932), 49 T.L.R. 90 at p. 93, apart from even legal liability:

On the other hand honour policies are common in insurance business, and any insurance company which failed to fulfil its "honourable obligations" would be liable to pay in loss of business reputation.

I had occasion to deal with this question of "honour insurance" once before, where a returned soldier at Merville had his house and barns burned down (*Hanley* v. *Corporation of the Royal Exchange Assurance of London, England* (1924), 34 B.C. 222). The company defended the action on the ground that at the time the agent purported to place the insurance he was in fact not their agent although he was later and the policy issued but after the date of the fire. The learned trial judge, MACDONALD, J., gave judgment for the plaintiff, the returned soldier, but the Court of Appeal reversed the judgment. I dissented. In the course of my judgment I said the facts, as I viewed them, and as the learned trial judge did, Thomas the agent placing the insurance was acting at the time within the scope of the authority conferred upon him by the company and he was held out as the agent of the company by the Victoria general agents of the company who wrote up the policy. In my dissenting judgment I drew attention to the case of *Mackie* v. *The European Assurance Society* (1869), 21 L.T. 102, and I took occasion there to say that as long ago as 1869 Vice-Chancellor Malins in England drew attention to a matter of this kind, where an insurance company endeavoured to escape liability. Malins, V.-C. said (p. 106):

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Having raised these objections, fatal to the public and to the success of the office, and most unwisely taken, and frivolous and ridiculous in them-

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selves, I fear I can only make a decree that they are bound to the terms of the policy, and must make reparation for all damage, with interest on the money. I should be glad if I could make them pay damages for the injury which this defence has caused to the plaintiff; it could not have originated with the respectable directors or solicitors, but the miserable officials.

In my dissenting judgment, having referred to the *Mackie* case, I said, in the *Hanley* case, pp. 238-9:

"I have no hesitation in adopting the language of the Vice-Chancellor and applying that language in the present case. . . . I cannot believe, as Vice-Chancellor Malins could not believe in the *Mackie* case, that the defence has had the approval of the directors in England."

When the directors of the Royal Exchange Assurance of London, England, did get to know of it and all the surrounding facts, the company paid the claim in full although it had finally succeeded in the Courts—that was living up to the principles of "honour policies" and "honourable obligations" referred to by Lord Wright. I might also say that this is a class of insurance both statutory and contractual, and when the Legislature authorizes this class of insurance, it is the sovereign authority that can admit of it.

MCPHILLIPS, J.A.

With regard to Mr. *Bull's* contention that this was a gaming or wagering policy, I do not think it was, because in this case Rennie, the moment he took the car out with the possibility of an accident, had an insurable interest, and he was insured under the policy.

I would also refer to *Les Affreteurs Reunis Societe Anonyme* v. *Leopold Walford (London), Limited* (1919), A.C. 801, to follow up some of the matters I have been referring to. There was a case—it is referred to by Lord Wright in his judgment—where the charterers had a contract with the shipowners, and clause 29 of the charterparty was as follows:

A commission of three per cent. on the estimate gross amount of hire is due to Leopold Walford (London), Limited, on signing this charter (ship lost or not lost).

The only difference in this case we have before us is that there they have Leopold Walford, the brokers for the charterers names inserted, and we have not the name of "Rennie," but we have "any person." I do not see any difference. If you can find the person who is insured under the terms of the contract,

then that person is the one that is insured, and can anyone doubt but what Rennie was a person covered by the terms of the contract, and being so, then he is the person insured? Now in this case Leopold Walford (London) Limited sued, although they were not parties to the contract—except their name happened to appear in clause 29 of the charterparty. They sued, but in answer to an application by the respondents to join the charterers as plaintiffs, the appellants agreed to raise no point as to parties. So the analogous position is this. We have the charterers here in the position of Hornbrook; we have the person Rennie in the position of being one of the insured persons referred to in the contract. And what did Lord Birkenhead say about the right to bring the action? At p. 808 Lord Birkenhead said this:

We have seen that, as the result of an authority binding upon the learned judge, charterers can sue upon a commission clause, under the circumstances which I have attempted to explain, as trustees for the broker.

Hornbrook is in the same position as the charterer and he can sue upon this term in the contract.

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Lord Birkenhead further said:

My lords, whom can they sue? Obviously the shipowners. Why can they sue for the amount of the commission? Obviously because the owners have contracted to pay it.

Obviously in the present case, because the insurance company contracted to pay "any person or persons," etc., as set out in the policy. I have made these observations largely because of this—it is a matter of great public interest. Almost everyone drives a motor-car now, and often it is a family car and relatives and friends drive it with the consent of the owner, and the owner—the insured—bargains for and obtains a policy in the form of the present policy, for the protection of the insured's relatives and friends who may be entrusted with the motor-car. The insurance is granted, a policy issues, the insured gives permission to his co-plaintiff Rennie to drive the car, and Rennie causes injury to a person in so driving, which resulted in death, and it is the damages recovered against him and sued for upon the contract of indemnity. The insurance company in denial of its contract, refuses payment—they refuse to pay what they con-

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tracted to pay. I trust that the morality of insurance companies in Canada engaged in the insurance business is equally as high as the morality of the insurance companies in London, England, and that possibly this claim may yet be paid upon it coming to the notice of the directors of the company as I cannot think it possible that the directors of the company can have sanctioned this denial of liability. When it is considered that the amount in question here is only $1,000, one wonders the more.

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

Appeal allowed.

Solicitors for appellant: *Walsh, Bull, Housser & Tupper.*
Solicitor for respondent: *J. L. Lawrence.*

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Motor-vehicles—Negligence—Collision at intersection—Gratuitous passenger—Damages—Evidence.

The plaintiff was a gratuitous passenger in the defendant's car as he was driving easterly on Twelfth Avenue in the City of Vancouver shortly after three o'clock in the morning. There was a stop sign on Commercial Drive where it crossed Twelfth Avenue, and one S., who was driving a car southerly on Commercial Drive approached the intersection at from 25 to 35 miles an hour, and although he checked his car he continued across the intersection without stopping, and was run into by the defendant who was going at a moderate rate of speed. It was held on the trial that both drivers were guilty of negligence.

Held, on appeal, reversing the decision of MACDONALD, J., that the defendant, who was driving at a moderate rate of speed and had the right of way, could reasonably advise himself that the law would be observed. The driver S. was travelling at an excessive speed when approaching the intersection, proceeded through without observing the stop sign, and paid no attention to his obligations under the traffic laws as regards the defendant. He was wholly responsible for the accident.

Per MARTIN, J.A.: The case of *Hall* v. *Tinck* (1932), 45 B.C. 540 is not properly founded on *Kennedy Lumber Co. Ltd.* v. *Porter* (1932), 1 W.W.R. 230, owing to the difference between the British Columbia Act and that of Saskatchewan on the right of way of vehicles at intersections.

Statement

APPEAL by defendant from the decision of MACDONALD, J. of the 22nd of June, 1932, in an action for damages resulting from a collision between two cars at an intersection. The defendant was driving his car easterly on Twelfth Avenue with the plaintiff as a gratuitous passenger, at about three o'clock in the morning, and on entering the intersection at Commercial Drive he collided with a car going southerly on Commercial Drive and driven by a boy named Sanford who was 19 years old, the boy driving his mother's car without his parents' consent. Another boy and two girls were passengers in the car and they were returning home from a beach party. The defendant had the right of way but slowed down when entering the intersection. Sanford was going at about 25 miles per hour when nearing the intersection, and although there was a stop sign on Commercial Drive, he did not stop but continued across, think-

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ing he could get across before the defendant's car reached the point of contact. The cars came together and both cars overturned, the plaintiff being severely injured. It was found on the trial that both drivers were guilty of negligence and judgment was given against the defendant for $1,700 damages.

The appeal was argued at Vancouver on the 28th of November, 1932, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, McPHILLIPS and MACDONALD, JJ.A.

Argument

Bull, K.C., for appellant: The boy Sanford failed to stop at the stop sign and the defendant had the right of way. Further, the evidence shews Sanford was going at an excessive speed. The defendant entered the intersection first according to two independent witnesses. Sanford is entirely to blame: see *Lechtzier* v. *Lechtzier* (1931), 43 B.C. 423. Further, he was committed for driving to the common danger. If he had stopped at the stop sign there would have been no accident: see *Toronto Railway* v. *King* (1908), A.C. 260; *Carter* v. *Van Camp et al.* (1930), S.C.R. 156 at p. 161; *Nelson* v. *Dennis* (1930), 1 W.W.R. 656; *Rahal* v. *Burnett* (1931), 45 B.C. 122; *Hall* v. *Tinck* (1932), *ib.* 540.

[MARTIN, J.A.: It would appear from the reasons for judgment in *Hall* v. *Tinck* (1932), 45 B.C. 540, that the learned judge, in comparing that case with the Saskatchewan case of *Kennedy Lumber Co. Ltd.* v. *Porter* (1932), 1 W.W.R. 230, overlooked the important difference in the language and in founding it thereupon, between the Saskatchewan Act (R.S.S. 1930, Cap. 226, Sec. 45 (2)), and the British Columbia Act (B.C. Stats. 1930, Cap. 24, Sec. 21), the former reading that "when a person operating a motor meets another vehicle at an intersection of highways, the vehicle to the right hand shall have the right of way," etc., whereas the latter reads "The person in charge of a vehicle upon a highway shall have the right of way over the person in charge of another vehicle approaching from the left upon an intersection," etc.]

J. A. MacInnes, for respondent: There is no question that Sanford was at fault, but he was not wholly to blame. Both drivers were approaching a blind corner but the defendant, notwithstanding Sanford's careless driving, could have avoided the

collision if he had taken reasonable care, as in fact it was he who ran into Sanford's car.

Bull, replied.

MACDONALD, C.J.B.C.: This appeal should be allowed. I think it perfectly clear that Sanford broke the law when he passed the stop sign without stopping, as admitted, and he also, coming from the right, paid no attention to the other man, Dosse, who was coming from the right; he paid no attention to his rights and obligations under the traffic laws. Now it is not positive upon the point that Dosse could have stopped between the time when he first saw or ought to have seen Sanford coming to the intersection. There is no positive evidence upon that. It is a matter of inference. The learned judge has made an inference, and I think he has made that inference because he thought he was acting upon direct evidence. That was his mistake. He said it was clear that he had not looked to the left, while as a matter of fact it is not clear on the evidence that he did not look to the left. The very wording of the Act has been broken by Sanford, and I do not see that any liability at all could have been fixed upon Dosse, who apparently did everything, I think, at all events, that he could do in the circumstances. In any case, the plaintiff has failed to shew that he did not do everything he could have done under the circumstances. In that state of facts, I say that the man who had deliberately disregarded the law in two or three respects was the sole cause of the accident, and that Dosse was not a contributory thereto.

MACDONALD, C.J.B.C.

The appeal should be allowed.

MARTIN, J.A.: I agree. It is an exceptionally clear case, and coming down to really one point only, as stated by counsel on the opening of the case, and repeated by the learned judge when giving his reasons, *viz.*, that everyone is bound to keep a proper look-out at an intersection, and was that duty discharged by both drivers? Fortunately, there is no conflict of evidence upon that point, and I am assuming that the learned judge proceeded upon the same evidence as that before us, which must be the case. Then the question resolves itself into this: was it proper for the learned judge to draw the inference that he did

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on the admitted evidence when he was exercising the function of a jury? I do not hesitate to say if I had been a jury sitting on this case that I would have arrived at the conclusion, on this evidence, that it is not safe to say under the admitted circumstances that this defendant did fail to discharge his duty to keep timeously a proper look-out, and therefore the negligence of Sanford was the sole cause of the accident.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree. This judgment can only be sustained on the ground that there was an act of ultimate negligence. The plaintiff, of course, is not affected by the negligence of the driver of the car in which he is riding, being a gratuitous passenger therein.

Now there is no evidence from the driver of the car, that is, the defendant, on the question of looking, but the law will give the defendant the benefit of this, that he would reasonably advise himself that the law should be observed. Now there is evidence in the case of the plaintiff that the car in which the plaintiff was was fifty feet behind the stopping post at the time when both cars were approaching the intersection. We can only proceed on inference, and the inference that the defendant is entitled to have found in his favour is that he did look. The other car being fifty feet from the stopping post, the defendant was perfectly safe to cross, and in crossing he was entitled to be let cross. See *Rex* v. *Broad* (1915), A.C. 1110 at p. 1115, in the Privy Council, which has been a number of times referred to. Lord Sumner said:

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

But what occurs here? The car comes up to the stopping post and goes right through, disobeying the governing law. There was no reasonable opportunity to do anything. Just take the evidence itself and it is the evidence of "a flash" as representative of how the second comer's car appeared. Now what possibility was there to obviate collision with the second comer

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and, notwithstanding the negligence of the second comer, for the first comer to prevent the accident? How could the accident have been avoided? On the evidence itself it was utterly impossible, because reasonably the defendant was entitled to assume that the car would be brought to a stop at the stopping post and then only go on, and in such case there would have been no accident. That is clear (*Lloyd* v. *Hanafin* (1931), 43 B.C. 401 at p. 405, and *Swadling* v. *Cooper* (1930), 46 T.L.R. 597 at p. 598).

Therefore, it seems to me it is utterly impossible to arrive at the conclusion that it is a case of ultimate negligence. There is no evidence to support it, and an inference of that character is not supportable in law. As I look at it, therefore, the judgment, in my opinion, must be reversed and the appeal allowed.

MACDONALD, J.A.

MACDONALD, J.A.: The onus was on the plaintiff to establish an act of negligence. What is relied on is that the defendant did not look to the left, thus destroying the chance of avoiding the danger by stopping. But the plaintiff's evidence does not shew that after looking to the right he did not look to the left. I think, too, the defendant had the right to assume that the driver of the other car would stop, and upon finding that he was not going to do so, it was then too late to avoid a collision with this other car driven by a very careless young man.

I would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Walsh, Bull, Housser & Tupper.*
Solicitors for respondent: *Fleishman & MacLean.*

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IN RE M. D. DONALD LTD.

IN RE M. D. DONALD LIMITED.

Taxation — Company — Land in company's name — Transferred to individuals—Deed not registered—Sold by individuals at profit—Liability of company for tax.

In June, 1926, M. purchased a lot in Vancouver which was registered in her daughter's name. Shortly after, owing to differences arising between M., her husband and her daughter, they formed the appellant company, each of them holding one share in the company and a fourth share being in the name of their solicitor, only four shares being issued. The daughter then transferred the lot to the company. In December, 1927, M. purchased another lot adjoining the first one and had it registered in the daughter's name, and on May 5th, 1928, the daughter transferred this lot to the company. M., her husband and daughter having shortly after settled their differences, the company conveyed both lots in June, 1927, to the three of them. This conveyance was not registered and on February 2nd, 1929, the three then owners sold the two lots to others at a profit of $67,000. The assessor's assessment of the company for $5,600 on this profit was upheld by the Court of Revision.

Held, on appeal (MACDONALD, C.J.B.C. and GALLIHER, J.A. dissenting), that the Court of Revision reached the right conclusion in viewing the private transaction of the individual members of this company as an unsuccessful attempt to evade the provisions of the statute.

Statement

APPEAL by M. D. Donald Limited from the judgment of *W. H. S. Dixon*, Esquire, judge of the Court of Revision, of the 13th of April, 1932. The appellant was incorporated in 1926 as a British Columbia company and the memorandum of association shews that its objects were, *inter alia*, "To transact all kinds of agency business, negotiate loans and buy and sell real and personal property." There were four shareholders only, each holding one share, namely, Mary Schwartz, Mrs. Mamie Meltzer, her husband William Meltzer, and *Max Grossman*, the solicitor who incorporated the company. Mary Schwartz was the married daughter of Mrs. Meltzer. On June 9th, 1926, one Love transferred by agreement for sale a lot hereinafter known as lot 9 to Mary Schwartz, the consideration being $53,000, and on December 13th, 1926, Mary Schwartz assigned said agreement for sale to the appellant company, the consideration shewn in the assignment being $53,000. On May 5th, 1928, the appellant also acquired lot 10 (adjoining lot 9 afore-

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said) from said Mary Schwartz, the consideration in the deed being $1. Mary Schwartz had purchased said lot 10 in December, 1927, for $70,000. The company held both lots until June, 1928, when it conveyed them to Mamie Meltzer, William Meltzer and Mary Schwartz for the consideration of $1, but this document was not registered until February 5th, 1929. On February 2nd, 1929, the three then owners sold said lots 9 and 10 to Vested Estates Limited for $210,000. The assessor assessed the appellant on a profit of $67,000 made by the appellant in 1929. Mrs. Meltzer averred that the reason for incorporation of the company was that they had had some domestic difficulties, and in fact all the business with relation to the properties was done by Mrs. Meltzer, and when the family troubles ceased to exist the properties were transferred to the individual names and there was no evidence of any attempt to avoid taxation.

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

Argument

Grossman, for appellant: Five thousand six hundred dollars as extra taxes was charged on the sale of these lots. The Court of Revision upheld the assessor. The mother bought the two lots and put them in the daughter's name. A dispute arose in the family and the result was that the properties in which they were interested were put in the name of a company (the appellant) formed by themselves, as they all lived in Seattle. When the family settled their dispute the properties were transferred by the company back to the individual members of the family. The lots were in the individual names when the sale took place and had been for some time. There is no evidence of any attempt to avoid income tax: see *Corporation of District of Burnaby* v. *Ocean View Development Limited* (1923), 32 B.C. 413. The company made no profit on this sale and should not be taxed.

Harper, for respondent: Lot 9 went into the company's name in 1926 and lot 10 in 1928, and when the transfer was made in June, 1928, from the company to the individuals it was not registered until the actual sale on which the profit was made was put through on February 2nd, 1929, so that at this time the lots

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were registered in the company's name: see *Anderson Logging Co.* v. *The King* (1925), S.C.R. 45 at p. 56; *In re Hastings Street Properties Limited* (1930), 43 B.C. 209.

Grossman, replied.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: I think this is a very clear case of an attempt to tax something which was not income. The family was composed of several members who were attempting to straighten out their affairs and they were not clear about how the property should be divided among them and could not arrive at a division and they therefore conveyed the property to M. D. Donald Limited, I think as a shareholder. It was not a sale. The Donald Company took the property and credited the family, as I shall call them, with the money, they had paid for it. The family took the rents and profits and divided it amongst themselves and carried on for a short time when an agreement was come to between the members of the family and then conveyances were made from the company to the several members of the family each of his or her share. Thereafter, I think four months afterward or some months afterward, the family sold the property for $200,000, the cost of the property to them being $123,000, and the Government now claims to assess the company for the difference between these sums it claims on the profit you—your company have made, although it did not make it at all. It seems to me that the transaction is very similar to a case where a person finds that he can deal more justly with his property, if there are different claimants to it, by transferring it to a trustee, we will say, to an individual. He transfers the property to the individual at its cost price $123,000, he is credited in the books of the individual with that price, the individual carries on and keeps small sums of money for his pains on which he is assessed. In the meantime the *cestui trust* who had conveyed it to the company make an agreement for the division of it amongst those who are entitled to it. He notifies the company and the company gives deeds to each individual for the share of that individual, and thereafter the several individuals sell the property. The company have made no profit out of that sale. That is perfectly clear, there is no dispute about that fact. It did not get the difference between

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$123,000 and $200,000, the family got it and the family got the rents from month to month to be divided amongst themselves. It seems to me it would be an extraordinary thing if a company that made no profits should be assessed and compelled to pay taxes on a profit which they had never got and which other people got. If there were any liability to pay taxes, it is on the part of the family who sold and made the profit and not this company. It was held by the Revision Court judge that the transfer to the company was a scheme to avoid assessment. That is to say, that the parties conspired against themselves to transfer property to a company which was assessable from those who were not (since they were foreigners). The fact that the members of the family did not register the deed is immaterial since as between the parties they were the owners and could have no motive for not registering.

MACDONALD, C.J.B.C.

MARTIN, J.A.: In my opinion the Court of Revision has reached the right conclusion in viewing, in effect, the private transaction of the individual members of this company as an unsuccessful attempt, in the same category as the *Hastings Street Properties* case, to evade the provisions of the statute which imposed the tax objected to upon it. I would therefore dismiss the appeal.

MARTIN, J.A.

GALLIHER, J.A.: I take the same view as the Chief Justice. I would allow the appeal.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I am of the same view as my brother MARTIN. I think it is well to call up for consideration what the learned judge of the Court of Revision and Appeal said about the taxation appeal when before him and which is now before this Court upon appeal from his decision. The judge of the Court of Revision and Appeal said this:

MCPHILLIPS, J.A.

Mr. *Grossman* contends that the appellant was a mere trustee or agent for the said Mamie Meltzer, Mary Schwartz and William Meltzer. Mrs. Meltzer gave evidence and gives as her reason for the incorporation of appellant "We had some domestic difficulties. Therefore we put it in the company's name." She says they took it out of the company's name because she was sick, and because domestic relationships were bettered. On cross-examination, however, Mr. *Harper* asks Mrs. Meltzer:

"Did you form the company to avoid any danger of personal liability on business dealings? Yes.

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"*Grossman*: It shews the reverse.

"The Witness: I would not have done it.

"*Harper*: What? I would not do that.

"You would not have done that? No, sir, I value my reputation more than that. I guess I would be known in business here, of which I am proud."

At all events they got whatever benefit there was from the incorporation and, so far as the evidence goes to shew, may still be doing business. The appellant made returns and Mr. Clyne (a witness called on behalf of appellant) states that he got his information for making up the income tax return from Mrs. Meltzer. I think the evidence shews that Mrs. Meltzer collected the rents and other income and paid taxes and other outgoings without using the company's bank account, but whether these unorthodox methods of carrying on the company's business—because it was the company's business—is sufficient evidence to relieve this company of income tax is another question. The appellant, in order to succeed, has to get away from its own returns as made to the assessor, hence the large number of cases cited to me as to the effect of bookkeeping entries. Mr. *Harper* agrees that it is permissible for the Court to disregard mere bookkeeping entries if it is necessary to arrive at a just finding. But I do not think Mrs. Meltzer's or Mr. Clyne's evidence shews that these figures are incorrect. I think her evidence amounts to this that although she had legal advice as to incorporation of the company and, apparently good reasons for it, and though Mr. Clyne says he advised her strict accounts would have to be kept, she would like to give the impression that she did not know what she was doing. From all the evidence it is clear that she was the "brains" of the family and in control of affairs. She was able annually, or when written to by Mr. Clyne, to give him full and complete details of all payments in and out. She simply carried on as before because she was used to it and it was more convenient.

If M. D. Donald Limited can escape taxation on the facts set out in the evidence before me then all the shareholders in *The Hastings Street Properties Limited* case (recently decided by the Court of Appeal of this Province) [(1930), 43 B.C. 209] need have done to escape taxation if they did not wish to buy and sell as individuals for some reason, was to purchase the lot in question there in their own names, transfer it to the company and when a sale came in sight, transfer it back to their own names, hold the deed up until the sale is consummated and then register all documents together in the *Hastings Street Properties Limited* case, however the shareholders put everything in black and white and it was found, by a majority of the Court, to be a fraudulent scheme.

Mr. *Grossman*, for appellant cites: As to onus, *Anderson Logging Co.* v. *The King* (1925), S.C.R. 45 at pp. 50-2. As to a company being bound by its bookkeeping entries *Gresham Trustees (City's Moiety)* v. *The Commissioners of Inland Revenue* (1897), 4 T.C. 304 at p. 341; *Doughty* v. *Commissioner of Taxes* (1927), A.C. 327 at 336; *J. and M. Craig (Kilmarnock), Ltd.* v. *Cowperthwaite* (1914), 13 T.C. 627, 668, and 669; *The Liverpool and London and Globe Insurance Company* v. *Bennett* (1913), 6 T.C. 327 at p. 359; *Edinburgh Life Assurance Company* v. *Lord Advocate* (1910), A.C. 143 at p. 163; *Collins* v. *The Firth-Brearley Stainless Steel Syndicate, Ltd.* (1925), 9 T.C. 520 at p. 569.

In the last mentioned case Pollock, M.R. says:

"In all cases one has to look at the substance of the transaction. The particular way in which the item has been dealt with in the balance sheet or in the profit and loss account does not bind the Court," and this is more or less the same opinion as in the other cases quoted above, and also *Isaac Holden & Sons, Ltd.* v. *The Commissioners of Inland Revenue* (1924), 12 T.C. 768 at pp. 772-3.

Mr. *Harper*, for the assessor (respondent), contends that the deed dated June 12th, 1928, was executed and held until such time as a sale could be arranged for and then registered. He further contends that by virtue of section 34 of the Land Registry Act, Cap. 127, R.S.B.C. 1924, so far as a claim by the Crown for income tax is concerned, no interest passed to defeat their claim until registration in February, 1929. The sale to Vested Estates was on New Year's Day, 1929. He cites *District of Burnaby* v. *Clowes* (1923), 3 W.W.R. 1078 hereon and cases cited therein. That case was before the Court of Appeal of this Province and the decision was upheld. The section in question has been amended since that case, but I do not think the amendment affects the position of the assessor who is entitled to consider only the registered owner. This would dispose of the contention of appellant that one lot (lot 10) was held by the company only five weeks. The word "owner" is also defined in the Taxation Act and refers only to "registered" agreements, deeds, etc.

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Mr. *Harper* also contends that it does not matter who the shareholders of the company are or what their relationship to one another. He cites Plaxton & Varcoe's Dominion Income Tax Law, 2nd Ed., p. 7, where the learned authors say:

"In connection with corporations and joint-stock companies, it is a cardinal distinction that the incorporated body is a totally different person or entity from the individuals comprising it, even if an individual holds the whole of the shares of the corporation," and cites *John Foster & Sons* v. *Commissioner of Inland Revenue* (1894), 1 Q.B. 516, 528, 530, and *The Alabama Coal, Iron, Land and Colonization Co., Ltd.* v. *Mylam* (1926), 11 T.C. 232 at p. 252 thereon.

So far as carrying on business is concerned, one transaction is enough. Only one transaction ever took place in the history of *Hastings Street Properties Limited, supra.* Here there were two distinct transactions and rentals and assumption of mortgages by the appellant company involved, depreciation, directors' fees, etc. These people had the advantages and protection too, of incorporation, and when it was realized that a sale would involve payment of a substantial sum ($5,600) as income tax I do not think the company is able to repudiate its returns by alleging faulty book-keeping or misunderstanding over a period of years. I think it should be borne in mind, too, that Mr. Clyne, who made the returns on information supplied him is a taxation expert.

I find that the company did in fact carry on the business of buying, selling and dealing in real estate, within its powers, and made the profit alleged from such dealings. The fact that all the shares were not allotted does not, I think, make any difference. It would not have helped them any to have allotted 33 shares each to each member of this family, they each held one share, and they were in it equally and received distribution of the profits equally. I do not think appellant has discharged the onus upon it.

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I am of the opinion that the learned judge of the Court of Revision and Appeal came to the correct conclusion. His judgment in the matter shews that he had a proper appreciation of the facts and the law and I find no error in his adjudication. I would, therefore, affirm the judgment of the learned judge of the Court of Revision and Appeal (Vancouver Assessment District) and confirm the assessment. The appeal to this Court in my opinion should stand dismissed.

MACDONALD, J.A.

MACDONALD, J.A.: I only find it necessary to say and I think it is a fair inference to draw from the evidence—that this company acquired the property, owned it and in reality pursuant to its powers to buy and sell real estate effected a sale of it; none the less so because of the circuitous way they took to bring it about. I would dismiss the appeal.

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

Solicitors for appellant: *Grossman, Holland & Co.*
Solicitors for respondent: *Harper & Sargent.*

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Husband and wife—Voluntary transfer of property by wife to husband—No independent advice—Undue influence—Onus.

The defendant who was a soldier married the plaintiff, a French woman, in France in 1919. They came to Vancouver in the same year and, with a war bonus in which the wife had an interest, made a first payment on a home, the deed for the property being in their joint names. The husband was employed in the city fire department, and in September, 1931, when a fire chief, he went to a firemen's convention in California, remaining away for two weeks. By this time they had four children. On his arrival home from California late at night his wife was not there, and when she came in some time later an altercation arose between them as to a Frenchman with whom the wife was on friendly terms, and the husband ordered her out of the house. She went to the house of a friend and the next morning the husband went to the place where she was staying and told her he wanted to take her to a lawyer for the purpose of obtaining a divorce. They went to the office of Mr. *Nicholson*, a barrister, who had not seen them before, and his evidence was that he considered himself acting for both parties when instructed to draw up a quit-claim deed transferring the wife's half interest in their home to the husband, and that she signed it voluntarily, saying as she did so that she was willing to sign as her husband had undertaken to look after the children. The plaintiff averred that she thought they went to the lawyer solely for the purpose of obtaining a divorce and did not know that she was signing a quit-claim deed. An action for the cancellation of the quit-claim deed was dismissed.

Held, on appeal, affirming the decision of CAYLEY, Co. J. (MARTIN and McPHILLIPS, JJ.A. dissenting), that the plaintiff's marital conduct was indefensible and on the question of conflict of evidence between her and the solicitor the learned trial judge was amply justified in accepting the evidence of the solicitor. Since their quarrel there was not fiduciary relationship between the husband and the wife, and there was no evidence of undue influence. She signed the document voluntarily, the fact of her husband looking after the children being given by her as a reason for doing so, and the appeal should be dismissed.

Statement

APPEAL by plaintiff from the decision of CAYLEY, Co. J. of the 8th of April, 1932, in an action for the cancellation of a quit-claim deed made by the plaintiff to the defendant in September, 1931, conveying a one-half interest in a property in Vancouver, of which they were the joint owners. The plaintiff and defendant were married in France in 1919. Shortly after they came to Vancouver where they bought the property in question which

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was registered in their joint names, the first payment thereon of $600 being made from a war bonus received by the husband on his return to Canada, the wife being entitled to a portion of the bonus. The husband was a fire chief in the City of Vancouver, and in September, 1931, he went to a fire convention in California and remained away for about two weeks. On returning he arrived home late in the evening and his wife was not there, she eventually coming home at about 2.30 a.m. when on asking her where she came from she said she did not know. This led to a quarrel and he ordered her out of the house. She was of French origin and went to the house of a French woman who was a friend of hers. The next day he went for her and took her to the law offices of *Russell, Nicholson & Co.,* where they consulted Mr. *Nicholson.* On instructions from the defendant Mr. *Nicholson* drew up a quit-claim deed whereby the wife transferred her half interest in their house to the husband. According to Mr. *Nicholson's* evidence the wife signed the deed voluntarily after his explaining fully to her what she was signing. She denies this in her evidence saying that she understood she was going to the lawyer's office to get a divorce and for no other purpose whatever. Her action was dismissed.

The appeal was argued at Vancouver on the 21st and 22nd of November, 1932, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Edith L. Paterson, for appellant: We submit that even on Mr. *Nicholson's* evidence it is a transaction that cannot stand: see Halsbury's Laws of England, Vol. 20, p. 760, sec. 1785; *Baker* v. *Monk* (1864), 4 De G. J. & S. 388; *Waters* v. *Donnelly* (1884), 9 Ont. 391; *Burns* v. *Minchau* (1927), 1 D.L.R. 472; *Fry* v. *Lane* (1888), 40 Ch. D. 312 at p. 321. The contract must be fair, just and reasonable: see *Evans* v. *Llewellin* (1787), 1 Cox 333; *Harris* v. *Richardson* (1929), N.Z.L.R. 668 at p. 676; Story on Equity, 3rd Ed., 55, sec. 119; *Clark* v. *Malpas* (1862), 4 De G. F. & J. 401. The bargain was improvident: see *Hrynyk* v. *Hrynyk* (1932), 1 W.W.R. 82. The deed was signed by the wife when under the husband's influence: see *Howes* v. *Bishop* (1909), 2 K.B. 390 at p. 396; Halsbury's Laws of England, Vol. 16, p. 391, sec. 789; *In re*

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Lloyd's Bank, Ld. Bomze and Lederman v. *Bomze* (1931), 1 Ch. 289 at p. 301; *Willis* v. *Barron* (1902), 71 L.J., Ch. 609. Mr. *Nicholson* should have advised her to consult another solicitor.

Kappele, for respondent: They were married in France in 1919 and the lot in question was for a home. The first payment was made with the bonus in which we admit the wife was interested and her name was in the deed. She acted voluntarily in signing the quit claim and she was not influenced by the husband: see *Canadian Bank of Commerce* v. *Foreman* (1927), 2 D.L.R. 530 at p. 531; *Bank of Montreal* v. *Stuart* (1911), A.C. 120 at p. 137; *Chaplin & Co., Limited* v. *Brammall* (1908), 1 K.B. 233 at p. 237; *Bradley* v. *Imperial Bank* (1926), 3 D.L.R. 38 at p. 52; Snell's Principles of Equity, 20th Ed., 451.

Paterson, replied.

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MACDONALD, C.J.B.C.: This action arises out of a quit-claim deed made by the wife to her husband of her interest in their home. The property was purchased with money received by the husband as a war bonus, he having fought in France and as she puts it herself, the property was bought as a home for herself, her husband and children. A day or two before this transfer was made the two parties to this action quarrelled. He had gone down to California to a firemen's convention, and to see his young daughter who was being taken care of by a sister in California, and had just come back. Whether it was the same day or the next day, I am not sure, but at all events he found on his return that his wife was absent and he waited up for her until half-past two in the morning when she returned and he asked her where she had been and she said, "I don't know." A quarrel, thereupon, took place between them which resulted in his saying to her "If you like the other man better than you like me, you may go," and she finally left. She went to her friend, another French woman, whom she described in her evidence as a "bootlegger." The following day her husband went to the place where she was staying and said that he wanted to take her to a lawyer, for the purpose of obtaining a divorce. They went to their lawyer, Mr. *Nicholson*, who did not know either one of them before, and had never heard of them. It was at that meeting at the

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lawyer's office that the quit-claim deed in question was drawn up. Mr. *Nicholson* tells what took place. It is true that there is a conflict of evidence as to that, the plaintiff saying that Mr. *Nicholson's* evidence was not accurate in all respects, but the learned judge has settled that question for us by finding in favour of the evidence of Mr. *Nicholson* and I cannot do any better than read his evidence on that point. He was asked:

But the conveyance is a conveyance to Heathorn, his heirs and assigns?

THE COURT: That does not make any difference. This witness is perfectly right in telling all the circumstances that led to signing this conveyance.

The witness [Mr. *Nicholson*]: Then I asked them what they intended to do about this property in which the husband and children were living, and she said as far as she was concerned she had left her husband and was living with this other man——

THE COURT: That is all you need say. She knew she was signing away the property? There is no question at all about it, your Honour.

This is the evidence of Mr. *Nicholson* who is speaking—

But not only that, after she said that she was going to sign the property over—I understood she was going to burn her bridges behind her, but I asked Heathorn to go out of the office—she states that this morning, that after Heathorn went out—this quit-claim deed had been dictated, the particulars of the quit-claim deed had been given to my stenographer in Mrs. Heathorn's presence, and when the stenographer prepared the document and brought it in, I asked Mr. Heathorn to go into an outside office, and I said to Mrs. Heathorn—she was there alone—I said, "Now, Mrs. Heathorn—" I took the deed; I said, "This is the deed, the transaction," and I shewed her the deed with her name upon it, Jeanne Heathorn, and her husband's, Herbert Daryl Heathorn, and I said, "By signing this document you transfer the property back to your husband." She said, "That is all right; I know that he is going to look after the children; it is their home. I will transfer the property back to him." I said, "I want you to distinctly understand Mrs. Heathorn that at the present time this property is registered in the name of yourself and your husband," and I said, "Notwithstanding the fact that there are differences between you, you do not have to sign this property back to him if you do not want to." And I referred to this little clause on the back here, for the maker, and I said, "I want it distinctly understood that if you sign that document that it is a purely voluntary act on your part, that you are quite willing to do it." And she then—some tears came in her eyes, I can remember that, and she said, "Well, he is going to look after the children; I have gone with the other man. It is all right," and she signed it.

That is what took place between Mr. *Nicholson* and herself at that time. The quit-claim deed was signed and her half interest in the property was transferred back to Mr. Heathorn and that is the subject-matter of this dispute with the exception of a few

small articles which she said she brought from France with her and for which she asks damages for conversion.

As to the chattels, I think that she abandoned them when she left, when she packed her trunk and left, although she had plenty of room in the trunk to put these articles she said nothing about them and apparently made no demand either then or since. I think as far as those articles are concerned, we can consider them out of the case.

There then remains a question of the legality of the quit-claim deed from herself to her husband. It is claimed that she was taken by surprise when she was asked to go to Mr. *Nicholson's* office. Her husband, she said, told her it was for the purpose of a divorce. They were apparently under the impression that all they need do was to go to some solicitor's office and have papers drawn up and the divorce would be complete. That is the impression she said she had from what her husband told her and she said that she never heard of any transfer of the property until the deed was being prepared.

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Without saying very much about the quality of her evidence, I think where there is conflict between the evidence of the witness, a reputable solicitor, and this woman, considering her acts and the evidence she has given, there should be no difficulty about accepting the evidence of the solicitor.

It was said that she was taken by surprise because she did not expect anything would be done about her property and in fact she said she would not have gone there at all had the property been mentioned by the husband. It was conceded by Miss *Paterson* and very properly, that there was no evidence of any undue influence used by the husband to get her to make the quit-claim deed. In fact it was not mentioned between them, the respondent says herself until they got to the solicitor's office.

Apart from the fact that the evidence I have just read that she understood the transaction perfectly, she knew her marital conduct was indefensible. She knew the property had been purchased for her husband and herself and children and I can easily understand that she did not require any assistance and advice from anyone to ascertain her position. It was not as if she were selling the property, the value of which, perhaps, she did not understand, appreciate, and had been taken advantage

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of by the purchaser. She was giving up this property, which was not very valuable—it cost about $1,500. She was giving it up entirely. She knew exactly what it was and what it was worth and there was no fact that she needed any advice about, except that which Mr. *Nicholson* advised her of, that she was the absolute half owner, registered, and that she need not give up the property unless she wanted to do it and that her act was an entirely voluntary act. That conversation took place in his office in the absence of the husband, the husband having been sent out.

It is rather absurd in this case to say that a husband who was being deserted by his wife and who was being left by her along with her children, was likely to influence her by his advice. He would have no influence with her. She had broken her marriage contract and the relationship of husband and wife in reality did not exist. So that I think the mere fact that she had no independent advice has no place in this case at all. Moreover, Mr. *Nicholson* said, "I understood I was acting for both of them." They both came together and he understood he was acting for both and, therefore, he advised her in the manner in which I have read on the assumption that he was acting for both parties. I think he acted very fairly and very reasonably in the circumstances.

She was not advised to get an independent solicitor probably because Mr. *Nicholson* thought he was acting for both, but the mere fact that she had no independent legal advice is not fatal to the deed that she signed. A good deal has been said in the case about independent legal advice and surprise and that sort of thing, but every case has to be decided upon its own facts. The law is well known that if two persons in a fiduciary relationship, for instance, a lawyer and his client, enter into a transaction whereby the lawyer purchases from his client property, the onus is entirely upon him to shew the fairness of the transaction and that everything necessary to be told the other party has been disclosed and that a fair price has been paid. These people were not in a fiduciary relationship to each other.

In the latter case, the onus is upon the person who asserts undue influence to prove it. Those are two propositions which are well recognized in law and I say nothing further about that.

There was no proof of undue influence upon this lady at all. Nothing was said between them from the time of the quarrel until the time the deed was prepared. In *Bank of Montreal* v. *Stuart* which was referred to, the wife was so loyal to the husband and thought so much of him that she said she did not need any legal advice. She had perfect faith in the husband and stuck to that throughout the trial. In this case, it is the very reverse of that case.

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In the circumstances of this case and on the fact that the learned trial judge who heard the evidence has decided the facts in favour of the respondent, I have no hesitation at all in saying that the appeal should be dismissed.

MARTIN, J.A.: This is a case which presents unusual features, quite unlike any case which has been cited to us from the books in its essentials and it, therefore, in my opinion stands alone and must be considered upon those special circumstances. It is a stronger case, I might say, by way of preface, than any of the other cases cited to us on the subject, and for this reason—that we start here with the admitted fact upon the record, paragraph 2 of the dispute note, that this plaintiff is the registered owner as a tenant in common of this property with the defendant. It is unnecessary to go into the question of how she derived that, though the evidence shews that more than half came to her from a war bonus, or the money which she and her husband got from the war bonus, and was invested in this property.

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Beginning, then, with these tenants in common in possession of this property, unfortunate differences arose with the consequence that when the husband, who is apparently a fire captain, as it is called, in the employ of that department of the City of Vancouver, came back from a trip he found that his wife was out at a late hour in the morning and when she returned a dispute arose between them, with the result that upon that day, that early morning, he ejected her from the house. She says that he "kicked" her out. Whether that is supposed to be figurative or not, I do not know. Anyway, she was forced to leave. She asked him, "Do you mean I must go?" And he said, "Yes." And then she describes in two different places where he "kicked" her out. Of course, he was wrong there, as a matter of law.

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That is something that is not explained and I have yet to learn how one joint tenant in common can lawfully eject the other from her own house. There was a wrong committed for which she was entitled to recover damages. Such being the case, being "kicked" out and dispossessed from her own property, she went and took refuge with a woman who has been described as a "bootlegger." The particular moral *status* of a bootlegger is unknown to me. We will assume it to be the worst. Nevertheless, in justice to the woman, if it is the worst, it ought to be stated that the reason she made the acquaintance of the bootlegger is because her husband took her and introduced her to her, as stated on page 22 of the appeal book and, therefore, she went and stayed with the person of her husband's own selection as one fit to associate with. I think I need say nothing more about her association with that woman than that she was a compatriot of her own, a French woman. Then the next day her husband got in communication with her and told her that he wanted to be divorced from her and said that he would arrange to take her the next day to a lawyer for the purpose of drawing up the documents. She being a French woman, married just after the war in 1919—it was a civil marriage—and more than usually unfamiliar with our legal procedure, was then taken by her husband to a lawyer selected by himself, and for what purpose? Again, I say, let it be understood that everything I am stating is upon uncontradicted evidence in this case. She went to the lawyer for one reason only, as deposed on three different pages in the appeal book, and accepted beyond contradiction because the husband never went in the witness box and denied it, and it is a peculiar thing he did not, because on pages 15, 16, and 25 she deposes that she went for that express purpose, and the learned judge was impressed with that so much so that at page 15 he got her to repeat that, and said, "Wait until I write it down," that is what she told him, and he writes down what she said and this is it: "He told me he was going to take me to a lawyer's office to sign for a divorce." And then the learned judge asked, "You went to the lawyer's office the next day? I went that morning and I signed the divorce." So we have the admitted fact of this woman being taken to the lawyer's office for one purpose only—that divorce proceedings should be accomplished then.

Naturally, it would seem strange to us that she should think that would be the case, but certainly if her husband, a fire chief, should think that was the way it would be done, she at least would be pardoned as an ignorant French woman for not having any more knowledge of the law than he had. They both went there with the idea that that was all that had to be done to obtain the divorce.

But what do we find? We find that the matter of the divorce was brought up, and as the evidence shews they were later divorced, and that part of their idea was carried out, details of which are immaterial. When the matter came up for discussion a very serious question arose to one a wife and mother, one of the greatest importance, and that is found at page 34 in the account given by the solicitor who, of course, it is obvious must be considered as the husband's solicitor, because he was the person selected by him for the purpose of attending to his affairs. Now, this is what was stated to the wife, the mother, in the presence of the solicitor who was there for the purpose, we will assume a proper purpose, of doing the best as he desired to do in the interests of both parties, but note what was said to her:

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"Heathorn said to her," the solicitor says, "'If I ask the Court for a divorce, I will ask for the children, too.'"

And from there the whole interview proceeds upon the assumption that the woman would lose her children. It is most unfortunate the solicitor did not tell her it would not follow at all that because she was divorced she would lose her children and for this particular reason in this case because one of the children, as he said himself, was a child in arms, and I have yet to learn, and I have acted as a judge in divorce matters for eleven years, and I have some knowledge of the procedure (for it was my judgment in *Sheppard* v. *Sheppard* (1908), 13 B.C. 486 that came before the Privy Council that was the means of preserving the divorce jurisdiction in this Province—*Watts* v. *Watts* (1908), A.C. 573, 579) and so I may be pardoned for being somewhat alert when I saw that statement, because thereupon the duty of the solicitor arose to have informed that ignorant woman "that it does not follow that the children will be taken away, on the contrary, I will tell you that at least you will in all probability be able to retain your little one who is in

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your arms." And he could have also told her this, "Now you have been wrongfully dispossessed of your property, and it is your legal right to go back and assume occupation in common with your husband tomorrow, and the question of the disposition of the children and the maintenance of them will be one that will be dealt with by the Court in its exclusive jurisdiction," as decided the other day in a case reported in the last number of the Law Times (*Rex* v. *Middlesex Justices; Ex parte Bond* (1932), 174 L.T. Jo. 325).

What would the position of that woman have been? Had she been informed, she would have known that a *locus pœnitentiæ* was open to her and that the question, vital to her, of her four children would come up, because her counsel would be able to say to the Court, "This woman has repented and wishes to come back to the children. She is the owner of the property, one-half of the home, and to shew the condition of her mind, she is now prepared to make a conveyance of all the property and give up this man and come back to her home": and, be it not forgotten, had she not entirely removed away from the anchor of her home she would be left with her husband and children and would have the family linen which was given by her mother and grandmother to her in France, and other articles in the home. Picture this woman, believing that she had no right to any property because she was thrown out, she thought that she had no place where she could rest her head, but she was entitled to her own property, though it is true that she would not have her husband to consort with her. That she had been deprived of her ownership in that property was a very powerful lever, in the discretion of the Court, for a favourable exercise of that discretion over all infants and little children. Would anybody suggest that any Court would take a little child from a mother's arms had she shewn maternal instinct and consideration and was offering to do what was right? Would anybody suggest that she would lose the child? We have not arrived at that stage—I would rather put it this way—we have not retreated to that stage of civilization. Such being the case, being wrongly informed by the husband, and not corrected by the solicitor, thinking that she had lost her children and thinking that she was lawfully thrown out of her own house beyond redress and that, therefore, she

must go with this man for the only solution presented to her, a divorce, and then for the first time being face to face with this new element which was never suggested to her before when she consented to go to get that divorce, she finally decided, we are told, after weeping, to comply with the solicitor's advice, thus sprung upon her just thirty-six hours after this crisis had arisen. Picture her state of mind and mental distress, because she said in her evidence that she had nothing more: she was stripped of everything. Would it not have been well for the solicitor to have told and warned her, "Be careful what you are doing, if you give away your property, you lose your chief hold upon the situation and will place yourself at the mercy of your paramour, because you have nothing at all. You will have to rely upon him alone."

Further, the cases shew clearly that the whole situation must be disclosed. Was anything said about the value of the property? There is not one word of evidence as to what was its value. It may be $2,000, $5,000 or $10,000. We know nothing about that, and yet we are invited to take the same leap in the dark that was taken below. I refuse to take it. Furthermore, she should have been advised as to her husband's relations with the children. There was not a single statement made that there was the primal legal obligation on her husband to look after the children, and therefore what she was being asked to do was not a matter of legality, but a matter of sympathy, and of morality, to divest herself of her property in favour of her husband who had thrown her out of it: but we are not trying the morality of the wife, we are trying the illegality of the husband's action.

MARTIN, J.A.

Then what are the means of this man? He is a captain in the fire brigade, as the evidence shews, and therefore well able to support, one must think, his children, and yet we find that this woman, who was taken alone by him to have the papers drawn up which would divorce her from him, loses all she has, but not only does he get the divorce but also gets all her property. Really, is it necessary to go further? Can anyone suggest that that was a proper discharge, speaking in all kindliness of the solicitor, of his duties? It is wholly apparent that, though animated by the best intentions, he forgot the three fundamentals I have mentioned. Can

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anybody seriously suggest that that woman had the advice necessary for her to appreciate the situation? Is it not manifestly clear beyond all contradiction that she was precipitated and hurried into this thing and that her emotions were excited in a tender way, as a mother's would be, and that she, in the precipitancy of the moment, made an act of sacrifice? Is it right that a Court should countenance that? Upon further consideration she finds that she has been rushed, so to speak, into that position, which is something the law does not countenance. On the contrary, case after case was cited which shews that that is not the law. We have not here merely a case of surprise, but a case of mistake, on a most vital point.

MARTIN, J.A.

It is unnecessary to consider the question of undue influence, because both of the other grounds are made manifest. The well-known decision in *Evans* v. *Llewellin* (1787), 1 Cox 333, which has been so often quoted, notably by Lord Justice Turner in *Baker* v. *Monk* (1864), 4 De G. J. & S. 388 and oft quoted since, not only without dissent but with continuing approval, shews that such a transaction cannot stand, and in that case, be it noted, the person there who was relieved had got something for his property: he got 200 guineas, but in this case the wife got nothing.

I shall only conclude by referring to two or three decisions upon the subject. One is *Fry* v. *Lane*, a late application of the *Evans* v. *Llewellin* case, found in (1888), 40 Ch. D. 312, by Mr. Justice Kay and the case of *James* v. *Kerr* (1889), in the same volume, by the same judge at p. 460 and the well-known elucidation of the principle in that great work of primary authority Story on Equity, 3rd English Ed., pp. 55, 104 and 105, and I conclude by saying that whatever may be said about the cases in which independent advice is to be sought, that this is above all others, one where that precaution should have been taken, and I adopt the language of Lord Justice Vaughan Williams, speaking in the Court of Appeal in *Chaplin & Co., Limited* v. *Brammall* (1908), 1 K.B. 233 at p. 237, where he said:

It is unfortunate that the plaintiffs did not take care to see that the defendant had independent advice in the matter.

For these reasons I would allow this appeal.

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GALLIHER, J.A.: I do not feel that I could add very much to what has been said by both my brothers who have spoken, no matter which view I took. Therefore, I simply say that under the circumstances of this case, as I read the evidence, and as I understand what took place between Mr. *Nicholson* and the appellant, I do not feel justified in saying that the learned judge went wrong in his interpretation of the law. In my opinion, he came to the right conclusion.

MCPHILLIPS, J.A.: I may say that I am of the same opinion as my learned brother MARTIN and I adopt all he has said, but I have a few things I would like to draw attention to. The guiding principle of the law is that people should not be overreached, improperly induced to do things and act improvidently. The situation may oftentimes be nothing more than the relationship between the parties and nothing need be said at all, therefore it is the atmosphere that you have to look at in connection wtih the relationship between the parties, and here it was husband and wife. In that standard work of authority, Snell's Principles of Equity, 3rd Ed., there is this to be found at p. 461:

Contracts and bargains of improvident character

MCPHILLIPS, J.A.

(and I say this—could there be a contract of a more improvident character than this? As my learned brother MARTIN pointed out, where she let go her joint interest with her husband in the land and house constituting the home)

made by poor and ignorant persons acting without independent advice will be set aside in equity unless the other party satisfies the onus which is on him to shew that the transaction is fair and reasonable.

The onus here was upon the defendant (the husband) to shew that what she (the wife) did was fair and reasonable. I fail to find any evidence to establish that it was fair or reasonable.

In the first place if you look at it apart from any other consideration, she was giving up a valuable property for what? For nothing. I consider that this was an improvident transaction and void—the wife was entitled to independent advice—she was overreached and imposed upon in a most flagrant manner. Take the case of the *Bank of Montreal* v. *Stuart*, a very important case referring to large property interests and huge assets of a lady that were all lost and spirited away—you might say by this lady being very indulgent towards her husband,

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signing promissory notes and other documents, in fact anything he asked her to do, and she was a lady of education and refinement—she said herself she was quite content to do it—nevertheless relief was given by the highest Court in the land. That is the case of the *Bank of Montreal* v. *Stuart,* reported in (1910), 80 L.J., P.C. 75, and without referring to specific parts of the judgment which I might do, I just take the head-note itself:

A married woman living with her husband, at her husband's request and with the knowledge of her husband's solicitor, who was also the solicitor of the appellant bank, in a long series of transactions surrendered to the bank her whole fortune as guarantee for a company of which the solicitor was a director and shareholder, but was himself unwilling to guarantee the liabilities:—*Held,* that the transactions must be set aside; that the solicitor ought to have plainly informed the lady of the whole situation and the risks which she was incurring, and ought to have insisted on her taking independent advice.

MCPHILLIPS, J.A.

The law is not merely for the wealthy. It is for the poor and for the ignorant as well (the wife here is an uneducated French woman with little or no command of English and unfamiliar with our laws), and although this may be looked upon as a small matter, it is just as important as if it were a case involving millions—the law must be applied. The principles of the law are inborn in the British people, equitable principles of fairness, justness, and impartiality. When properly understood there are no injustices occasioned by the law and no favouritism in the application of the law, poor and rich are treated alike.

Could it be said by any method of argument or the calling up of any principle of justice, that this lady has been treated properly under the circumstances? I make no reflection upon the solicitor. Solicitors may make mistakes; but he was the solicitor for the husband and not the solicitor for the wife. This was admittedly a case where the lady ought to have had independent advice. This lady is shewn to be living apart from her husband. It may be she thinks she is justified in living apart and he may be answerable for her living apart from him. I do not know. The sole assets she was possessed of—that were in her possession, she is despoiled of. It is an unfortunate situation. I think that a solicitor of longer experience would have advised her that it was a proper case for this lady to have independent advice, and it was most unfortunate that that course

was not adopted. She was brought to the solicitor's office by her husband and she did not know the solicitor. It is true the solicitor did not know either of these parties and therefore the solicitor himself was handicapped somewhat. It was not as if it had been a client of long standing in whom he had great trust, knowing that his client was an honourable man and would always do that which was right and proper. And when she comes there for the purpose of dealing with the question of a divorce, there is thrust before her this deed which she is prevailed upon to sign, a new matter to the extent of despoiling her of everything she has. Surely our law is not so frail that it is incapable of meeting a situation of this kind? As I look at it—with all respect to contrary opinion—the books are full of cases of this character, and relief has been given where you have circumstances anything approaching this case. What is the use of saying what this lady said at the time, affected as she was by all these circumstances, affected to tears, threatened with the loss of her children, thrown out of her own home, "kicked" out, as the evidence shews, and then brought before a solicitor unknown to her at all and a document is produced to her which she could not understand or comprehend? I have not the slightest doubt she knew nothing whatever about the nature of the document or its effect. Viewing the evidence as my learned brother MARTIN has gone through it, the case in my opinion is one fitting for relief. Equitable principles can be called up in this case. If they could not be called up in this case I know of no case in which they could be called up. What has taken place here is the accomplishment of the gravest injustice and is contrary to the principles of law as I understand them, and it may be that it is thought that this lady is not to be considered very much, living apart from her husband with another man—that cannot be decisive of the matter. I will only read what a distinguished judge, Lord Atkinson, sitting in the Privy Council, said in the case of *Toronto Electric Light Company, Limited* v. *Toronto Corporation* (1917), A.C. 84 at pp. 99-100. Lord Atkinson said this:

MCPHILLIPS, J.A.

> With the hardships (if any) or the moralities of the case this Board has no concern. It deals with the legal rights of the parties and those alone, and, having regard solely to them, their Lordships are

of a certain opinion. I, in strict compliance with that obliga-

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tion which is upon me, and dealing solely with this lady's legal rights, am of the opinion—with great respect to the learned judge in the Court below, and any contrary opinions here—that the transaction cannot stand. I would therefore allow the appeal and set aside the judgment of the Court below.

MACDONALD, J.A.: There may be room for legitimate differences of opinion on the facts of this case. I think that is largely due to the fact that the defendant was not called as a witness. He was not called because the trial judge stated it was not necessary to do so. However, that omission does not prevent us from appreciating the true facts as gathered from all the evidence. The case is illustrative of how differently the same facts affect different minds, because for my part the conduct of the appellant does not secure my sympathetic support at all. We should not give an exaggerated importance to evidence which, while proper to consider, is really collateral to the main issue, *e.g.*, the question of the custody of the children and the advisability on the solicitor's part of discussing it with her. We must deal with the matter solely from its legal aspect.

MACDONALD, J.A.

The onus was on her to establish undue influence, but far from satisfying it, the evidence of Mr. *Nicholson*, which was accepted, shews that she had no doubt in her mind as to the propriety of making the transfer. Her statements to him do not indicate doubt or hesitation, although the situation was explained to her with meticulous care before the document was executed. In fact, I think, she had what was almost equivalent to independent advice. She no doubt felt that if she was going to withdraw her care from the family, leaving the children behind her, one very young, and in great need of her personal attention, leaving them to her husband while she consorted with another man who was apparently willing to support her, that it was only right that the home should remain intact and afford a shelter for the family she, in effect, was deserting. She does not allege that her husband mistreated her hitherto and that being so there was all the more reason why she should feel that it was her duty to assist in preserving the home for the family. She acted fairly at the time and should have adhered to her original position. Her evidence as detailed to *Nicholson* does

not shew that she was surprised or taken off her guard; in fact she appeared to take the initiative in insisting, or certainly in clearly stating that this property should be transferred to serve a purpose which she specified. I am inclined to draw the inference from her conduct knowing that the question would sooner or later arise that she gave thought to this matter before, but I do not rest on that. I simply find on all the facts that the trial judge was justified in finding that it was not shewn that she was taken by surprise or that any undue influence was exercised.

I, therefore, would dismiss the appeal.

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

Solicitors for appellant: *Hamilton Read & Paterson.*
Solicitors for respondent: *Russell, Nicholson & Company.*

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WHITEHEAD v. DISTRICT OF NORTH VANCOUVER

WHITEHEAD v. THE CORPORATION OF THE DISTRICT OF NORTH VANCOUVER.

Municipal law—Municipal debentures—Failure to pay interest—Application to appoint commissioner—Ex debito justitiæ—R.S.B.C. 1924, Cap. 179; B.C. Stats. 1932, Cap. 39, Sec. 19.

The plaintiff, who was the owner of a $1,000 debenture of the defendant municipality to which were attached $30 coupons payable half-yearly for interest, presented the $30 coupon thus attached which was payable on the 1st of September, 1932, at the bank where it was payable on the 20th of September, 1932, and payment thereof was refused. Proceeding by petition under Part XXIII. of the Municipal Act, he obtained an order authorizing the appointment of a commissioner for the Corporation of the District of North Vancouver.

Held, on appeal, affirming the order of MCDONALD, J. (MCPHILLIPS, J.A. dissenting), that upon its being shewn that there has been failure to provide, which means failure to pay, the learned judge below has no discretion in the matter, but must *ex debito justitiæ* make the order authorizing the appointment of a commissioner.

Statement

APPEAL by defendant from the order of MCDONALD, J. of the 17th of September, 1932, authorizing the appointment of a commissioner for the Municipality of the District of North Vancouver, pursuant to Part XXIII. of the Municipal Act, R.S.B.C. 1924, Cap. 179 and amending Acts. The petitioner herein, the owner of a $1,000 debenture of the District of North Vancouver to which is attached, *inter alia*, a coupon for $30 payable to bearer at the Bank of Hamilton in North Vancouver on the 1st of September, 1932, presented the coupon at the Bank of Commerce (said bank having in the meantime taken over and acquired all the assets of the Bank of Hamilton) for payment on the 20th of September, 1932, and on the following day presented said coupon for payment to the clerk of the Corporation of the District of North Vancouver at the Municipal Hall in North Vancouver, and on both occasions payment of the money due under the said coupon was refused. The petitioner then applied for an order authorizing the appointment of a commissioner for the Corporation under said Act.

The appeal was argued at Vancouver on the 12th of December, 1932, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

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Argument

Maitland, K.C., for appellant: Section 19 of the 1932 amendment to the Municipal Act added sections 467 to 484 to Cap. 179 of R.S.B.C. 1924, as Part XXIII. This Part deals with the appointment of a commissioner and his powers. This application was made under section 467. We have taken all the steps that we could and it is the intention of the Legislature that if we do something that is not right, then and only then the section should be put into operation: see *Spillers & Bakers, Limited* v. *Great Western Railway* (1911), 1 K.B. 386.

Bull, K.C., for respondent: As to section 467, the words "failure to provide" are synonymous with "failure to pay." When one is holding a debenture that is payable he has a right to proceed, and the judge must make the order. There is no discretion: see Maxwell on Statutes, 7th Ed., 213; Craies' Statute Law, 3rd Ed., 253; *Macdougall* v. *Paterson* (1851), 11 C.B. 755; *Shannon* v. *Corporation of Point Grey,* 30 B.C. 136; (1921), 3 W.W.R. 442; and on appeal, 63 S.C.R. 557; (1922) 2 W.W.R. 625.

Maitland, in reply: There is failure on their part to shew that the municipality had not done everything it could do under the statute. There may be many excuses for non-payment.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The appeal, I think, should be dismissed. I think it is really not a question of discretion. I agree with Mr. *Bull* that "provide" in this statute means payment, and as it has not been provided by payment, of course, the matter was open to the Court below to make the order. The rule, as I recollect it, and I cannot recollect it so as to be able to state it, is where a person is entitled to something as of right, and the Court is given power by the words "may" or "shall," particularly by the use of the word "shall"—it means he must do it if the person entitled to relief is entitled to it by reason of legal right; if, on the other hand, he is not entitled to a declaration, the Court then has discretion. Under the rule the Court is given power to make an order on failure to provide. The contract between the parties provides he is to be paid; in other words, he has a right to be paid; and the Court, when it has no discretion but to enforce the right, must enforce it. On the other hand, a matter which did not depend upon a right, he

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might exercise a discretion. In this case it is a question of right. He had a right to payment, and there can not be any question of discretion.

I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: In my opinion the order is the proper one we should make, and that is supported by the decision of my brother MCPHILLIPS and myself in the position which we took in *Shannon* v. *Corporation of Point Grey* (1921), [30 B.C. 136]; 3 W.W.R. 442, and my judgment by some oversight was not included in the first report, but it will be found at p. 549, and the view of my learned brother and myself was affirmed by the Supreme Court of Canada in (1922), [63 S.C.R. 557]; 2 W.W.R. 625, and applying the principle underlying that case, I am of opinion that once it is shewn that there has been a failure to provide, which we have indicated means failure to pay, then the learned judge must *ex debito justitiæ* make the order authorizing the appointment of a commissioner, and there is no discretion in the matter except that which is expressly conferred upon His Honour the Lieutenant-Governor-in-Council after the learned judge makes such an appointment. Therefore, the appeal, in my opinion, should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I may say that I am clear in my mind on this point, with great respect to the contrary opinions of my learned brothers. The amending section, 19, Cap. 39 of the statutes of 1932, inserted in the Municipal Act, Cap. 179, R.S.B.C. 1924, has the words

> 467. In case a municipality for any reason fails to provide for the payment of either the principal money of or the interest on any debentures issued by the municipality, or guaranteed by the municipality when the payment is due, it shall be lawful for any creditor or any elector of the municipality to apply to a judge of the Supreme Court for an order authorizing the appointment of a commissioner for the municipality to carry out the duties and functions provided for in this Part. . . .

Now, is it not clear to demonstration that it is not saying if there is default in payment when it says, to appoint "a commissioner for the municipality to carry out the duties and functions provided for in this Part?" That is, the commissioner

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coming in will do those things which the municipality has failed to do—failing to provide—and, as Mr. *Maitland* submitted, what could the commissioner do when he comes in other than to comply with the statute, and when we have compliance where can we find the failure to provide? The Legislature did not use the words "failure to provide" capriciously or inadvisedly or without thought. No, the Legislature, in conformity with the terminology of the principal Act, used those words, and we should pay attention to the definition that the Legislature plainly indicated should be their meaning.

In section 231 of R.S.B.C. 1924, Cap. 179, we find the principal Act reads:

231 (1.) The Council shall, on or before the fifteenth day of May in every year, subject to the provisions and restrictions in this Act contained, pass a by-law or by-laws for imposing upon all land and improvements, according to the assessed value thereof, a rate or rates as follows:—

(a.) To provide for the amounts required under by-laws of the municipality to meet payments of interest and principal of debts incurred by the municipality, other than debts incurred for school purposes:

(b.) To provide for moneys required for school purposes for the year, being the total of the following amounts:— . . .

(c.) To provide for all other lawful purposes of the municipality a rate which in the years 1932 and 1933 shall not exceed thirty-five mills on the dollar and in succeeding years shall not exceed twenty mills on the dollar.

MCPHILLIPS, J.A.

Now, the municipality, as I have said during the argument, is a creature of the statute. It is absolutely devoid of any power other than that conferred by statute, and it may only do those things which the statute authorizes and directs it to do, and the Legislature when it passed this legislation did not purport to clothe the commissioner with any different powers than the municipality. So that the crux of this matter necessarily must be the demonstration before a judge of the Supreme Court that the municipality has failed to utilize its statutory powers in making provision for this indebtedness which is claimed to be overdue.

The proceedings do not shew any such default. In truth, the proceedings shew that there was compliance with all the requirements of the statute on the part of the municipality. I must say that the submission made by Mr. *Bull*, that when the Legislature uses this language, "fails to provide for the payment of either principal money of or the interest on any debentures," really means "fails to pay the money" it is a submission with

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which I cannot agree. The municipality can only get in money by the utilization of the statutory powers and collection of taxes. The municipality having done this, it has done all it could do in the premises.

Failure to pay is not a default in my opinion, and covered by the legislation the language does not convey that meaning, and it is not in the province of the Court to legislate. We have no power in that respect. Our duty does not extend further than the interpretation of the language of Parliament, and that interpretation must be in conformity with the genus of the municipal law, always remembering that the municipality can only do those things which Parliament has authorized it to do. If it fails to do those things which Parliament authorized it to do, then undoubtedly the Legislature has said this procedure may be adopted. But I find no default on the part of the municipality whatever; and I might say, just by the way, it would certainly be a very inconvenient, in fact a revolutionary, thing that every municipality in this Province should be subject to the peril of having an application of this kind made if it is found in default in the payment of a dollar. It would affront one to think that that really was the intention of the Legislature. I do not—with respect to all contrary opinion—take that view. With respect to the *Shannon* case referred to in the judgment of my learned brother MARTIN I cannot—with the greatest respect to my learned brothers—agree that the principle of that case is determinative of the present case. I would allow the appeal and set aside the order made below.

MACDONALD, J.A.

MACDONALD, J.A.: I agree that where authority is conferred by this Act to make an order on proof of certain facts, it is imperative that the order should be made. Discretion, however, is vested in the Lieutenant-Governor-in-Council, and I have no doubt that body, after investigation with the assistance possibly of the inspector of municipalities, will be in a position to say whether or not this order should be implemented.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Grant & McDougall.*

Solicitors for respondent: *Walsh, Bull, Housser & Tupper.*

MacPHERSON v. MacPHERSON.

FISHER, J. (In Chambers)

1932

Dec. 16.

MacPherson v. MacPherson

Husband and wife—Decree for alimony—Non-payment—Attachment proceedings do not lie.

An order for payment of alimony is an order for the payment of money and enforceable under Divorce Rule 79 (*a*); it is not enforceable by attachment for non-compliance therewith.

Statement

MOTION for an order that the respondent, the husband, be pronounced contumacious and in contempt for non-compliance with an order to pay alimony, and that writs of attachment do issue. The facts are set out in the reasons for judgment. Heard by FISHER, J. in Chambers at Victoria on the 12th and 13th of December, 1932.

O'Halloran, for petitioner.
Lowe, for respondent.

16th December, 1932.

Judgment

FISHER, J.: This is an application by petitioner by way of motion for a writ of attachment against the respondent for contempt for non-compliance with an order made in this cause on the 25th day of April, 1932, the relevant portions of which read as follows:

IT IS ORDERED that the said respondent John Bethune MacPherson, otherwise known as John Duncan MacPherson, out of his present income and until further order of this Court, pay or cause to be paid to the petitioner Marie Adele MacPherson alimony at and after the rate of $30 per month, first of such payments to be made on or before the 1st day of May, 1932, and the said payments to be made on the 1st days of each and every month until further order.

AND IT IS FURTHER ORDERED that the alimony hereinbefore ordered to be paid by the respondent to the petitioner be continued in the action for divorce commenced by the respondent against the petitioner by petition dated the 21st day of April, 1932, and serve as *interim* alimony in the said cause without further order.

Counsel on behalf of the respondent raises, *inter alia*, the preliminary objection that the material before the Court does not establish that the petitioner has complied with the provisions of Divorce Rule 79 (*a*) reading as follows:

79. (*a*.) In default of payment to any person of any sum of money at the time appointed by any order of a judge for the payment thereof, a writ

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of *fieri facias* shall be sealed and issued as of course in the registry upon an affidavit of service of the order and of non-payment. The provisions of the Execution Act of the Province of British Columbia shall apply.

Counsel on behalf of respondent cites *In re Prudential Life Insurance Co.* (1919), 27 B.C. 402, where the Court held on an application for an order for the examination of a judgment debtor that writ of execution must issue and a return of *nulla bona* be made before applying for order. In reply counsel for petitioner contends that the order in question herein is not an order for the payment of money within the said rule or a final judgment and that the said order could not be enforced by a writ of *fieri facias* or under and pursuant to the provisions of the Execution Act but that a writ of attachment may issue forthwith notwithstanding the provisions of the said Execution Act, section 5 whereof provides that no person shall be taken in execution upon any judgment whatsoever recovered against him as a debtor at the suit of any other person except in accordance with and pursuant to the Arrest and Imprisonment for Debt Act which provides that under certain circumstances and not otherwise an order for committal of a debtor may be made. On the other hand counsel on behalf of the respondent contends that the said order is an order for payment of money and enforceable accordingly.

Judgment

It seems to me, therefore, that the real issue I have to determine here is whether or not the order sought to be enforced is an order for payment of money which may be enforced pursuant to the provisions of rule 79, or is an order requiring a person to do an act other than the payment of money and enforceable by attachment immediately.

Counsel on behalf of the petitioner seems to suggest a difference between *interim* alimony and permanent alimony orders with respect to attachment but it may be noted that Phillips in his book on the Practice of the Divorce Division apparently recognizes no such difference between orders for alimony pending suits and those for permanent alimony and while dealing with the subject of "Enforcement of Orders for Alimony pending Suit, Permanent Alimony, Permanent Maintenance, Periodical Payments" says on p. 202:

Any of the usual modes of execution are available for the recovery of sums due under any of these orders, but in no circumstances may a writ of attachment issue.

It may be of interest to observe that the corresponding English rule 79 (*a*) is a little different as it reads as follows:

In default of payment to any person of any sum of money at the time appointed by any order of the Court for the payment thereof, a writ of *fieri facias*, sequestration or *elegit* shall be sealed and issued as of course in the registry upon an affidavit of service of the order and of non-payment.

It may also be noted, however, that the English Divorce rules 77 and 78 with regard to attachment and committal are practically the same and that Browne & Latey's book on Divorce, 11th Ed., referring to such rules and the subject of attachment, at p. 726, says in part as follows:

Application can be made to the Court . . . for a writ of attachment for contempt of Court in not obeying any direct order of the Court. . . .

A writ may issue in respect of any disobedience or non-compliance with an order of the Court, other than orders for payment of costs, or for alimony, maintenance, periodical payments, or damages. Among the more usual cases in which such writs issue are the following:

(1) Discovery. (2) Custody. (3) Security for costs (where a bond may be given). But where a wife's answer is a plain denial, her proper course is to apply to have the petition dismissed. (4) Answer to alimony petition. (5) Attendance for cross-examination.

And at p. 265 under the heading of "Attachment for Contempt" says:

Judgment

Non-compliance with an order of the Court is contempt of Court which may be punished by committal to prison, except where the order is for payment of costs, damages, or maintenance or alimony or periodical payments.

Counsel for the petitioner has referred to *Bailey* v. *Bailey* (1884), 13 Q.B.D. 855 and *Robins* v. *Robins* (1907), 2 K.B. 13, but it will be found that both cases are noted by Phillips while still laying down the principle that attachment does not lie for non-payment of a sum of money and they would seem to be authority simply for the proposition that no action lay in the King's Bench Division to recover arrears of either *interim* or permanent alimony payable under an order of the Probate and Divorce Division such an order not being a final and conclusive judgment upon which an action of debt to enforce it might be maintained. The fact that the Court has power to vary an order for alimony may make the word "debt" inapplicable to money due under such an order on the ground that the order is not final but remains subject to the control of the Court. In this connection reference might be made to *Linton* v. *Linton* (1885), 15 Q.B.D. 239, where at p. 246 Bowen, L.J., referring to section 52 in the English Act (corresponding to section 36 of

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our Act referred to by counsel for the petitioner) says in part as follows:

It appears to me that arrears of alimony are, within the meaning of s. 5 of the Debtors Act, 1869, "a debt due in pursuance of an order or judgment of a competent Court." Before that the payment of alimony was enforced by proceedings for attachment under the provisions of s. 52 of the Act 20 & 21 Vict. c. 85. Since the Debtors Act was passed the proceeding by attachment has fallen into disuse, and, unless the payment of alimony can be enforced under s. 5 of the Debtors Act, there seems to be no way of enforcing it. I think it is not too wide a construction to say that arrears of alimony are a debt within s. 5, though they do not constitute a debt at law.

Reference might also be made to the decision of W. A. MACDONALD, J. in *Francis* v. *Wilkerson* (1917), 3 W.W.R. 920, where he held that while a decision in favour of a wife's claim for alimony granted in proceedings under the Divorce and Matrimonial Causes Act may be termed a "decree" it is, nevertheless, a "judgment" of the Supreme Court and in the same position as any other judgment of that Court; and also to the case of *Royal Bank of Canada* v. *McLennan* (1918), 25 B.C. 183, where at p. 189 MACDONALD, C.J.A., says in part as follows:

We have section 2 of the Arrest and Imprisonment for Debt Act. That section provides that "no person shall be detained, arrested, or held to bail for non-payment of money except as hereinafter in this Act is, or in any other Act of the Legislative Assembly may be, provided."

In simple language, that means that no person shall be arrested for non-payment of money unless in the Act itself, or in some other Act, it is provided that he may be arrested for non-payment of money.

It may be noted that said section 2 also provides that:

Process of contempt for mere non-payment of any sum of money, or for mere non-payment of any costs payable under any judgment, decree, or order, is abolished; . . .

Referring to said section MCPHILLIPS, J.A., in the *Royal Bank* case, *supra,* at pp. 191-2 says in part as follows:

We have an organic statute which is the declared policy of Parliament, that no one shall be affected in his liberty and imprisoned for contempt for non-payment of money. . . . In this particular case it cannot be said to be other than an order for payment of money. That is the order that has been made. Now if it had been any other order, *i.e.*, within the zone of a contumacious act with respect to an order of the Court, the inherent power of the Court is exercisable to see that its orders are always obeyed. That, of course, the Court is very jealous of, and rightly so; otherwise Courts would be brought into contempt. But in this particular case it is an order for the payment of money, and as I have indicated, where it is an order for the payment of money, there must be some express legislation

fulfilling the requirement as to consequences of disobedience. To indicate that even the payment of the money would not purge the contempt, if it were a contempt other than the non-payment of money, I refer to the case of *Jones* v. *Macdonald* (1893), 15 Pr. 345. There Mr. Justice Rose pointed out (p. 346), "the imprisonment was not in any sense in execution." But there it was a contumacious act, the refusal to answer questions; and further said: "'The payment of the debt and costs would not entitle the defendant to his discharge; this was decided as long ago as (1860), 19 U.C.Q.B. in *Henderson* v. *Dickson*, p. 592; and at the expiry of the three months the defendant would be entitled to be discharged without payment of any portion of the debt and costs." So that with respect to orders other than those within the purview of sec. 2 of the Act, the powers of the Court relative to contempt will remain. It would appear, though, that where a judge makes an order for the payment of money, nothing can follow on that order in the way of contempt for non-compliance with it unless Parliament has undertaken to say what shall be the responsibility and what shall follow.

I have not overlooked section 20 of the Arrest and Imprisonment for Debt Act, but I do not see that that section assists the petitioner in view of the authorities cited above unless I am prepared to hold that the order herein is not an order for the payment of money.

Judgment

Counsel on behalf of the petitioner has called my attention to the fact that the order herein as aforesaid contains the words "out of his present income and until further order" and I have carefully considered the effect of same. I note that the registrar's order of the 8th day of March, 1932 (Exhibit A to the affidavit of petitioner), contains the same words but also provides for a proportionate reduction of the monthly payments in the event of the respondent receiving a reduction in his present salary.

It should be noted that such order of the registrar also ordered the payment as permanent alimony and it would appear that by the order now before me it was further ordered that the alimony thereinbefore ordered should serve as *interim* alimony in the divorce action. I have also to add that my first impression was that the order was somewhat different from the usual order but I find that Rayden on Divorce, 2nd Ed., at p. 541 gives a form of order for permanent alimony containing exactly the same words, *viz.*, "out of his present income and until further order," and yet on p. 208 of the same book we have the following as part of note (*a*):

. . . non-compliance with orders of the Divorce Division for payment

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of money, *e.g.*, costs or alimony is still contempt of Court, though no longer punishable by attachment, and the person so in contempt may be debarred from taking a further step in the litigation: *Leavis* v. *Leavis* (1921), P. 299.

It is quite clear that even an order for permanent alimony may be varied as to the amount from time to time according to the circumstances—see *Linton* v. *Linton, supra.* I must hold, therefore, that the order in question herein as set out aforesaid, though it may be varied in case of a change of income, is nevertheless an order for the payment of money and enforceable as such under rule 79 referred to, and not as an order requiring a person to do an act other than the payment of money.

Judgment

I think the authorities already cited shew conclusively that the order which it is sought to enforce herein cannot be enforced by attachment but reference might also be made to the case of *Jenns* v. *Jenns* (1921), 3 W.W.R. 226, where it was held that a decree for alimony and maintenance made by a British Columbia Court cannot be enforced by attachment or committal, even though the respondent be in contempt.

I have not overlooked the fact that since the *Royal Bank of Canada* and *Jenns* decisions, *supra,* our Supreme Court Act was amended by section 2 of Cap. 16 of the statutes of 1922, but that does not affect the question now before me or make the order herein for the payment of money by way of alimony enforceable by attachment or otherwise than in accordance with the provisions of the Divorce Rules or the express legislation applicable in case of disobedience.

The motion is therefore dismissed.

Motion dismissed.

EVANS v. NYLAND.

MCDONALD, J.

1933

Jan. 10.

EVANS
v.
NYLAND

Vendor and purchaser—Sale of land—Mutual mistake as to boundary adjoining a highway—House built by purchaser on wrong property—Rectification—Execution of conveyance—Effect of.

The defendant, who owned two adjoining lots in the Lillooet District, sold the west lot to the plaintiff and conveyed the same to him by deed in fee simple. At the time of the sale the defendant, believing that a wagon road represented the eastern boundary of the lot sold, so advised the purchaser, and after the sale the plaintiff built a house adjoining the wagon road on its west side. Subsequently it was found that the line dividing the lots was west of the wagon road and that there was a strip of the eastern lot lying between the wagon road and the eastern boundary of the west lot, upon which the plaintiff had built his house. In an action that the defendant convey to the plaintiff that portion of the eastern lot that lies west of the wagon road:—

Held, that in a case of mutual mistake such as this, there should be rectification and the defendant was ordered to convey to the plaintiff that portion of the eastern lot which lies west of the wagon road.

Statement

ACTION to rectify a conveyance of land owing to a mutual mistake by vendor and purchaser as to the ground sold. The facts are set out in the reasons for judgment. Tried by McDONALD, J. at Vancouver on the 24th of October, 1932.

Castillou, for plaintiff.
E. J. Grant, for defendant.

10th January, 1933.

Judgment

McDONALD, J.: The defendant, being the owner of lot 1577, group 1, Lillooet District, and also of lot 1252 lying immediately to the east thereof, in 1925 sold lot 1577 to the plaintiff and, in 1927, conveyed the same to him by deed in fee simple. When the sale was made, the defendant, by her husband acting for her, believing the wagon road lying a short distance east of the easterly boundary of lot 1577 to mark said easterly boundary of lot 1577, so represented the boundary line. Both parties in fact believed that the roadway did mark the boundary line and the plaintiff, after his purchase, proceeded to erect a house upon that portion of lot 1252 which actually lay to the west of said wagon road. As stated at the trial, I am satisfied that both

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parties acted under a mistake. It is I think common ground that lot 1577 is not of any substantial value without the strip of lot 1252 which lies between lot 1577 and the roadway.

The plaintiff now asks that the defendant convey to him that portion of lot 1252 which lies west of the wagon road and it is contended that the conveyance having been already executed cannot now be rectified. This does not seem to be so. I can see no distinction between this case and *Craddock Bros. Ld.* v. *Hunt* (1922), 2 Ch. 809—confirmed (1923), 2 Ch. 136—where it was held that in the case of a mutual mistake, such as this, rectification could be had and that even though the vendor was not, as here, the owner of the land in question at the time of the litigation. An order will accordingly go directing the defendant to convey to the plaintiff that portion of lot 1252, group 1, Lillooet District, which lies west of the wagon road in question.

Judgment

If a survey is required for the purpose of such conveyance I think the plaintiff must pay the cost of same as this litigation would have been avoided had he required a survey prior to accepting his conveyance.

The plaintiff will have the costs of the action including the costs of the interlocutory motion for an injunction.

Judgment for plaintiff.

HYDE AND HYDE v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED.

MACDONALD, J.

1933

Jan. 12.

HYDE v. BRITISH COLUMBIA ELECTRIC RY. CO.

Negligence—Street-car—Stopped with jerk—Passenger thrown down—Burden of proof—Pleadings—Trend of trial—Effect of.

Although particulars have been applied for and supplied in a negligence action, where the trial broadens and evidence is adduced and argument submitted with respect to other acts of negligence, the Court should be governed by the trend of the trial in reaching a decision.

Scott v. *Fernie* (1904), 11 B.C. 91, applied.

The mere happening of a jerk when the street-car was about to stop does not of itself bespeak negligence on the part of the motorman or the company, and a passenger who is thrown down in the vestibule when about to alight, must, in order to succeed in an action for damages, prove such negligence by affirmative evidence.

Statement

ACTION for damages owing to the negligence of a motorman of the defendant company in suddenly stopping a street-car so as to throw the plaintiff, Kate Hyde, to the floor of the car, and injuring her. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at New Westminster on the 21st of December, 1932.

J. E. Bird, for plaintiffs.

J. W. deB. Farris, K.C., for defendant.

12th January, 1933.

Judgment

MACDONALD, J.: Plaintiff, Kate Hyde, on the 17th of August, 1932, while a passenger on one of defendant's street-cars in the City of New Westminster, as she was about to alight from such car, fell while in the vestibule and was severely injured. She alleged in her statement of claim that the accident, and consequent injuries, were due to the negligence of the defendant's motorman, in allowing the car to run backwards down the grade "and be then suddenly brought to an abrupt stop," throwing her with great force to the floor of the car. Although this was a specific act of negligence, the defendant sought further particulars and the plaintiffs, in satisfying the demand therefor, enlarged the negligence on part of the defendant, so as to include an allegation that the brakes on the car were defective and

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repeated at greater length and with more detail the facts surrounding the occurrence, particularly as to the car running backwards when the motorman-conductor applied the brakes in a "sudden and harsh manner" with the result already mentioned.

While the plaintiffs were thus confined by their particulars, still the trial broadened and evidence was adduced and argument submitted with respect to other acts of negligence. I think I should be governed by the trend of the trial. *Vide Scott* v. *Fernie* (1904), 11 B.C. 91 and cases there cited.

If the plaintiffs were restricted to such particulars of negligence then they have not satisfied the burden thus assumed. There was no evidence of defective brakes being used on the street-car. It was only by inference drawn from a statement, as to what plaintiff, Kate Hyde, observed, as she was proceeding to alight, that any submission could be presented that the car was travelling backwards when brought to a standstill. There was evidence which I accept to the contrary.

Judgment

The evidence was, however, principally directed towards determining whether the motorman, who was also the conductor, improperly, in the sense of being negligent, stopped the car and caused the accident. This was really the issue between the parties during the trial and was featured during the argument which ensued. It was contended by plaintiffs that, in view of the circumstances, the maxim of *res ipsa loquitur* should be applied, as against the defendant, it being submitted that the case of *Vivian* v. *B.C. Electric Ry. Co.* (1930), 42 B.C. 423 lent support to their contention. The defendant's counsel argued that the facts were so dissimilar, as to destroy any assistance which might otherwise be afforded to the plaintiffs. Such counsel has also, since judgment was reserved, drawn my attention to certain cases and thus inferentially argued that the principle cannot be invoked, where a plaintiff has pleaded and attempted to prove specific negligence on the part of a defendant. There is no doubt that *Penman* v. *Winnipeg Electric R. Co.* (1925), 1 D.L.R 497, following *Curry* v. *Sandwich, Windsor and Amherstburg R. Co.* (1914), 18 D.L.R. 685 supports this proposition.

Notwithstanding the fact that the plaintiffs so pleaded specific negligence, with the result which I have stated, I think it well

to consider the question of liability, as it was presented during that trial and oral argument.

Plaintiffs' counsel referred to *Angus* v. *London Tilbury and Southend Railway Co.* (1906), 22 T.L.R. 222 at p. 223 upon which the judgment of the majority of the Court of Appeal in *Vivian* v. *B.C. Electric Ry. Co., supra,* was based.

That case was commented on in Beven on Negligence, 4th Ed., Vol. I., p. 157 as follows. The judgment in that case

> reaches a conclusion so directly in opposition to insuperable authority that it might be passed unnoticed save that it is a judicial utterance of Lord Loreburn, C., giving the judgment of the Court of Appeal.

While at first blush this case might appear to afford assistance to the plaintiff, still each case, when treated as an authority, must depend upon its own facts and they (as well as in the *Vivian* case) are so different to the present one, as to be quite distinguishable. The train was suddenly and unexpectedly stopped and Angus was thrown off his seat and injured. A *prima facie* case of negligence was thus established and the jury found for the plaintiff. The Court of Appeal declined to interfere. Lord Loreburn in his judgment said in part:

Judgment

> The jury came to the conclusion that the railway company had not discharged the burden of shewing that they were blameless in the matter.

Here Mrs. Hyde was not in her seat in the street-car but standing in the vestibule preparatory to alighting. I accept the evidence of Vera McLean and G. P. Lewis that the stopping of the car caused Mrs. Hyde to fall. These two independent eyewitnesses do not differ materially as to what occurred at the time. Herbert Bell, the motorman, had received a signal to stop at the corner in question. While this required skill on his part, on account of the heavy twelve per cent. grade, at that point, still he had done so hundreds of times. In ascending he had to shut off the power of his car and then before momentum had ceased and gravity prevailed, downhill, to apply the brakes and bring his car to a standstill. This was bound to produce a slight jolt or jar. He says there was nothing unusual about the stop on the occasion. Miss McLean and Mr. Lewis corroborate him in this respect, while other passengers were not so observant, or had less opportunity, and, except as to Mrs. Eliza Olson, gave what may be termed negative evidence. Support was rendered to some extent to the defendant's position however, by a submission

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that if anything had happened in the stopping of the car these witnesses would likely have noticed it. An accident having occurred their minds would be directed to the probable cause and the prior events.

Then Mrs. Olson, the only witness called by Mrs. Hyde to give an account of the accident, intended to alight at the same corner. She stated that she rose from her seat before the car stopped and stood in the front, holding on to one of the iron poles or bars. She did not see Mrs. Hyde fall but was ready to step down the steps when she glanced back and saw Mrs. Hyde lying on the floor. She heard Mrs. Hyde state, after they were both off the car, that her foot was hurt. While she was still hanging on to the bar or pole and her back was turned to the front of the car, it "jerked when it stopped." She stated that the effect of the jerk was "I would have fall if I don't hold on." This was her opinion and she described the jar later on as "just the car gives a jerk, you know; a kind of a sudden stop or jerk." Mrs. Olson's evidence has given me thought and consideration in this connection. If it were coupled with her statement that the car was, as it were slipping down hill, at the time, as alleged by plaintiffs, in their particulars of negligence, then it would lend them support in establishing liability. Her recollection however was that the car was going forward up the hill at the time and then "it stopped and kind of jerked back like." Speaking generally, I should not consider that there was an unusual movement in the stopping of a street-car. I think that the evidence of the witnesses for the defence outweighs any presumption to be drawn from the occurrence, as well as the evidence of Mrs. Hyde and Mrs. Olson. Mrs. Hyde was accustomed to street-cars and should have been aware that, in applying the brakes and bringing the car to a stop, that, especially on a steep grade, there was bound to be some jerk or jar at the last moment, when the brakes became fully effective and the car came to a standstill. This is one of the ordinary incidents of travelling on street-cars. Mrs. Hyde lost her balance, tripped and fell, causing her injuries. Bell, the motorman, should not be blamed for this occurrence. The plaintiffs have failed to establish negligence on the part of the defendant. In so deciding I might, in conclusion, refer to a portion of the judgment of Chis-

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holm, J. (now Chief Justice) in *Whitford* v. *Nova Scotia Tramways Etc. Co. Ltd.* (1917), 52 N.S.R. 105 at p. 111 as follows:

> The mere happening of the jerk which threw the plaintiff off the lower step of the platform while the car was still in motion did not of itself bespeak negligence of the company. It was necessary therefore for the plaintiff to prove such negligence by affirming evidence, and that she did not do.

Mrs. Hyde was not even on the steps, with no lateral support, when she lost her balance and fell.

The action is dismissed with costs.

Action dismissed.

BURRARD DRYDOCK COMPANY LIMITED v. BANK OF TORONTO AND VULCAN ENGINEERING WORKS LIMITED.

FISHER, J.

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Jan. 16.

BURRARD DRYDOCK CO. LTD. v. BANK OF TORONTO

Chose in action—Book accounts—Assignment of—Equities to which subject—Registration of assignment—Effect of—Registration under Companies Act—Effect of—R.S.B.C. 1924, Cap. 16—B.C. Stats. 1929, Cap. 11, Secs. 133 (8) and 138.

Registration of an assignment of book accounts under the Assignment of Book Accounts Act confers no greater rights upon the assignee than he had by virtue of the assignment; the effect of registration is to preserve those rights as against creditors, subsequent purchasers or mortgagees. The fact that the assignment is also registered under the Companies Act has no effect as against existing superior equities.

Statement

ISSUE between the plaintiff company and the defendant bank, the plaintiff claiming the right to set off part of its indebtedness to the Vulcan Engineering Works Limited for goods purchased from said company, against moneys owing by said company to the plaintiff by virtue of an assignment to the plaintiff of a chattel mortgage made by the defendant company to the Wallace Foundry Company Limited. The further facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 9th of January, 1933.

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1933

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BURRARD DRYDOCK CO. LTD. v. BANK OF TORONTO

Burns, K.C., and *Lundell*, for plaintiff.
Farris, K.C., for defendants.

16th January, 1933.

Judgment

FISHER, J.: The issue here is between the plaintiff company and the defendant bank. The plaintiff claims the right to set off part of its indebtedness to the defendant company for goods purchased by the plaintiff from the said company against moneys owing by the said defendant company to the plaintiff by virtue of an assignment to the plaintiff of a chattel mortgage, made by the defendant company to Wallace Foundry Company, Limited, and the amount still owing thereunder by the defendant company. The defendant bank claims that by virtue of an assignment of book debts from the defendant company to it the various accounts incurred by the plaintiff with the defendant company had been assigned to the bank and that consequently the plaintiff should pay the defendant bank the total amount of such accounts and was not entitled to set off its said indebtedness to the defendant company against the moneys owing by the said defendant company to the plaintiff as aforesaid. On the 6th of October, 1931, the defendant bank notified the plaintiff in writing of its assignment of book debts and it is conceded by the plaintiff that it is not entitled to set off the indebtedness incurred after its receipt of such notice.

The defendant bank registered its assignment of book accounts under both the Assignment of Book Accounts Act and the Companies Act. It is admitted by counsel on behalf of the defendant bank that registration under the Assignment of Book Accounts Act does not confer any greater right upon the assignee than it had before. See *Snyder's Ltd.* v. *Furniture Finance Corporation Ltd.* (1931), 1 D.L.R. 398 at pp. 404-5 where Orde, J.A. says in part as follows:

This assignment was duly registered as required by the Assignment of Book Debts Act, and some stress was laid upon this registration as if it in some way placed the plaintiff in a position superior to that of the defendant. This is, of course, not the effect of the Act. The Act does not either expressly or impliedly confer any greater right upon an assignee of a chose in action than he had before. All it does is to make a general assignment of book debts void, as against creditors and subsequent purchasers or mortgagees in good faith and for value, unless registered. By registration the plaintiff here has preserved whatever rights it acquired by virtue of the assignment and no more. In other words, its rights are to be determined exactly as if the Act had never been passed.

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What are those rights? The assignment as such transferred to the plaintiff no rights in the choses in action which were recognized at common law. Its efficacy was and still is based solely upon principles of equity, with the additional statutory right given to the assignee to bring action in his own name, instead of that of the assignor, against the debtor, upon giving notice to the latter: Conveyancing and Law of Property Act, R.S.O. 1927, Cap. 137, sec. 49. The assignee takes subject to all the equities. He cannot acquire higher rights against the debtor than those of the assignor himself, and his rights may be defeated or impaired by the intervention of some other assignee who, by giving notice to the debtor of his assignment, or for some other reason, acquires a superior equitable title.

It is contended however on behalf of the defendant bank that by virtue of the registration under the Companies Act (Cap. 11, B.C. Stats. 1929) it has put itself in a stronger position than it would be if it had registered only under the Assignment of Book Accounts Act and subsection (8) of section 133 of the Companies Act is relied on, said subsection reading as follows:

No mortgage which is duly registered under the Land Registry Act, the Bills of Sale Act, or the Assignment of Book Accounts Act shall become void under subsection (1) by reason of the fact that the mortgage is not duly registered under this Act; but this provision shall operate only to confirm the security on property in respect of which the mortgage is under any of those Acts duly registered.

Judgment

Shortly stated, the argument on behalf of the defendant bank is: that the assignment (admittedly a "mortgage" within the meaning of that word as used in said section 133 of the Companies Act) being perfectly good by virtue of the registration under the Assignment of Book Accounts Act but subject to existing superior equities is by registration also under the Companies Act "confirmed" or made firm in the sense of being made good without being subject to any such equities, that is, by such registration is confirmed against those with respect to whom it otherwise would be void. It is argued that as no confirmation is required as against those having actual notice of the assignment the last clause or last three lines of said subsection (8), in order to have any meaning at all, must mean that the assignment is thus affirmatively made good even as against those having no actual notice. Section 138 of the Companies Act, providing that the copies of mortgage instruments and the register of mortgages, etc., shall be open to inspection, is referred to and it is argued that the plaintiff could have protected itself under said section.

On the other hand, counsel for the plaintiff, while apparently

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suggesting that the clause in question has a meaning in the sense of confirming as against everybody, but subject to superior existing equities, argues that in any event persons acting *bona fide* without any actual notice of the assignment cannot have notice imputed to them or be deprived of the equity otherwise existing in their favour unless the statute clearly and expressly says so.

After carefully considering the situation as it would admittedly be, apart from the Companies Act or registration thereunder, I have come to the conclusion that the sections of the Companies Act referred to should not be interpreted as taking away the superior equity which the plaintiff would otherwise have unless the statute expressly and clearly says so and in my opinion it does not.

There will be a declaration accordingly that the plaintiff was and is entitled to and did set off part of its said indebtedness to the defendant company, *i.e.*, to the extent now claimed and if there is any question as to the amount of such set-off or the form of declaration the matter may be spoken to.

Order accordingly.

MANUFACTURERS LIFE INSURANCE COMPANY v. DAVID SPENCER LIMITED *ET AL.*

MURPHY, J. (In Chambers)

1933

Feb. 13.

MANUFACTURERS LIFE INSURANCE CO. v. DAVID SPENCER LTD.

Landlord and tenant—Receiver in mortgage action—Order that tenants attorn and pay rent to receiver—Service of order on tenants—Whether creation of relationship of landlord and tenant.

The mere service of an order obtained by the receiver in a mortgage action, ordering tenants to attorn and pay rent to the receiver does not create the relationship of landlord and tenant between the receiver and the tenant where the mortgage antedated the creation of the tenancy between the mortgagor and the tenant, and where the mortgagor was allowed to remain in possession by the mortgagee after default.

Evans v. *Elliott* (1838), 8 L.J., Q.B. 51, and *Towerson* v. *Jackson* (1891), 61 L.J., Q.B. 36 applied.

Statement

APPLICATION for an order declaring rent, payable antecedent to the date when occupational rent was fixed, to be payable to the mortgagee. Heard by MURPHY, J. in Chambers at Vancouver on the 18th of January, 1933.

E. H. Ellis, for plaintiff.
W. Savage, for defendant Thompson.
Burnett, for defendant Pirie.
McTaggart, for defendant White.

13th February, 1933.

Judgment

MURPHY, J.: The point reserved as against both Thompson and Pirie is in essence this: Does the mere serving of an order obtained by the receiver in a mortgage action, ordering tenants to attorn and pay rent to such a receiver, create the relationship of landlord and tenant between the receiver and the tenant where the mortgage antedated the creation of the tenancy between the mortgagor and the tenant and where the mortgagor was allowed to remain in possession by the mortgagee after default? In my opinion the answer is in the negative. The relationship of landlord and tenant can only be created by a contract assented to by both parties. *Towerson* v. *Jackson* (1891), 2 Q.B. 484; 61 L.J., Q.B. 36. The case of *Evans* v. *Elliott* (1838), 9 A. & E. 342, 1 P. & D. 256, 8 L.J., Q.B. 51, 112 E.R. 1242, decides that under such a state of facts the mere serving of the notice by

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the mortgagee does not create the relation of landlord and tenant. This case is approved in the *Towerson* case, *supra*. The *Towerson* case further decides that the mere continuing in possession by the tenant after receipt of notice from the mortgagee is not conclusive proof that a contract of tenancy has been created. Here both Thompson and Pirie expressly refused to attorn when served with the receiver order. In my opinion the receiver order in no way differs from a notice given by the mortgagee. It would be against natural justice, on facts such as are alleged in the case at Bar, for the Court on an application, without notice to either Pirie and Thompson, to make an order, the effect of which would be to create a contract between each of them and the receiver. I therefore hold that no order, declaring rent payable antecedent to the date when occupational rent was fixed at the hearing before me, can be made. This disposes of the matter apart from the question of costs. As to these I make no order leaving each party to bear his own.

Application dismissed.

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. THE BANK OF MONTREAL.

McDONALD, J.

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March 2.

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. THE BANK OF MONTREAL

Forest Act—Timber licence—Cutting of timber—Royalties—Liability of owner of licence—R.S.B.C. 1924, Cap. 93, Sec. 127 (1).

Section 127 (1) of the Forest Act provides, *inter alia*, that "Every holder of a timber licence on lands whereon any timber or wood is cut in respect of which any . . . royalty . . . is . . . payable under this Act, . . . and every person dealing in any timber . . . and every person operating a mill or other industry which cuts such timber . . . shall keep books of account of all timber and wood cut for or received by him, and shall render monthly statements thereof . . . and . . . the licensee, or person dealing . . . or operating . . . shall pay monthly all such sums of money, as are shewn to be due, to the minister."

Having become owner of timber licence No. 7994 by assignment, the defendant bank entered into a contract with R. whereby it granted R. the right to cut and remove the timber referred to in the licence. R. cut and removed timber for a certain time and then became bankrupt, when $774.20 was due in royalties in respect of timber cut. In an action against the bank for the royalties so due:—

Held, that the point for decision is whether or not the timber in question was "cut for and received by" defendant, and as in the opinion of the Court it was not, the action fails.

ACTION to recover royalties due for timber cut under timber licence No. 7994. Tried by McDONALD, J. at Victoria on the 28th of February, 1933.

Pepler for plaintiff.
Lawson, K.C., for defendant.

2nd March, 1933.

McDONALD, J.: This dispute arises upon the construction of section 127 (1) of the Forest Act, R.S.B.C. 1924, Cap. 93, which, with its bark peeled off, may be read as follows:

Judgment

(1) Every holder of a timber licence on lands whereon any timber is cut in respect of which any royalty is payable under this Act, and (2) every person dealing in any such timber, and (3) every person operating an industry which cuts such timber shall keep books of account of all timber cut for or received by him, and shall render monthly statements thereof; and the

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licensee, or person so dealing, or person so operating shall pay monthly all such sums of money as are shewn to be due, to the minister.

By assignment dated 23rd January, 1923, defendant became the owner of timber licence No. 7994 and on 22nd October, 1924, entered into a contract with the Redonda Logging Company Limited, whereby the defendant granted unto the company the right to cut and remove the timber referred to in the licence. The purchase price was $9,000 payable by instalments and the company's rights under the contract ceased on 22nd April, 1926. The company cut timber and made certain payments until it became bankrupt in September, 1925. Royalties amounting to $774.20 in respect of timber cut by the company, and still lying upon the lands, have not been paid and it is stated that at present prices such timber would not realize upon seizure and sale a sufficient price to pay these royalties. The defendant is sued for the royalties so due.

Judgment

Two main defences are raised—first that the royalties are payable by the Redonda Logging Company Limited, and not by defendant; and secondly that in any event no action lies for the recovery of such royalties but that same are recoverable only by seizure and sale pursuant to the lien provided for by the said Act.

The first point for decision, therefore, is whether or not the timber in question was "cut for or received by" defendant. In my opinion it was not and on that ground alone the action fails. Admittedly the timber was not received by the defendant, nor do I think it can be said to have been cut for the defendant; it was cut for the Redonda Logging Company Limited.

It becomes unnecessary, therefore, to offer any opinion upon the second defence raised.

Action dismissed.

HOCHBAUM *ET AL.* v. PIONEER INSURANCE COMPANY *ET AL.*

MURPHY, J.

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Jan. 19.

HOCHBAUM *v.* PIONEER INSURANCE CO.

Insurance, fire—Oral contract—Right to enforce—Agent—Authority of—Policy written after fire.

Where it is admitted that a contract for fire insurance is one that can be made orally, in an action thereon it is not necessary for the insured to shew that the agent with whom the contract was made was authorized to bind the insurers by such a contract.

The loss insured against occurred when the only existing contract was an oral one, but the insurers afterwards issued a policy which was not signed and not intended to be signed by the insured.

Held, that this did not prevent the insured from suing on the oral contract and they were not obliged to sue for rectification of the policy where it did not conform to the oral contract.

Held, further, that the fact that the insured accepted the policy after the loss but without knowing then that it differed from the oral contract, did not affect their rights to enforce the original contract.

Statement

ACTION to recover loss through fire under a contract of insurance. The facts are set out in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 4th of January, 1933.

Arnold, and *Gilmour,* for plaintiffs.
Locke, and *Johannson,* for defendants.

19th January, 1933.

Judgment

MURPHY, J.: At close of plaintiffs' case defendants' counsel moved that the action be dismissed on two grounds—first, that suit was brought on an oral contract and no evidence had been led to shew that the agent with whom the contract was made was authorized to bind his principals by an oral contract of insurance. Second, that the contracts having been reduced to writing plaintiffs could not sue on the original oral contract but must sue for rectification if the written contracts did not conform to the oral contract. In my opinion both these contentions are unsound. It is admitted that such a contract as the one in question can be made orally. That being so, unless constrained by authority, I would not hold that plaintiffs must prove specific authority to make an oral contract in a person authorized to place insurance on behalf of defendants and holding himself out

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to the public as so authorized. No case laying down such a proposition has been cited to me. To so hold would be to set a trap for persons making preliminary oral agreements to obtain a line of insurance and to be covered pending the issue of the policies since it would be difficult, if not impossible in many instances, for such persons to prove that specific authority to make such contracts had been given to the agent by the principals. The case of *Westminster Woodworking Co.* v. *Stuyvesant Insurance Co.* (1915), 22 B.C. 197, as I read the decision, supports the view above taken.

On the second point this is not a case where the contract has been reduced to writing and executed by both parties thereto. The matter of putting the contract into writing was left to the defendants and it was never intended that defendants should execute such written contract. There is no dispute on the evidence that the oral contract was in the terms contended for by plaintiffs. One of the policies issued does not correctly embody these terms but that fact was unknown to plaintiff until raised in the original statement of defence filed in this action. In Porter's Laws of Insurance, 7th Ed., p. 436 it is stated that where a company issues a policy in pursuance of a contract made by one assuming to be its agent, it is estopped from denying the agency and is bound not only by the contract appearing on the face of the policy but by that actually made by such agent. An American case is cited as authority. No decision in our own Courts to the contrary has been called to my attention and the principle seems to me to be in accord with equity and fair dealing. In the American case, it is true, the Court decreed that the written contract should be reformed whereas here no such request is made, plaintiffs choosing to stand squarely on the oral contract. No estoppel can arise in favour of defendants for they have not changed their position in reliance on the terms of the written policies. The fire occurred before the policies were written and that event fixed the rights and liabilities of all parties under the admittedly enforceable oral agreement. The only other ground that I know of which defendants can take is that where a contract has been reduced to writing evidence cannot be adduced to vary or contradict such writing unless mutual mistake is an issue and then rectification must be asked. The

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reason for this however is that both parties have agreed that the writing sets out the terms of their agreement as evidenced by their signatures or by their conduct. These policies are not signed and never were intended to be signed by plaintiffs. No conduct of plaintiffs can affect the matter in my opinion since the only existing contract at the time of the fire was the oral one. Plaintiffs did accept the written policies after the fire but did not know one of them differed from the oral contract. I fail to see why in consequence they have to ask that this be rectified in order to enforce rights which had accrued and were enforceable before any attempt to reduce the oral contract into writing had been made.

Since there is no dispute on the evidence that plaintiffs, if they prove loss, can recover on the oral contract, if that can be sued upon, it remains for me to decide whether or not there has been any recoverable loss and if so what is that loss? The loss recoverable on fire insurance contracts, such as the one in question, is the actual value to the insured of the property at the time of the loss—*Canadian National Fire Ins. Co.* v. *Colonsay Hotel Co.* (1923), S.C.R. 688.

Judgment

The first question to be answered is accordingly what number of Leghorn chickens were destroyed by the fire or perished as a direct consequence thereof? I find there were approximately fifteen thousand Leghorns in the buildings, exclusive of the last hatching when the fire occurred. I would not make this or any other finding of fact on the unsupported evidence of plaintiff Hochbaum and witness Swanson. The evidence of both was not satisfactory to me, particularly that of Hochbaum. It is possible that the record of hatchings produced is correct but I am convinced that the mortality was much heavier than stated by these witnesses. I have, however, in addition Cale's evidence and I see no reason to question it on this phase of the case. He went to Hochbaum's place largely to ascertain what chickens were there and he estimated the number for purposes of insurance as well as for security to be taken. I am not unmindful of the evidence of difficulty in making even an approximately correct estimate of the number when there were from 1,500 up to 2,000 or more chicks in a comparatively small space and I would have more hesitation in fixing the number at approximately fifteen thousand if I regarded that as the determining factor in the case, but I do not as will appear hereafter. There were about 1,900 chicks salvaged but possibly some considerable number of these died in time as a direct result of the fire. At

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any rate, as I remember the evidence, it was not shewn how many of the salvaged chicks belonged to the last hatching. I find that the Leghorns in question were taken as a whole either diseased or debilitated and stunted. It is admitted that disease was prevalent amongst the purchased cockerels but I find the conditions above set out to have been present amongst the chicks hatched out by Hochbaum as well. These conditions probably resulted from an improper brooder system, or a faulty use of what might have been a proper system if skilfully handled or from overcrowding. In all probability all these factors were more or less responsible for the condition of the Leghorns. The point I am concerned with is, what was the condition not what was its cause. I base the findings, as to condition, on the evidence of Good and Notten which I accept as correct on this feature. In addition I accept as true the evidence of the two Dunlops though that has not as great probative force on the issue involved. It remains to try to fix the actual value to Hochbaum at the time of the fire of these birds in the condition in which I hold them to have been. I find such of them as were pullets would be worthless to rear for laying purposes. They might, however, if they survived be sold as meat when they had attained sufficient weight. This is of course also true of the cockerels. It is a most difficult task to estimate what was the actual loss to plaintiffs from this standpoint. It would require an indeterminable time to bring the chicks to the proper weight and there would be a heavy mortality. Still a considerable number of the birds had either reached or were approaching the age when had they been healthy they would attain marketable weight, and, even in the condition they were in, would do so if they survived in a comparatively short time. Probably all the birds had not suffered to an equal degree though in my opinion the majority of them were seriously affected. I believe, however, that plaintiffs did sustain considerable actual loss. I think justice will be done if I fix this loss at $1,500, the amount paid into Court.

Judgment for plaintiffs for $1,500 with costs up to time of payment into Court. Costs to defendants from that date on.

Judgment for plaintiffs.

REX v. GENERAL NEWS BUREAU INCORPORATED.

HARPER, CO. J.

1933

April 4.

REX *v.* GENERAL NEWS BUREAU INCORPORATED

Criminal law—Receiving telegraphic information relating to betting—Distributing betting information—"Wilfully and knowingly"—Interpretation of—"Mens rea"—Criminal Code, Sec. 235 (i).

The General News Bureau Incorporated operated a general news service in the City of Vancouver and had installed in its office a teletype machine which is a later improvement on the telegraph in that the words of each message received is automatically printed out, and the information is then forwarded by the accused through telephones to its subscribers. Racing sheets were found on the accused's premises with the names of horses engaged in racing on various racecourses. The results of races and their betting odds and the news was forwarded to the newspapers in Vancouver as part of a syndicate service. On a charge against accused that it did wilfully and knowingly receive a message by telegraph conveying information relating to betting, contrary to section 235 (*i*) of the Criminal Code:—

Held, that the inclusion of the words "wilfully and knowingly" in the section expresses the intention of Parliament that the prosecution shall establish the *mens rea* of the accused either directly or by inference from facts from which only one conclusion can be drawn. The evidence should go further than merely to shew that certain individuals had engaged in betting on the races published. The gravamen of the offence is in the corrupt and intentional receipt of such information for use in betting operations in which it must be shewn the accused had some active part, and this should be clearly established. The furnishing of racing news to newspapers in Vancouver as part of a syndicate service without any proof of active participation in betting operations, is not sufficient to sustain a conviction under said section, and accused is acquitted.

Statement

TRIAL of General News Bureau Incorporated on the charge of wilfully and knowingly receiving a message by telegraph, conveying information relating to betting. The charge was laid under section 235 (*i*) of the Criminal Code. The facts are sufficiently set out in the head-note and reasons for judgment. Tried by HARPER, Co. J. at Vancouver on the 25th of March, 1933.

Des Brisay, for the Crown.
Maitland, K.C., for accused.

HARPER, CO. J.

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HARPER, Co. J.: The charge against the accused is that it did on February 2nd, 1933, wilfully and knowingly receive a message by telegraph conveying information relating to betting. This charge is laid under section 235 (*i*) of the Criminal Code.

The General News Bureau Incorporated is an incorporated company carrying on business in the Randall Building in the City of Vancouver, and operates a general news service. For this purpose there is installed in their office a teletype machine. This machine is owned by the B.C. Telephone Company and is similar in design to those ordinarily in use in stock-brokers' offices. The B.C. Telephone Company act as agents for the Pacific Telephone and Telegraph Company at Blaine, Washington, which pays the accounts for the use of this machine and the supply of circuit power.

Judgment

The teletype is operated in the same manner as the telegraph in the sense that the characters are sent over the wire and reproduced at the other end with the difference that the teletype prints on the machine the message sent, *i.e.*, the words are typed out at one end and printed automatically at the "receiving" end. Two electric plugs are inserted in the wall connections, one being hooked up into the power circuit to operate the motor of the machine, and the other for the transmission of signal impulses to reproduce the messages. The teletype is a comparatively modern invention and has this advantage over the telegraph that in place of sending messages by the Morse Code, it prints the word, and as one witness expressed it, "does everything but talk," and in general news work it takes the place of the telegraph. Through the medium of two telephones the accused disseminated any information received to its subscribers.

Several racing sheets were found on the premises with the names of horses engaged in racing in the various cities of the United States, and results of these races and their betting odds. This information would be of use in betting, but it was not shewn that the accused was engaged in distributing this information in any way except as hereinafter stated. The section of the Code under which this charge is laid states that the act complained of must be done "wilfully and knowingly."

The word "wilfully" as applied in criminal law is defined in

the case of *Ex parte O'Shaughnessy* (1904), 8 Can. C.C. 136 at p. 139 as follows:

> Wilfully means not merely to commit an act voluntarily but to commit it purposely with an evil intention, or in other words it means to do so deliberately, intentionally and corruptly and without any justifiable excuse.

In the case of *Anderson & Eddy* v. *C.N.R. Co.,* 10 Sask. L.R. 325 at p. 342; (1917), 3 W.W.R. 143, Brown, J. says (quoting 40 Cyc. 944):

> But generally in penal statutes the word "wilful" or "wilfully" means something more than a voluntary or intentional act; it includes the idea of an act intentionally done with a bad motive or purpose, or, as it is otherwise expressed, with an evil intent.

Further reference might be made to *O'Leary* v. *Therrien* (1915), 25 Can. C.C. 110.

It is therefore an essential part of the case for the prosecution that the act was done "wilfully and knowingly" within the above meaning. No reported authority on section 235 (*i*) of the Criminal Code has been quoted to me, but reference has been made to section 235(*f*), a somewhat similar section relating to the publication of betting information, but which does not specify that such act shall be done "wilfully and knowingly."

Judgment

The unanimous decision of the Court of Appeal of Ontario in *Rex* v. *Hewitt* (1922), 38 Can. C.C. 264 is somewhat instructive. Chief Justice Meredith at p. 269 says:

> The most that can be said is that the information might and perhaps would be of use in betting, but that is far from establishing that it was intended to be used in connection with betting.

The inclusion of the words "wilfully and knowingly" in section 235 (*i*) expresses the intention of Parliament that the prosecution shall establish the *mens rea* of the accused either directly or by inference from facts from which only one conclusion can be drawn.

On the facts here I can find such evidence neither directly nor by necessary inference. It is obvious that in itself the mere receipt of betting information would scarcely be made an offence as the recipient would be helpless to protect himself in case someone chose to telegraph such information. The gravamen of the offence, in my view, is in the corrupt and intentional receipt of such information for use in betting operations in which it must be shewn the accused had some active part. Hence the insertion of the words "wilfully and knowingly." The evidence

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should go farther than merely to shew that certain individuals had engaged in betting on the races published. The connection of the accused with these should be clearly established.

The furnishing of racing news to newspapers in Vancouver as part of a syndicate service without any proof of active participation in betting operations is not sufficient, in my opinion, to sustain a conviction under section 235 (*i*).

The accused is acquitted.

Accused acquitted.

COURT OF APPEAL

1932

Dec. 2.

PETROLEUM HEAT & POWER LTD. v. BRITISH COLUMBIA ELECTRIC RY. CO.

PETROLEUM HEAT & POWER LIMITED v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED.

Negligence — Damages — Contributory negligence — Ultimate negligence— Motor-truck stalled on street-car tracks—Run into by street-car—B.C. Stats. 1925, Cap. 8.

A motor-truck driver, after sending a look-out into the street to see that the way was clear, backed his truck from his garage on the east side of Richards Street about 300 feet north of Davie Street in Vancouver, intending to go north. On getting well over to the west side of the road, the front of his car being on the west tracks of the defendant company, his car stalled. At this time a south-bound car of the defendant had stopped on the north side of Davie Street over 300 feet away, but the street-car came on before the truck-driver could get his car started, and running into him did extensive damage to the truck. In an action for damages, the learned trial judge found both parties equally at fault and assessed the damages equally between them.

Held, on appeal, *per* MACDONALD, C.J.B.C. and MACDONALD, J.A., that there was no evidence of negligence on the part of the truck-driver and the appeal should be allowed.

Per MARTIN and MCPHILLIPS, JJ.A. (affirming the decision of FISHER, J.): That the truck became stalled on the tram tracks because of the plaintiff's own negligence, and as there was common and continued negligence by both vehicles the learned trial judge properly, on the facts, applied the degree of fault of contributory negligence by making them equally liable.

The Court being equally divided the appeal was dismissed.

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PETROLEUM HEAT & POWER LTD. v. BRITISH COLUMBIA ELECTRIC RY. CO.

Statement

APPEAL by plaintiff from the decision of FISHER, J. of the 1st of August, 1932, in an action for damages for negligence. The plaintiff company owned premises on the east side of Richards Street and about 300 feet south of Davie Street in the City of Vancouver. Shortly before six o'clock on the evening of the 30th of November, 1931, the plaintiff's driver having a call on the tank-car for gasoline sent a signal-man out into the street to see that all was clear and he then backed the car out, intending to go north on Richards Street. Double street-car tracks were on the street and when the back of his car was over the west tracks his car stalled. He then saw a south-bound street-car stop to let passengers off on the north side of Davie Street and between 300 and 400 feet away. He had difficulty in starting his engine and in the meantime the street-car came on (there being a slight grade southerly) and the motor-man realizing too late that there was danger of a collision, failed to stop his car in time to avoid a collision. The cost of repairing the damage done to the tank-car was over $2,000.

The appeal was argued at Vancouver on the 1st and 2nd of December, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Bull, K.C., for appellant: Our truck was stalled when on the west track and the motor-man saw the truck in time to stop if he had used proper care to bring the car to a stop. We say the judge was wrong in saying there was negligence in allowing the truck to stall: see *Vancouver Ice and Cold Storage Co.* v. *B.C. Electric Ry. Co.* (1927), 38 B.C. 234; *Willox* v. *Niagara and St. Catharines R.W. Co.* (1920), 19 O.W.N. 324; *Maderios* v. *Boston Elevated Ry. Co.* (1926), 150 N.E. 156; *Dunnett* v. *The King* (1917), 41 D.L.R. 405; *Pronek* v. *Winnipeg, Selkirk & Lake Winnipeg Ry. Co.* (1932), 3 W.W.R. 440. He should have held on the last chance doctrine that the motor-man saw us on the track and had ample time in which to stop and avoid the accident. The plaintiff was not negligent in stalling his car: see *Johnston* v. *McMorran* (1927), 39 B.C. 24. The motor-man knew he had to stop his car when 180 feet away: see *W. L. Morgan Fuel Co.* v. *British Columbia Electric Ry. Co. Ltd.* (1930), 42 B.C. 382 at p. 384; *Nason* v. *Hodne* (1929), 41

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Argument

B.C. 398; *Holgate* v. *Canadian Tumbler Co.* (1931), 40 O.W.N. 565.

Sloan, for respondent: If the causing of the stalling could have been anticipated and avoided then in stalling he can be found guilty of negligence: see *Maderios* v. *Boston Elevated Ry. Co.* (1926), 150 N.E. 156. We skidded helplessly on the track for 180 feet, and if he had exercised reasonable care he could have avoided the accident: see *British Columbia Electric Railway* v. *Loach* (1915), 85 L.J., P.C. 23 at p. 27. When the question of ultimate negligence arises the contributory negligence passes out of the picture: see *Key* v. *British Columbia Electric Ry. Co.* (1930), 43 B.C. 288.

Bull, in reply, referred to *McLaughlin* v. *Long* (1927), S.C.R. 303, and *Admiralty Commissioners* v. *S.S. Volute* (1922), 1 A.C. 129 at p. 139.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: In this case the plaintiffs, and when I refer to the plaintiffs I refer to the plaintiff who is suing—were backing the truck, which was an oil-truck about thirty feet long, out of a garage in the middle of a block on to the public street with the intention of turning it and proceeding up the street. He was doing what he had a perfect right to do, but he had to take sufficient care that it was not endangering himself and others. He sent out a look-out to the street to see if there was an opening to do what he proposed to do. The look-out signalled the plaintiff to come out with his truck, which he did, and I think the evidence discloses that he did not stop between the time he left the garage and the time he stalled on the railway track. It was a continuous motion. Now, the street-car at the time he was signalled to come out of the garage was over 300 feet away on Davie Street taking on or letting out passengers. When it got through with that operation it came on, and the motor-man of the street-car saw the plaintiff's truck coming out of the garage and moving towards the street-car rails; he saw that when he was 180 feet from the truck; he realized that there was danger and therefore he cut off the power and put on the brakes. But he knew the state of the street-car rail was slippery on account of frost and other causes and that it was also necessary to put sand on the rails if he expected his brakes

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to be efficient. This he did not do. Therefore, the car skidded and he was unable to stop it before it struck the truck and did the injury complained of. That seems to me to be the fact with regard to the defendant's operations. The plaintiff got on to the street-car rails quite properly, I think, because he was entitled to depend upon the defendant using ordinary care. If the defendant had used ordinary care and had put the sand on the rails at the time he put the brakes on there would have been no collision. Unfortunately the truck stalled on the tracks for a reason which can only be guessed at, that is, it is supposed it was either from a cold engine or from flooding. The learned judge says it was either from the one cause or the other, but he does not specify which; there is no evidence upon which he could specify which, if either was the cause of the stalling, therefore, I think we are in just as good position as the learned judge was to say whether that really was the cause of the stalling or not. It was an inference or guess, either one or the other. Now the defendant being in a position unquestionably to stop if he had used the proper appliances did not use those appliances with the result of an accident. In my opinion he was guilty of what we call ultimate negligence and therefore the plaintiff was entitled to recover his whole damages against the defendant.

The learned judge came to a different conclusion. He came to a conclusion that there was negligence on the part of the plaintiff in venturing out on that street without first having his car sufficiently warmed up, or guarding against flooding. But, as I say, that is merely guessing at the negligence of the plaintiff. There is no evidence upon which one could substantially say that either one or the other or both of those caused the accident. In those circumstances, I think the learned trial judge's judgment must be set aside and judgment pronounced in favour of the plaintiff for the whole amount of his claim.

MARTIN, J.A.

MARTIN, J.A.: In this case the learned judge has found that both parties were guilty of negligence, which just for the purpose of description, I should call primary negligence, that of the plaintiff's driver consisting in the fact that he was negligent in backing out into a street having considerable traffic with double street-car tracks without taking precautions to see that his truck

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would not stall, as it did, through one of two causes as suggested. There is, to my mind, no difficulty in supporting that finding of fact, and the learned judge would have been quite entitled upon the uncontradicted evidence to find definitely, and I so find upon that evidence, that the cause, as a matter of reasonable inference, of that stalling must be that sufficient precaution had not been taken to deal properly with a cold engine before backing out, and that the explanation of the driver of the truck that he only took a few seconds to warm it up before taking it out in that condition on a street of that description shews that there was negligence in so doing, having regard to the state of the weather, which the motorneer deposed to as being "freezing," and is found by the learned judge as "cold and frosty."

MARTIN, J.A.

There can, also, to my mind be no doubt that the learned judge was justified in finding that the street-car was improperly operated, in that at a distance of 180 feet it could have been brought to a stop if the sand apparatus with which it was provided had then been used as it ought to have been used. It is to be observed, as distinguished from the *Loach* case, that there is no charge against the tram-car of being operated at an excessive speed. On the contrary, it was a moderate speed, and there was no defect in the apparatus furnished for its operation, nor was there any defect in the construction of the truck, and if both or either of the vehicles had been properly operated, there would have been no collision, so the question then becomes one of the negligent operation by the servants of each of the owners of this tram and truck of the respective vehicles entrusted to their care.

Now, when it was seen, at a distance of 180 feet, by the motorneer that the truck was going to stop momentarily, apparently, on the tram line in front of him, he had no immediate apprehension of danger, but as a matter of precaution he put on his brakes in such a way as to reduce the speed, but that was not sufficient under the frosty conditions and he should have promptly used his sanding apparatus to prevent the skidding and sudden consequent acceleration of speed which occurred, and if he had done so the accident would have been avoided. But it is also the fact, as found by the learned judge, that at a distance of two car lengths, about 80 feet, when he first became aware that the truck was "dead" or stalled, it was then too late

for him to do anything more to prevent an accident, which brings his negligence within the definition of the Privy Council's decision in *B.C. Electric Railway Company Limited* v. *Loach* (1916), 1 A.C. 719 at p. 725 where it says:

If, however, the same conduct which constituted the primary negligence is repeated or continued, and is the reason why the defendant does not avoid the consequences of the plaintiff's negligence at and after the time when the duty to do so arises, why should it not be also the "ultimate" negligence which makes the defendant liable?

Their Lordships then answer that question in the affirmative. Therefore, if there be nothing else in this case, the ultimate negligence of the motorneer would have continued up to the time of the impact, for the very reason that he had not operated his car properly in that he had disabled himself from avoiding a collision by neglecting to use the sand apparatus provided to prevent skidding.

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Now, then, we turn to the case of the truck, and in essentials and principles it is exactly the same, because the truck had got stalled on the tram tracks owing to the fact that the driver of it had disabled himself from the proper use of it because he had neglected to run it properly by warming the engine to the extent the circumstances of the case required. He, therefore, was unable to get out of the road of the approaching tram because he had disabled himself from locomotion. His car was out of control and he could not move away from the tram, and the tram could not keep away from him. They were in exactly the same condition of self-disablement. It, therefore, reaches this stage, that where you have two persons in the position where from the initiation of their negligence it is, to use the Privy Council expression, "continuous," a combination of that "continued" negligence necessarily excludes from either side the element of ultimate negligence, and as it is, as stated by the Privy Council at p. 728, "a combination of negligence" that by the application of our Contributory Negligence Act makes them both liable for the consequences of their common and continued negligent act. Such being the case, the learned judge has to my mind properly applied the degree of fault of contributory negligence by making them equally liable. While I agree with this, I do not wish to be understood that I agree wholly with the reasons the learned judge has advanced, because they are somewhat obscure and not

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in entire accord with what I think is the true view of this case, having regard to the aspect of it I have mentioned, *i.e.*, of the continuation on both sides of the primary negligence to the time of the impact, which common and continued negligence mutually excludes ultimate negligence by retaining the primary negligence up to the very end: he has, however, reached the right conclusion and therefore his judgment should be affirmed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I may say my view, which is in accord with that expressed by my learned brother MARTIN, is that the principle to be applied in this case is that which is so well known and so well expressed in *Admiralty Commissioners* v. *S.S. Volute* (1922), 1 A.C. 129, and I refer to what Viscount Birkenhead, L.C., said at p. 144. I take the view that you cannot draw a clear line in this case, and unless you can draw a clear line, the principle of contribution must be applied:

> And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act,

I think the case we have before us is a splendid illustration of that—

> that the party secondly negligent, while not held free from blame under the *Bywell Castle* rule, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution.

Now, this same point was considered by the Privy Council in *Canadian Pacific Railway* v. *Frechette* (1915), A.C. 871. At p. 879 we have Lord Atkinson in delivering the judgment of their Lordships saying this—he speaks of the distinction which we have to deal with, as I view it, and my learned brother MARTIN also views it in the same way—that is that this is not a clear case—a clear line of demarcation does not exist here.

> The ground of this distinction between the two cases is this: The latter is not, in the true sense of the term, a case of contributory negligence at all. That term can only be properly applied to a case where both the parties, plaintiff and defendant, are each guilty of negligence so connected with the injury as to be a cause materially contributing to it. If the negligence of either party falls short of this it is an irrelevant matter, an *incuria*, no doubt, but to use Lord Cairns' words, not an *incuria dans locum injuriæ*.

This matter was also considered in the case Mr. *Sloan* referred to, *McLaughlin* v. *Long* (1927), S.C.R. 303. At p. 311 Anglin, C.J.C., said:

In our opinion, within the meaning of s. 2 of The Contributory Negligence Act of New Brunswick (1925, c. 41)—

and I think for all purposes we may say it is similar to our statute—

damage or loss is "caused" by the fault of two or more persons only when the fault of each of such persons is a proximate or efficient cause of such damage or loss, *i.e.*, only when at common law each would properly have been held guilty of negligence which contributed to causing the injurious occurrence. *Canadian Pacific Railway* v. *Frechette* (1915), A.C. 871 at p. 879.

And that is all, I think—this case is—which is now before us. Then we have Mr. Justice Newcombe at pp. 313-4 saying this: when he is dealing with this question of principle as demonstrated in the *Volute* case, and he makes the quotation, that I have referred to—(1922), 1 A.C. 129 at p. 144—at pp. 313-4 of what Lord Birkenhead said and then proceeded to say:

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These questions may, as I have said, be decided when they arise; but in this case we heard no argument upon the interpretation of the statute, and I do not find it necessary to assent to more, upon the point involved in The Contributory Negligence Act, than that, in my opinion, the infant plaintiff's negligence was not a cause, or any part of the cause, of the injury which he suffered, and therefore that The Contributory Negligence Act has nothing to do with the case.

My view, though, is that the present case is one for contribution. Looking at the judgment pronounced by the learned judge in the Court below I would not change that contribution, which is 50 per cent. on the part of each.

Therefore, in my opinion, the appeal should be dismissed.

MACDONALD, J.A.: I am unable to agree with the learned trial judge in drawing an inference of negligence on the part of the truck-driver. The stalling of the car in this case should be regarded simply as a misadventure or a mishap that might occur with any driver, not often, but at intervals. He was not bound either to anticipate that it might occur on this occasion. I guard against saying that under no circumstances could the stalling of an engine be at least an element in reaching a conclusion on the question of negligence. It is enough to say that the evidence does not warrant such a finding in the case at Bar.

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The stalling was attributed by the trial judge either to the state of the weather, causing the engine to become cold, or to what is commonly called flooding. He was in doubt as to

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whether it was due to the one or other of these causes. I might add one or two other causes that might lead to the same result, and be equally justified in doing so, by the evidence.

On the point that the engine was cold making it advisable to take some time to warm it up before moving it, there is no reasonable evidence to justify that conclusion. It is true—it was so stated by the motorneer—that it was freezing outside. There is no evidence, however, to shew the temperature of the building where it was under cover for an hour and a half before being taken out on this occasion. If the windows were open, or the building old or poorly constructed, that result might follow, but there is no evidence on that point. The car was in use prior to this period of one and a half hours, and it is difficult to understand when it was in the meantime, in a building, not necessarily heated, but at least protected from the elements, why it should get unduly cold. At all events, there is no evidence to justify the inference that it stalled because of lack of warmth; indeed the trial judge could not so find—he gave alternative possible reasons. It is always possible to suggest that a higher degree of care should be taken, but the law only requires that one should act reasonably according to the circumstances and mere criticism of conduct is not enough.

So far as the finding of the learned trial judge is concerned, as the Chief Justice pointed out, he was really drawing an inference from inconclusive evidence, and we are in an equally good position to do so. It follows that the appeal should be allowed.

The Court being equally divided the appeal was dismissed.

Solicitors for appellant: *Walsh, Bull, Housser & Tupper.*
Solicitor for respondent: *V. Laursen.*

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Police officers — Fugitive from justice — Force to effect arrest — Firing revolver—Bullet ricochetting hits fugitive — Justification — Criminal Code, Secs. 30 and 41.

Three men running from a police officer were ordered to stop. They continued to run and the officer fired two shots from a revolver in the air, followed by some shots on the ground behind the men who were running ahead of him. One of these shots ricochetting from the ground, struck one of the fugitives and killed him. In an action against the police officer for the death of the fugitive:—

Held, that the officer believed on reasonable and probable grounds that the deceased had been abetting one whom he also believed had broken into a shop, and that the officer in shooting as he did was acting properly within his rights, and doing no more than his duty required him to do.

Statement

ACTION for damages owing to the death of one Saul Merin, who was struck by a bullet which ricochetted from the ground when fired by the defendant, a police officer, when the deceased and two companions were running away to avoid arrest, after being ordered to stop by the police officer. Tried by FISHER, J. at Vancouver on the 9th of November, 1932.

Fleishman, and *C. F. MacLean,* for plaintiff.
McCrossan, K.C. and *Lord,* for defendant.

31st December, 1932.

Judgment

FISHER, J.: In this matter I have to say that I cannot accept the evidence of the witnesses Johnson, Betty and Wadella as to the latter not being in Car No. 90505 with Johnson, Betty and Saul Merin, since deceased, on the night in question herein. I am satisfied that Wadella was with them in the car and so find. I have to say also that I look upon the defendant Ross as a credible witness but I do not think the evidence before me would, in a criminal prosecution of Wadella or the others as aforesaid, be sufficient to justify a finding that Wadella or any of the three other men was guilty of breaking and entering the Japanese barber shop by night and stealing property therein. This is a civil action however in which I do not think the defendant must prove such guilt but only on this phase of the

matter that he believed they were guilty and had reasonable and probable grounds for such belief. I accept the evidence of the defendant as to his observations with respect to the movements of said car and its occupants and find that under the circumstances the defendant believed on reasonable and probable grounds that Wadella had on the night in question broken and entered the said barber shop and stolen property therein of considerable value and that the other three, Johnson, Betty and Saul Merin were aiding and abetting him in so doing and were thus also guilty of the same offence pursuant to section 69 of the Criminal Code. The defendant admits that he did not recognize any of the occupants while in the car but says that he saw the man whom he shortly afterwards arrested and found to be Wadella get out of the car and go into the said shop or vestibule of the shop which, the defendant had found to have been broken into by someone during the night a short time before. The defendant also shortly before had seen the same car parked not far away with no occupants and, as I have indicated, there was, in my opinion, good ground for an honest and reasonable belief that the car and its occupants were connected with the offence as aforesaid though not sufficient to convict the occupants of it in the event of a prosecution in which they would have to be given the benefit of any reasonable doubt.

Judgment

The defendant, having arrested Wadella and then directed his steps to the Avenue U-Drive Garage at the south-west corner of Main and Keefer Streets from where he was satisfied the car had come, observed the same car as it had just been turned in at the U-Drive place behind the office with its lights full on. He says he not only recognized the car at the time but also saw a man just coming out of the side door of the office having on the same kind of hat as he had before observed on the driver of the car and thereupon the defendant shouted to the man (who, according to the evidence, was Saul Merin) that he was a police officer and to stop. He saw two other men at or near the corner of the alley in the rear of the premises and all three ran down the alley. I think defendant was then justified in thinking they were fleeing from arrest for the offence just committed and in proceeding to pursue them accordingly. Under such circumstances, I find that the defendant, while running after the three

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young men, called to them to stop and, upon their continuing to flee to avoid arrest, first fired two shots in the air from his revolver and then coming under the viaduct fired several more shots down on the ground behind the men running ahead of him. I am also satisfied and find that one of the bullets ricochetted and killed Saul Merin. The defendant says that he did not aim at all but only fired as a warning to those pursued to stop. Upon the assumption that the defendant is telling the truth, when he says that he did not aim at all, counsel for the plaintiff submits that the defendant cannot therefore rely on his plea of justification but must prove that he did not use his revolver negligently. The argument really is that the defendant on his own evidence must be found liable in damages for negligence causing the death of the said deceased unless he has proved that he could not reasonably have anticipated any physical injury to anyone from firing in the manner he says he did and that the unfortunate result was simply an accident. After considering the argument of counsel, I have come to the conclusion that, though the defendant may be said to take the position that he did not intend to try to prevent the escape of the three young men by firing directly at them but by firing warning shots first in the air and then on to the ground, in order to persuade them to stop and submit to arrest, he is nevertheless entitled to rely on the contention that he was justified in using force. In this connection reference might be made to the case of *Maratzear* v. *C.P.R.* (1920), 69 D.L.R. 230 where the constable would appear to have acted in a similar manner and it was held that he was justified. As counsel for the defendant suggests, the defendant should not be in any worse position because he intended to threaten, rather than to use, force. The result however of the action of the defendant in shooting was the death of Saul Merin and I do not think that the defendant, upon the evidence before me, is in any better position than if he had intended to shoot directly at him. He must establish therefore that under the circumstances the shooting as well as the manner of it was justified. Counsel for the plaintiff refers to *Rex* v. *Smith* (1907), 13 Can. C.C. 326 where at p. 330 Perdue, J.A. says:

Shooting is the very last resort. Only in the last extremity should a peace officer resort to such a dangerous weapon as a revolver in order to

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prevent the escape of an accused person who is attempting to escape by flight.

On the other hand counsel for the defendant relies especially upon several sections of the Criminal Code including sections 30 and 41 reading as follows:

30. Every peace officer who, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, whether it has been committed or not, and who, on reasonable and probable grounds, believes that any person has committed that offence, is justified in arresting such person without warrant, whether such person is guilty or not.

41. Every peace officer proceeding lawfully to arrest with or without warrant, any person for any offence for which the offender may be arrested without warrant, and everyone lawfully assisting in such arrest, is justified, if the person to be arrested takes to flight to avoid arrest, in using such force as may be necessary to prevent his escape by such flight, unless such escape can be prevented by reasonable means in a less violent manner.

Assuming the facts to be as I have already indicated, and as I find, that the defendant, as a peace officer, was proceeding lawfully in the course of his duty to arrest without warrant the three men including the deceased as aforesaid for an offence for which they might be arrested without warrant and that the deceased, as well as the others, took to flight to avoid arrest, the question seems to narrow itself down to whether or not the defendant was justified in shooting, as he did, to prevent the escape of the men by flight. It seems to be clear that if such escape could have been prevented by reasonable means in a less violent manner the shooting should not have been resorted to. It is suggested that the defendant might have stopped and got the name and address of the driver of the car from the U-Drive Garage or in any case should have done nothing more than to fire in the air, but I cannot see that it is reasonable to believe that the escape could have been thus prevented or by any other reasonable means in a less violent manner. There is undoubtedly a principle here involved which concerns the rights of both the public and the individuals concerned. The result is greatly to be regretted and one might very naturally sympathize with the relatives of the deceased but the duty and rights of the police in protecting public interests must be considered and, though I would not like to part with this case without emphasizing what was said by the Court in the *Smith* case, *supra*, that "shooting is the very last resort" I must find in the present case,

that the defendant in shooting as he did was acting within his rights in a proper manner and doing no more than his duty required him to do in the circumstances while engaged in protecting public interests. The defendant's plea of justification is therefore sustained and the action is dismissed.

Action dismissed.

IN RE HOMFRAY AND BUILDING INSPECTOR OF THE CITY OF KAMLOOPS.

Municipal law — Construction of building — Permit — By-law—Validity— Mandamus—R.S.B.C. 1924, Cap. 179, Sec. 54, Subsec. (56).

The Central Hotel in the City of Kamloops, having been partially destroyed by fire, the owner's application for a permit to repair was refused on the ground that the repairs contemplated were in excess of 40 per cent. of the value of the building before the damage occurred, and under section 7A of By-law 719 the permit could not be granted. By section 7A "Any wooden building within the First-Class Fire Limits which has been or may hereafter be damaged by fire, decay or otherwise to an amount greater than 40 per cent. of the replacement value of the building immediately before the necessity for repairs or rebulding arose, shall not be repaired or rebuilt, but shall be removed under the provisions of section 162 of the Municipal Act." The power to pass by-laws on the question of repairs is only given by subsection (56) of section 54 of the Municipal Act as follows: "For regulating the erection of buildings and preventing the erection of wooden buildings, or any addition thereto or alteration thereof, and also for regulating and preventing any alteration to any existing wooden buildings within the fire limits of the municipality, either in the way of repairs or otherwise, unless the authority in writing of the fire wardens and building inspector for the time being of such municipality for such alteration is first obtained." On an application for an order directed to the building inspector to shew cause why a writ of *mandamus* should not issue directing him to issue a permit for the repair of the building:—

Held, that in relation to the subject-matter of a by-law, the powers of the corporation must be exercised strictly within the limits and in the manner prescribed by the statute, section 7A purports to set up a standard or guide of its own to direct or control the repairing of buildings damaged by fire and makes no reference to the authority in writing

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referred to in said subsection (56). Section 7A does not conform to the rule and is therefore invalid.

Held, further, that the building inspector having given his reasons for refusal of a permit, effect should not be given to any objection to granting the permit, raised for the first time after the application for a writ of *mandamus* is launched, and the *mandamus* to issue a permit should be granted.

Statement

APPLICATION for an order directed to the building inspector of the Corporation of the City of Kamloops to shew cause why a writ of *mandamus* should not issue directed to him demanding him to issue a permit for the repair of the building in the City of Kamloops, known as the Central Hotel. The applicant made application for a building permit pursuant to the by-laws of the corporation, which application was refused on the ground that the repairs contemplated were necessary by reason of damage to the building by fire in excess of 40 per cent. of the value of the building before the damage occurred, and under section 7A of By-law 719 the permit could not be granted. Heard by FISHER, J. in Chambers at Vancouver on the 6th of January, 1933.

Argument

Maitland, K.C. (*Hutcheson,* with him), for applicant: Section 7A of the by-law does not provide for the authority in writing of the fire wardens and building inspector and is, therefore, bad. The building inspector referred the matter to a committee, which had no authority to deal with it either under the Act or the by-law. Having clearly given his reasons for refusal, the building inspector cannot now add to them: see *The Queen* v. *Tynemouth Rural District Council* (1896), 2 Q.B. 219; Halsbury's Laws of England, Vol. 10, p. 85, sec. 172.

Fulton, K.C., for the municipality: Assuming section 7A to be bad, the building inspector still has a right to refuse for non-compliance with section 3 of the by-law. The building inspector has certain discretion and 7A might be adopted as a standard or guide to control his action: see 12 A.L.R. 1435. It is a matter of discretion and should not be interfered with.

27th January, 1933.

Judgment

FISHER, J.: From the material before me it would appear that on July 12th, 1932, Alice K. Homfray, as executrix of an estate duly applied under the provisions of By-law No. 348 of

the City of Kamloops and amendments thereto for a permit to repair the Central Hotel (in the City of Kamloops) which had been partially destroyed by fire on September 3rd, 1931, and in reply she received a letter dated July 20th, 1932, signed by the mayor, the fire chief, and the building inspector of said city, reading as follows:

Re your application to repair building on lots 9 and 10, block 31, Lansdowne St.

According to section 7A of By-law No. 719, we consider that damage was greater than 40 per cent. of replacement value of above building immediately before the necessity for such rebuilding.

Section 7D of By-law 719 makes allowance for any person dissatisfied with ruling of the building board may appeal to the city council.

It would also appear that the mayor, the fire chief and the building inspector constituted what is referred to as a Board in By-law No. 711 amending said By-law No. 348 and in this connection reference might be made to certain relevant portions of such By-law No. 711 reading as follows:

The erection or alteration of any building or part of any building of any description shall not be commenced or carried on by any person until a permit for such erection or alteration shall first be obtained from the building inspector by such person or his agent.

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The application for such permit shall be in writing on a blank form to be obtained at the office of the city clerk upon which form the applicant shall give clearly and fully the information required, and shall also give the correct estimated value of the work proposed to be carried out, and for which a permit is required, and which information and particulars shall be verified by the statutory declaration of the applicant when required by the building inspector.

Every applicant for a permit to proceed with the alteration or erection of any building, or part of any building, shall, on making such application, furnish proper drawings and specifications, sufficient to enable the building inspector to obtain full and complete information as to the extent and character of the work to be done, and all such drawings and specifications shall be filed with the building inspector and shall remain on file in his office.

Every plan of a proposed building shall be submitted to a board (hereinafter referred to as the Board) composed of the mayor, the fire chief, and the building inspector, two of whom shall constitute a quorum who shall consider whether such plan of any building, or erection or alteration to any existing building, or erection discloses that the building or erection when erected, or the alteration or addition made, will be or constitute having regard to the ugliness, deformity, incongruity or want of conformity of the proposed building, or altered or added building, with the adjacent building, a nuisance, or offensive to the taste, and an eyesore, and that in addition the construction of such building, alteration or erection would tend to have the effect of depreciating the assessable value of adjacent property, and if

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the Board finds such to be the case the building inspector shall refuse to issue a permit.

If the information given on any application for a permit, or if any drawings and specifications submitted with such application indicate to the building inspector that the work to be done is not in all respects in accordance with the provisions of this by-law, he shall not certify to the same, and such certificate shall not be given until such application, drawings and specifications shall have been made to conform in every respect to the requirements of this by-law. When any such application, drawings and specifications shall conform to the provisions of this by-law, the building inspector shall certify and approve of same, and the permit for the proposed work shall be issued by him.

It will be noted that the letter of July 20th, 1932, refers to what is and may hereinafter be called section 7A of By-law No. 719 (which was a by-law amending said by-laws 348 and 711) and said section reads as follows:

"7. (a) Any wooden building within the First Class Fire Limits which has been or may hereafter be damaged by fire, decay or otherwise to an amount greater than 40 per cent. of the replacement value of the building immediately before the necessity for repairs or rebuilding arose shall not be repaired or rebuilt but shall be removed under the provision of sec. 162 of the Municipal Act."

The only power of the municipal council to pass a by-law on the subject of repairs is given by the general clause and subsection (56) of section 54 of the Municipal Act (R.S.B.C. 1924, Cap. 179) reading as follows: [already set out in head-note].

It is obvious that by said section 7A the municipal council purports to set up a standard or guide of its own to direct or control the repairing of buildings damaged by fire and makes no reference to the authority in writing referred to in said subsection (56). The last paragraph of section 6 and section 7 of By-law 348 had contained such a clause but after being amended by By-law 711 had been struck out by sections 3 and 4 of said amending By-law No. 719.

It might be argued that the council should prescribe some uniform rule of action and not leave the matter to the discretion of the building inspector without any standard or guide to control his action. Counsel for the building inspector has referred to an annotation in 12 A.L.R., beginning at p. 1435, stating the generally accepted rule to be that a statute or ordinance, in conferring discretion upon public officials, must also prescribe a rule of action. It may be noted however that it is also stated at p. 1447 that it is well setttled that it is not always necessary

that statutes and ordinances prescribe a specific rule of action but, on the other hand, some situations require the vesting of some discretion in public officials. In any event however it may be said in the present case that the council is restricting the absolute right of enjoyment which the owner of property might otherwise exercise without question and is doing so under statutory authority. Even where statutory authority exists in relation to the subject-matter of a by-law the powers of the corporation must be exercised strictly within the limits and in the manner prescribed by the statute. See Biggar's Municipal Manual, 11th Ed., 331. In my opinion said section 7A does not conform to such rule and that part of the by-law as it now stands is therefore invalid. Though it is apparent from the letter above set out and the examination of the building inspector that the refusal of the permit was based upon said invalid section 7A counsel for the building inspector now invokes said section 3 of By-law 719 amending section 6 of By-law 348 so as to read in part as follows:

> No alterations shall be made to any wooden building within the fire limits unless the authority in writing of the aforesaid Board for such alterations be first obtained.

Judgment

I cannot see that there is any statutory authority for the substitution of such a board in place of the building inspector even though he is included therein but in any event it should be noted that it is section 4 of By-law 719 (repealing section 7 of By-law No. 348 and substituting said 7A and other sections therefor) that deals specifically with a case of repairs in the event of damage by fire while said section 3 of By-law 719 substitutes as aforesaid a different section which would appear to deal with alterations generally. It is obvious also from the letter as above set out that the application for a permit was treated as one to repair a building damaged by fire. It is obvious also from the answers of the building inspector that he received the application that he had no objection to the plans as such and did not require anything further from the applicant but his only answer to the application was the letter of July 20th, 1932, as aforesaid and the permit was refused solely on the ground therein set out based upon a portion of the by-law which I have found to be invalid. Under the circumstances I do not think that reliance can now be placed upon other grounds or that I should give

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effect to any objection to granting the permit raised apparently for the first time after the application for a writ of *mandamus* herein was launched. In this connection reference might be made to *The Queen* v. *Tynemouth Rural District Council* (1896), 2 Q.B. 219.

This was an application to approve plans of some proposed new buildings. The council refused to approve the plans except on certain conditions which it was held they had no power to attach to their approval. Lord Russell of Killowen, C.J., says at pp. 223-4:

Now, in that state of things, the questiou really seems to be this: Can a local authority, who have no objection to the plans of the buildings as such, decline to approve of a building owner's mode of laying out his property unless that building owner undertakes to have a system of sewage carried out at his own expense, including an outfall sewer? . . .

At p. 225:

"It seems to me impossible to support the view of the local authority that, because the owner has not indicated in his plans the complete drainage system which they require and undertaken to construct it at his own cost, that is a ground for withholding approval of the plans in question. The rule must be made absolute.

Wills, J. at p. 233, says:

Seeing, therefore, that the defendants have refused their approval to the plans on the ground that the applicant has not provided for what it will be their duty and not his to provide, and on no other ground, I think the *mandamus* to approve the plans must be granted.

That *mandamus* is the proper remedy under the circumstances here would also appear from Halsbury's Laws of England, Vol. 10, p. 85, sec. 172:

If public officials or a public body fail to perform any public duty with which they have been charged, a writ of *mandamus* will lie to compel them to discharge it.

My conclusion therefore is that the *mandamus* to issue the permit should be granted. Order accordingly.

Application granted.

IN RE ESTATE OF W. S. PEDLAR, DECEASED.

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IN RE ESTATE OF W. S. PEDLAR, DECEASED

Testator's Family Maintenance Act—Will—Provision for widow inadequate —Consideration of others' claims on testator—"Others" not restricted to legal claims—R.S.B.C. 1924, Cap. 256, Sec. 11.

Section 11 of the Testator's Family Maintenance Act provides that an application claiming the benefit of the Act shall be made within six months from "the date of the grant or resealing in the Province of probate of the will."

Held, with respect to the grant, as meaning the date the grant or granting of probate of the will is actually completed by the grant being sealed.

In the words "the situation of others having claims upon the testator must be taken into account" (see judgment of Duff, J. in *Walker* v. *McDermott* (1931), S.C.R. 94 at p. 96) the word "others" is not limited to only such others as would have had legal claims upon the estate either under the Administration Act or said Testator's Family Maintenance Act.

Held, in the circumstances of the present case, that the sister of the testator and two children who had lived with the testator and his wife as their daughters, for which sister and children the testator had made provision by his will, come within the word "others" in said expression.

Having regard to all the circumstances and the claims of said "others":—

Held, that the whole estate should not be given to the widow but that she should be given a larger share than that given her by the will, and there should be a reduction by one-half of the amounts which said sister and children claimed under the will, said amounts to be added to the widow's share.

Statement

APPLICATION by the widow of William Solomon Pedlar under the Testator's Family Maintenance Act for adequate provision from his estate for her proper maintenance and support. The facts are set out in the reasons for judgment. Heard by FISHER, J. in Chambers at Vancouver on the 9th of January, 1933.

Hossie, K.C., for petitioner.
H. C. Green, for the children.
Lefeaux, for deceased's sister.

18th January, 1933.

Judgment

FISHER, J.: After careful consideration of the arguments of counsel on behalf of the various parties appearing herein, I have come to the conclusion that the words, "the date of the grant or

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resealing in the Province of probate of the will," as used in section 11 of the Testator's Family Maintenance Act, should be interpreted with respect to the grant as meaning the date the grant or granting of probate of the will is actually completed by the grant being sealed and therefore in the present case the period of six months should run from the 19th day of May, 1932, and not from the 5th day of October, 1931.

On the merits of the application I have to say that, in my opinion, the testator in his will has not made therein adequate provision for the proper maintenance and support of his wife and therefore I have to consider what provision would be adequate, just and equitable in the circumstances. In this connection reference has been made by counsel to the case of *Walker* v. *McDermott* (1931), S.C.R. 94 where, at pp. 95-96, Duff, J. says:

The pertinent enactments of the Testator's Family Maintenance Act of British Columbia, c. 256, R.S.B.C. 1924, are these:

"3. Notwithstanding the provisions of any law or statute to the contrary, if any person (hereinafter called the "testator") dies leaving a will and without making therein, in the opinion of the judge before whom the application is made, adequate provision for the proper maintenance and support of the testator's wife, husband or children, the Court may, in its discretion on the application by or on behalf of the wife, or of the husband, or of a child or children, order that such provision as the Court thinks adequate, just and equitable in the circumstances shall be made out of the estate of the testator for the wife, husband or children.

"4. The Court may attach such conditions to the order as it thinks fit, or may refuse to make an order in favour of any person whose character or conduct is such as in the opinion of the Court to disentitle him or her to the benefit of an order under this Act.

"5. 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."

The provision which the Court is authorized to make in the circumstances stated in the section, is, "such provision as the Court thinks adequate, just and equitable." The conditions upon which this authority rests are that the person whose estate is in question has died leaving a will, and has not made, by that will, in the opinion of the judge, adequate provision for the "proper maintenance and support" of the wife, husband or children, as the case may be, on whose behalf the application is made.

What constitutes "proper maintenance and support" is a question to be determined with reference to a variety of circumstances. It cannot be limited to the bare necessities of existence. For the purpose of arriving at a conclusion, the Court on whom devolves the responsibility of giving effect to the statute, would naturally proceed from the point of view of the judicious father of a family seeking to discharge both his marital and his parental duty; and would of course (looking at the matter from that point

of view), consider the situation of the child, wife or husband, and the standard of living to which, having regard to this and the other circumstances, reference ought to be had. If the Court comes to the decision that adequate provision has not been made, then the Court must consider what provision would be not only adequate, but just and equitable also; and in exercising its judgment upon this, the pecuniary magnitude of the estate, and the situation of others having claims upon the testator, must be taken into account.

It is submitted by counsel on behalf of the widow that the expression in the quotation above set out "the situation of others having claims upon the testator" means that there must be taken into account the situation of only such others as would have had legal claims upon the estate of deceased either by way of the intestate succession provisions of our Administration Act or the provisions of the Testator's Family Maintenance Act as aforesaid. I have to say however that I do not understand the quotation from the judgment, as above set out, to mean this, and while saying so I might add that I have not overlooked the fact that in the passage quoted reference is made to the "marital and parental duty." I think the situation of others than those suggested by counsel was intended to be considered, for example, the situation of persons who would not have any such legal claims and yet might have claims upon the testator either because of blood ties or because of money transactions and I think the passage might be interpreted as meaning all those beneficiaries who have any moral claims upon the testator to make some provision for them (compare *Sheehan* v. *Public Trustee* (1930), N.Z.L.R. 1 at p. 9).

Judgment

In the present case the sister of the testator, Margaret Eliza Hughson, who would receive one-third of the residue under the will states in her affidavit that she was assisted by her deceased brother from time to time financially, she being a widow now 68 years of age, her husband having been killed in an accident 26 years ago and her present assets (including a small house and lot) being in value less than $2,000.

The testator also bequeathed a third share of the residue unto his trustee for the benefit of two infant children, Muriel Eleanor Perdue and Josephine Beryl Perdue, in equal shares for their maintenance on certain terms. These two infant children from the early part of the year 1920 lived with the testator and his first wife as their daughters until the death of Mrs. Pedlar in

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the year 1926 and for two years after that date when they returned to live with their father, who has since died, and their stepmother. No estate was left by their father and the stepmother, according to her affidavit, says she has no means whatever of subsistence apart from what she is guaranteed by way of relief. Under the circumstances it would seem that the testator recognized that his sister and the said children had some claims upon him and upon the assumption that they are such claims as may be considered, as I have already held, my view is that one should not wholly disregard the testator's intention.

Counsel on behalf of the widow contends that the whole estate should be now given to the widow. It would seem from the judgment of MARTIN, J.A. in *Brighten* v. *Smith* (1926), 37 B.C. 518 at p. 521 that the Court might take advantage of the power conferred upon it by section 5 of the Act to order that the applicant should forthwith receive an amount representing the entire value of the estate. It may be noted, however, that in the same case MACDONALD, C.J.A. said in part as follows (pp. 519-20):

> 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 re-marry 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.
>
> 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 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.

I have not overlooked the fact that since the decision in the *Brighten* case there is the judgment already referred to in *Walker* v. *McDermott, supra,* but I have already indicated that, in my opinion, such judgment does not exclude the consideration

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of the claims in the present case of the sister and the children as aforesaid. I do not think I should give the whole estate to the widow having regard to all the circumstances and the claims of the parties before me but I think that she should receive a larger share than that given under the will. In my opinion a provision adequate, just and equitable in the circumstances would be made by dividing the estate in a little different manner from that set out in the will. With respect to the claims of the sister of the testator and of the children as aforesaid I think that, as against the claim of the widow, there should be a rebate so that in the distribution of the estate, they should each receive only one-half of the amount to which they would be otherwise entitled under the will.

There will be an order accordingly with provisions for carrying out the terms of same and, if there is any difficulty as to such the matter may be further spoken to. All parties to be entitled to receive their costs out of the estate.

Order accordingly.

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THE DOMINION BANK v. THE AUTHORIZED TRUSTEE OF R. P. CLARK & COMPANY (VANCOUVER) LIMITED.

Interpleader—Garnishee—Parties—Proceedings taken without prejudice to claims of others not before the Court—Order—Appeal.

In June, 1931, R. P. Clark (now deceased), being indebted to the plaintiff bank, assigned to the bank as security for the debt certain moneys due him from R. J. Cromie. There being other claimants, an order was made at the instance of the bank that the money so owing, being the sum of $17,487.59, be paid into Court. The money was claimed by the Bank of Toronto under an alleged prior assignment; by the personal representative of said R. P. Clark, and by the authorized trustee in bankruptcy of R. P. Clark & Company (Vancouver) Ltd. The bank then procured from the Court an issue in which the question to be tried was whether the Dominion Bank is entitled to said moneys as against the trustee in bankruptcy, the order containing a clause that the proceeding was to be taken without prejudice to the claim of the Bank of Toronto and to the matters in dispute between the trustee in bankruptcy and the late R. P. Clark. On the trial of the issue it was found that the indebtedness of Clark to the Dominion Bank was $15,762.20, to which sum the bank was entitled, and that the balance of the moneys paid into Court belonged to the trustee in bankruptcy.

Held, on appeal, that the issue should have been framed to enable the judge to dispose of the claims of all the claimants. The order under review should be set aside and the matter referred back to the Court below for final determination with all parties interested represented.

Statement

APPEAL by plaintiff from the order of MORRISON, C.J.S.C. of the 24th of June, 1932. In June, 1931, the late R. P. Clark, upon obtaining a loan from the Dominion Bank, assigned to the bank as security therefor certain moneys due to him from one R. J. Cromie amounting to $17,487.59, and pursuant to a garnishing order of the 13th of August, 1931, said Cromie paid said moneys into Court. By order of MORRISON, C.J.S.C., an issue was directed as to whether the Dominion Bank was entitled to said moneys as against the trustee in bankruptcy of R. P. Clark & Co. (Vancouver) Ltd. The Bank of Toronto also claimed said moneys under an alleged prior assignment from R. P. Clark, and said order contained a clause that said proceeding was to be taken without prejudice to the claim of the Bank of Toronto. It was found on the issue that the indebted-

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ness of Clark to the Dominion Bank was $15,762.20, that the bank was entitled to this sum with interest and the trustee in bankruptcy was entitled to the balance of the moneys in Court.

The appeal was argued at Vancouver on the 7th to the 11th October, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

A. Alexander, for appellant: The learned judge took the date of the trial instead of the date of service of the garnishee order. At the time of the service of the order $21,000 was owing to the bank and the bank was entitled to the full amount paid into Court: see *Donohoe* v. *Hull Bros. & Co.* (1895), 24 S.C.R. 683; *Bank of Hamilton* v. *Black* (1917), 24 B.C. 394; *McKay* v. *Bank of Montreal* (1932), 1 W.W.R. 897. He had no right to break up the fund at all: see Laws Declaratory Act, R.S.B.C. 1924, Cap. 135, Sec. 2 (25); *Read* v. *Brown* (1888), 22 Q.B.D. 128 at p. 132; *Wilton* v. *The Rochester German Underwriters Agency Co.* (1917), 2 W.W.R. 782 at p. 786; *Durham Brothers* v. *Robertson* (1898), 1 Q.B. 765; *Tancred* v. *Delagoa Bay and East Africa Railway Co.* (1889), 23 Q.B.D. 239; *Comfort* v. *Betts* (1891), 1 Q.B. 737; *Hughes* v. *Pump House Hotel Company* (1902), 2 K.B. 190; *Wiesener* v. *Rackow* (1897), 76 L.T. 448; *Bank of Liverpool and Martins Limited* v. *Holland* (1926), 32 Com. Cas. 56; *Re Bland and Mohun* (1913), 30 O.L.R. 100 at p. 103; *Farney* v. *Canadian Cartage Co.* (1917), 3 W.W.R. 758.

McPhillips, K.C., for respondent: There was a prior assignment to the Bank of Toronto. Even under the Common Law Procedure Act the Court could deal with what was over after the debt was paid: see *Hirsch* v. *Coates* (1856), 18 C.B. 757. We are attacking Clark's interest in what was assigned: see *In re General Horticultural Company* (1886), 32 Ch. D. 512; *Cole* v. *Eley* (1894), 2 Q.B. 180 at p. 187. You can take no more than the right of the debtor: see *Bank of Montreal* v. *Rogers* (1912), 2 W.W.R. 128; *Barton* v. *Bank of New South Wales* (1890), 15 App. Cas. 379; *Smither* v. *Lewis* (1686), 1 Vern. 398; 23 E.R. 542; *Angell* v. *Draper* (1686), 1 Vern. 398; 23 E.R. 543; *Balch* v. *Wastall* (1718), 1 P. Wms. 445; *Salt* v. *Cooper* (1880), 16 Ch. D. 544; *Canada Cotton Co.* v.

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Parmalee (1889), 13 Pr. 308; *McLean* v. *Bruce* (1891), 14 Pr. 190; *Central Bank* v. *Ellis* (1893), 20 A.R. 364.

10th January, 1933.

MACDONALD, C.J.B.C.: In the month of June, 1931, the late R. P. Clark assigned to the appellant moneys due to him from one R. J. Cromie as security for a loan by the appellant to Clark. The appellant applied to have the money so owing by Cromie to Clark paid into Court since there were other creditors asserting claims upon it. The money was also claimed by the Bank of Toronto under what was alleged to be a prior assignment of it and by the personal representative of the said Clark and by the authorized trustee in bankruptcy of the said R. P. Clark & Company (Vancouver) Ltd. The appellant procured from the Court an issue in which:

The question to be tried is whether the Dominion Bank is entitled to the said moneys as against the said trustee in bankruptcy and shall be so tried by the presiding judge in Chambers.

The order contained the following clause:

The said proceedings shall be taken without prejudice to the claim of the Bank of Toronto to the said fund which claim is hereby reserved and also without prejudice to the matters in dispute herein between the said trustee in bankruptcy and the late R. P. Clark.

MACDONALD, C.J.B.C.

The trial of the issue came on before the learned Chief Justice of the Supreme Court, whereupon the two claimants, not parties to the issue, appeared by counsel but the learned judge refused to hear them. The amount of money in Court was $17,487.59. The learned judge found that the indebtedness of Clark to the Dominion Bank was $15,762.20, together with certain interest and further found that the balance of the said sum belonged to the said trustee in bankruptcy. From this the bank appeals, claiming that since it had an assignment of the whole sum owing by Cromie, it was entitled to an order for that sum subject to the rights reserved as aforesaid; while the trustee in bankruptcy claimed and was allowed the balance between that sum and the bank's actual claim, the sum aforesaid. I think the learned judge came to the wrong conclusion. Moreover, I think that the proceedings in this matter were a misadventure. It was impossible owing to the way the issue was framed that the judge should decide the ownership of the money since the rights of two of the claimants were reserved. It is clear that if less

than the whole amount were adjudged in favour of the appellant and either of the other claimants, by such proceedings as they might be advised to take, asserting their rights, succeeded in obtaining an order for the whole or any part of the money in Court, this would reduce or destroy the Dominion Bank's claim by the amount so adjudged to the other claimant or claimants. For instance, the claim of the Bank of Toronto was upon a prior or alleged prior assignment and as security for $25,000. This claim being reserved, that claimant might proceed against the Dominion Bank to claim its share—$25,000, which deducted from the total amount in Court would leave for the Dominion Bank less than its debt, whereas the authorized trustee would have some $1,700 of the money in question in its possession which ought to belong to the Dominion Bank, or the other claimant.

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With respect I think the trial judge failed to observe this difficulty when he awarded only the amount of the actual debt to that bank. It is unfortunate that the issue was not framed to enable the judge to dispose of the claims of all claimants. I see no difficulty in the way of an application for the payment out of the money to all claimants entitled to share in it. But the parties have got the matter into such a position that the judge was confined to the issue as framed. That being so and there being no dispute about the priority of the Dominion Bank's claim over the claim of the authorized trustee, the bank should have been awarded the whole sum subject to the rights of the other claimants. But I think the preferable course would be to refer the matter back to the Court below to straighten out the tangle and avoid multiplicity of proceedings which are repugnant to the Judicature Act and Rules, and to the Supreme Court of this Province and Rules of Court. I would give no costs of the proceedings to either party up to the present. Both parties are at fault in these proceedings.

MACDONALD, C.J.B.C.

MARTIN, J.A.: I agree.

MARTIN, J.A.

McPHILLIPS, J.A.: I agree that in the circumstances and the way they impress me that the issue as directed and tried does not determine matters in their entirety and whilst not disagree-

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ing with the judgment of the learned judge in the Court below it is not a determination as between all the claimants of the moneys; therefore upon full consideration the best course to follow will be to refer the matter back to the Court below and all the parties interested must make their claims or abandon their claims leaving the contestants to agree upon a form of issue which determined will be a final disposition of the right to the moneys called in question. The appeal should be dismissed but no costs to either party here or below.

MACDONALD, J.A.

MACDONALD, J.A.: An application was made in Chambers by appellant, the Dominion Bank (claimant by an assignment of the sum of $17,487.59 paid into Court under a garnishee order served on one Cromie) for an order directing it and the Bank of Toronto, another claimant under a prior assignment, and respondent trustee, a judgment creditor, in an action against one R. P. Clark and out of which the garnishee arose, to appear and state the nature of their claims; or to direct that an issue be tried in respect thereto. This amount was paid into Court by Cromie in an action by respondent against Clark with the suggestion that the moneys were assigned to the Bank of Toronto and that some time thereafter the balance was assigned to appellant.

Although all parties interested were named in the application a limited order for the trial of an issue was made, *viz.*, that appellant should proceed to determine its claim to this fund and that

> The question to be tried is whether the Dominion Bank is entitled to the said moneys as against the said trustee in bankruptcy [respondent].

Also

> The said proceedings shall be taken without prejudice to the claim of the Bank of Toronto to the said fund which claim is hereby reserved and also without prejudice to the matters in dispute herein between the said trustee in bankruptcy and the late R. P. Clark.

It is difficult to understand why all claimants were not made parties to the issue. Although the Bank of Toronto holds the first assignment it is not a party. The respondent too may have no claim if the first assignment is valid.

Under Court of Appeal Rule 20 the fact that no appeal has been taken from the order directing a limited trial of the issue does not prevent us from giving such a decision on this appeal

as may be just. I would, therefore, set aside the order under review and remit the matter for further and final determination with all parties interested represented. No costs here or below.

Case remitted to Court below.

Solicitors for appellant: *Tiffin & Alexander.*
Solicitors for respondent: *McPhillips, Duncan & McPhillips.*

BLAND v. AGNEW.

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BLAND v. AGNEW

Infant—Neglect of parents—Guardianship—Adoption—Religion of parents—Welfare of child—R.S.B.C. 1924, Cap. 6, Sec. 5 (2); Cap. 112, Sec. 93.

Audrey Bland, the seventh child of Charles and Jean Bland, who were Roman Catholics, was born on the 30th of December, 1929. In February, 1932, the father becoming involved in a charge of drunkenness and the children being neglected, Audrey Bland was on the 11th of February, 1932, by order of George Jay, a judge within the Infants Act, committed to the custody of the Children's Aid Society, of Victoria, the order reciting that the religion of the child was "not known." On the 16th of May, 1932, Herbert Agnew and his wife, who were Protestants, petitioned for leave to adopt the infant under the Adoption Act, and it appearing that the petitioners were able to bring up, maintain and educate the infant, and the Children's Aid Society, of Victoria, consenting thereto, the petition was granted in accordance with the provisions of the Adoption Act. On appeal by the natural parents, mainly on the ground that the foster parents were of a different religious persuasion to that of the infant's father:—

Held, affirming the order of McDONALD, J. (McPHILLIPS, J.A. dissenting), that it is not unlawful for a Protestant to adopt a child of Roman Catholic parentage or a Roman Catholic to adopt a child of Protestant parentage, and where parents have neglected to provide proper care and maintenance for their child their consent to the adoption may be dispensed with. The welfare of the infant has paramount consideration with the Court, and in the circumstances of this case her interests would be thoroughly looked after by the foster parents.

Statement

APPEAL by plaintiff from the order of McDONALD, J. of the 17th of June, 1932. Herbert W. Agnew and his wife petitioned for an order granting them leave to adopt an infant, Audrey

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Bland, who was born in Victoria on the 30th of December, 1929. She was the seventh child of her parents, Charles Bland and Jean Bland, and in consequence of their neglect to properly care for her an order was made by George Jay, a judge within the meaning of the Infants Act, to commit the child to the custody of the Children's Aid Society, of Victoria, on the 16th of February, 1932. The Children's Aid Society consented to the adoption of the child by the petitioners. The petitioners are Protestants and the natural parents of the child, who are Roman Catholics, appealed from the order on the ground that there was error in dispensing with the consent of the parents to the adoption of the infant, and that it was contrary to the welfare of the infant to allow it to be adopted by foster parents of a different religious persuasion to that of the infant's father and mother.

The appeal was argued at Vancouver on the 1st and 2nd of November, 1932, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

O'Halloran, for appellants: The consent of the parents was dispensed with here, but in view of section 93 of the Infants Act this should not have been done. There were seven children, and the father drank and was convicted for theft. The father was a Roman Catholic and both parents wanted the children to be brought up in that faith: see *Johnson* v. *Johnson* (1932), 2 W.W.R. 593.

Beckwith, for respondents: This Court should not interfere with the discretion exercised by the Court below: see *Painter* v. *McCabe* (1927), 39 B.C. 249 at p. 453; *Maddison* v. *Donald H. Bain, Ltd.* (1928), *ib.* 460 at p. 462. In the circumstances of this case the religious wishes of the father should not prevail: see *Hill* v. *Hill* (1862), 31 L.J., Ch. 505; *Andrews* v. *Salt* (1873), 8 Chy. App. 622; *In re Goldsworthy* (1876), 2 Q.B.D. 75; *In re McGrath (Infants)* (1893), 1 Ch. 143; *The Queen* v. *Gyngall* (1893), 2 Q.B. 232 at p. 243; *In re Newton (Infants)* (1896), 1 Ch. 740. The welfare of the child is strongly in favour of the adopting parents: see *Re Kenna* (1913), 29 O.L.R. 590; *Ward* v. *Laverty* (1925), A.C. 101 at p. 104.

O'Halloran, in reply, referred to *Attorney-General for New*

South Wales v. *Trethowan* (1932), A.C. 526 at p. 539; *Rex* v. *Bishop of Salisbury* (1901), 1 K.B. 573 at p. 579.

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Cur. adv. vult.

10th January, 1933.

MACDONALD, C.J.B.C.: A petition was lodged by the respondents asking consent of the judge to the adoption by the respondents of Audrey Bland, daughter of the appellants, who had been on the 16th of February, 1932, committed to the Children's Aid Society, of Victoria, in pursuance of the Infants Act.

While the appellants had not by means of notice of motion or application applied to the judge to transfer the said infant and her brothers and sisters from the Children's Aid Society, of Victoria, to the Catholic Children's Aid Society of the Archdiocese of Vancouver, yet counsel appearing for the Bishop of Victoria and the mother of the child moved at Bar for such a transfer. The bone of contention between the parties was that of religion. When the said child was committed to the Children's Aid Society, of Victoria, the magistrate who made the committal stated that the religion of the child was "unknown," but evidence was adduced before the learned judge on the application for transfer that her father was a Roman Catholic, and that both her father and mother were desirous of having her brought up as a Catholic. The Victoria Children's Aid Society were desirous that the child should be placed with foster parents, the respondents herein, who were admitted to be worthy persons to take custody of the child. The learned judge who declined to make the transfer held that he had no jurisdiction to do so; that the application should have been made to the magistrate who committed the child to the Victoria Children's Aid Society; but since there was no appeal to this Court against that order I am no concerned with it.

MACDONALD, C.J.B.C.

Apart from the statute the rights of the infant have paramount consideration with the Court and in the circumstances of this case I think her interests would be thoroughly looked after by the respondents.

The appeal must be dismissed. The appellants are appealing *in forma pauperis* so that I make no order as to costs.

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

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: With great respect to the learned judge making the order for adoption which is the matter of appeal before us, my opinion is that it was made without jurisdiction—it was an order made in denial of a governing statutory provision contained in the Infants Act (Cap. 112, R.S.B.C. 1924). The section of the Act reads as follows:

93. Notwithstanding anything in this Part contained, the judge, in determining on the person or society to whom the child is to be committed, shall endeavour to ascertain the religious persuasion to which the child belongs, and shall, if possible, select a person or society of the same religious persuasion, and such religious persuasion shall be specified in the order; and in any case where the child has been placed purusant to such order with a person or society not of the same religious persuasion as that to which the child belongs, the judge shall, on the application of any person in that behalf, and on its appearing that a fit person or society of the same religious persuasion as the child is willing to undertake the charge, make an order to secure his being placed with such person or society.

The child in question is under the age of three years and was committed under the Act to the Children's Aid Society, of Victoria, and being so committed the Children's Aid Society was only entitled to hold the child under the provisions of the Infants Act and the society in consenting to the adoption order going as recited in the order was guilty of dereliction of duty it being in defiance of the plain statute law under which the child was so held. The deputy superintendent of neglected children also was guilty of dereliction of duty. The order for adoption committed the child to Herbert Webster Agnew and Annie Heaton Agnew of Protestant persuasion whereas the child was admittedly as the material before the learned judge shewed of Catholic persuasion. The duty statutorily imposed upon the Children's Aid Society was to keep the child and not consent to parting with it save in conformity with the statute law under which it was held but in breach of that statutory law did so consent; likewise the deputy superintendent of neglected children was also guilty of breach of duty. Note the language in above section:

And in any case where the child has been placed pursuant to such order with a person or society not of the same religious persuasion as to that to which the child belongs, the judge shall, on the application of any person

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in that behalf, and on its appearing that a fit person or society of the same religious persuasion as the child is willing to undertake the charge, make an order to secure his being placed with such person or society.

Now the learned judge as I have said, in my opinion, acted without jurisdiction in making the order as the consents before him were valueless and contrary to the law. At the time of the hearing before the learned judge there was present the stated willingness of the Children's Aid Society of the Catholic Archdiocese of Vancouver ready and willing to undertake the charge of the child. So that all was without jurisdiction and with great respect the order made is without force in law—in truth a nullity. Here an irreparable wrong has been committed unless this order under appeal be set aside. It is unthinkable that the consents given and order made were made with a full knowledge of the state of the statute law and as Lord Birkenhead, when Lord Chancellor, said: Counsel are under an obligation to see to this. I feel confident if section 93 above referred to was specifically drawn to the attention of the learned judge the order for adoption never would have been made.

If this can be possible where the Legislature took every precaution to prevent it the law-making authority will have to see to it in some way and pass all necessary legislation to prevent its further continuance and such legislation should be retroactive in its nature. I have peculiar knowledge of this legislation in that I was the first introducer of the measure in 1901 and the Act then was for the first time passed as the Children's Protection Act of British Columbia (Cap. 9, 1901), the Government of the day taking the bill over and making it a Government measure. Further I was for years honorary counsel for the Children's Aid Society, of Victoria, and bear tribute to the very correct manner that the society conducted its affairs, never one collision occurring on the ground of religion. The society studiously observed the law and whatever the child was—Protestant or Catholic—the utmost care was taken to place it in a Protestant or Catholic institution or where it was placed with foster parents the religious persuasion was carefully seen to. Under the Infants Act the children are always under the guardianship of the society even when in institutions temporary homes and shelters or when with foster parents, but it is statutorily incumbent on the society that the religious persuasion must be respected. In

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short what has taken place here is a complete departure from the statutory duty. The Adoption Act in my opinion does not admit of children held under the Infants Act being disposed of in this way. Further here we have the parents of the child desirous that the child should be given into the charge of the Children's Aid Society of the Catholic Archdiocese of Vancouver and judicial notice I think will be taken of what any man on the street can see that that society has a complete and modern building well maintained to take the best of care of all the children committed to it.

Now section 5 (1) of the Adoption Act (Cap. 6, R.S.B.C. 1924) reads as follows:

5. (1.) Subject to the provisions of subsection (2), no order for adoption shall be made without the written consent of the following persons to the adoption, verified by affidavit, namely:—

(*a.*) Of the minor, if over twelve years of age:

(*b.*) Of the petitioner's husband or wife, unless they are lawfully separated, or unless they jointly adopt the minor:

(*c.*) Of the parents, or surviving parent, or the parent having the custody of the minor, if legitimate, and of the mother only if the minor is illegitimate:

(*d.*) Of the parent by adoption if the minor has been previously adopted:

(*e.*) Of the guardian or adult person having lawful custody of the minor, if any such guardian or person can be found, where the minor has no parent living or no parent whose consent is necessary under this section:

(*f.*) Of a children's aid society, or the superintendent of neglected children, where the minor has no parent living whose consent is necessary under this section, and no guardian or adult person having lawful custody of the minor can be found.

(2.) Where the written consent of a parent whose consent is required by subsection (1) is not submitted to the Court with the petition, and where the petition alleges that the parent has wrongfully abandoned the minor, or that the parent, without justification or excuse, neglects to provide proper care and maintenance for the minor, or that the parent is incurably insane, and where a copy of the petition, together with notice in writing of the time and place at which the application is made, has been served on the parent not less than ten days before the making of the application, either by personal service or in such other manner as the Court on the *ex parte* application of the petitioner has directed, then, upon proof to the satisfaction of the Court of the allegations contained in the petition, the Court may, by the order allowing the adoption, dispense with the consent of the parent.

(3.) If the minor has no parent living and no guardian or adult person can be found who has the lawful custody of the minor, the Court shall recite these facts in the order allowing the adoption. The fact of illegitimacy shall in no case be referred to in the order of adoption.

It will be seen that upon the facts of this case the consent of

the parent was necessary and could not be dispensed with. The child was at the time under the charge of the Children's Aid Society, of Victoria, and having the custody of the child was providing for it—the parents being paupers—as determined by this Court when given leave to appeal *in forma pauperis.*

But if it were to be assumed that the Children's Aid Society, of Victoria, could give an effectual consent without the consent of the parent which, of course, in my opinion, could not be done, then when the assent was given, it would have to be a consent bearing in mind and giving attention to section 93 of the Infants Act and the person adopting had to be of the religious persuasion of the child, which is not the case here, as the respondents are of the Protestant persuasion. It is important to consider section 6 of the Adoption Act which reads as follows:

6. On the hearing of the petition, if the Court is satisfied of the ability of the petitioner to bring up, maintain, and educate the minor properly, and of the propriety of the adoption, having regard to the welfare of the minor and the interest of the natural parents, if living, the Court may make an order for the adoption of the minor by the petitioner.

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It will be seen that the Court must consider "the propriety of the adoption." That at once brings up the question of the religious persuasion and certainly there was an absence of propriety to allow the adoption of the child or the children's Aid Society, of Victoria, consenting to it, when admittedly a Catholic child was proposed to be handed over to people of the Protestant persuasion and admitting of the Children's Aid Society, of Victoria, committing such a flagrant breach of the statute law, again I feel confident that this point was not brought clearly out and to the attention of the learned judge. A natural observation of the learned judge would have been "The Court cannot assent to such a breach of statutory duty as proposed." Then what about "the interest of the natural parents?" Their child a Catholic child is to be turned over and was turned over for all time to persons of the Protestant persuasion. I have no doubt that a devout Protestant is as conscientious as a devout Catholic, it being a matter of conscience that the children be brought up in the faith of the parent. To be paupers is not a crime and the circumstances of the parents may improve and their conduct improve. To despair is against Christian teaching. Regeneration is to be encouraged but the effect of this order is to wrench

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and withhold, during its life, this child from its parents and change its religion. The statute law in no way supports this, but is in absolute denial of that ever being possible, as I read it. Here there has been no attention paid to "the interest of the natural parents."

We have in this case a particularly plain demonstration of purposed proselytizing, something that the Legislature in the Infants Act took the utmost care to prevent. In this connection note that under section 60 of the Infants Act, subsection (3), where a monthly report has to be made and amongst other things

(c.) The disposition made by the society of any children during the period covered by the report, whether by way of adoption, placing in a foster home, or otherwise, and stating in each case the names, residence, occupation, and religion of the parents by adoption or foster parents of the children so disposed of.

Further to indicate that the rights of the parent are not wholly abrogated, see section 61 (3) of the Infants Act which reads as follows:

(3.) A judge, if satisfied on complaint made by a parent of the child, that the child has not been maintained by the society, or was not deserted by such parent, or that it is for the benefit of the child that it should be either permanently or temporarily under the control of such parent, or that the resolution of the society should be determined, may make an order accordingly, and any such order shall be complied with by the society; and if the order determines the resolution, the resolution shall be thereby determined as from the date of the order, and the society shall cease to have the rights and powers of the parent as respects the child.

To shew the duties of the superintendent, I would refer to section 54 of the Infants Act, where we have, quoting in part, " . . . shall make a written report . . . giving the name, age, and religion of the child." It is to be noticed that the Legislature is careful. Then we have in the above section "having regard to the welfare of the minor," is it to the "welfare" of this child that it shall lose its religion and be forever alienated in its changed religion from that of the parents—and note these words in the section "the interest of the natural parents." What higher or more sacred interest can there be than that of having the child brought up in its own religion? If there was to be adoption at all it should have been into a Catholic family or remain with the Children's Aid Society, of Victoria, until it could be so adopted. However, the evidence before the learned judge shewed that there was a Children's Aid

Society—The Children's Aid Society of the Catholic Archdiocese of Vancouver—ready to take the child and I have no hesitancy in saying that the child should have been committed to that society. Is this all to be thrown to the winds and by the action adopted here and under the agency of the Adoption Act the intention to preserve the religion of the child is to be thwarted and defeated? Here the parents protest against the adoption and appear by counsel before the learned judge opposing, and name a children's aid society that will take the child, a children's aid society of the same religious persuasion as the child—and the society expresses its willingness to take the child, but notwithstanding, the order for adoption is made and there is the irretrievable loss of the child to the parents. Under the Infants Act the child is not lost forever—the parent may come in and have his child again. Note section 62 (1):

62. (1.) Where the parent of a child applies to any Court having jurisdiction in that behalf for a writ or order for the production of the child, and the Court is of opinion that the parent has abandoned or deserted the child, or that he has otherwise so conducted himself that the Court should refuse to enforce his right to the custody of the child, the Court may, in its discretion, decline to issue the writ or make the order.

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(2.) If at the time of the application for a writ or order for the production of the child the child is being brought up by another person, or is boarded out by a society duly authorized in that behalf, the Court may, in its discretion, if it orders the child to be given up to the parent, further order that the parent shall pay to such person or such society, the whole of the costs properly incurred in bringing up the child, or such portion thereof as may seem to the Court to be just and reasonable, having regard to all the circumstances of the case.

(3.) Where a parent has:—

(*a.*) Abandoned or deserted his child; or

(*b.*) Allowed his child to be brought up by another person at that person's expense, or by any children's aid society, for such time and under such circumstances as to satisfy the Court that the parent was unmindful of his parental duties,—

the Court shall not make any order for the delivery of the child to the parent unless the parent satisfies the Court that, having regard to the welfare of the child, he is a fit person to have the custody of the child.

The method of adoption is in furtherance of proselytizing as section 65 of the Infants Act, a safeguard of the Legislature, is rendered nugatory. That section reads as follows:

65. Subject to such regulations as may be provided, all ministers of religion, or any person being duly authorized by the recognized head of any religious denomination, shall have admission to every temporary home or shelter, and access to such of the children placed or detained therein, as

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belong to their respective denominations, and may give instruction to them in their respective religions on the days and at the times allotted by such regulations for the religious education of such children of their respective denominations.

Children held under the Infants Act and committed to children's aid societies must at all times be subject to the provisions of that Act and the Adoption Act cannot be admitted to alter or affect the Infants Act.

It is pressed that the material welfare of the child is the paramount matter. I do not agree with that and the Adoption Act itself, section 6, as we have seen deals with more than the material welfare of the child "the propriety of the adoption having regard to the welfare of the minor and the interest of the natural parents."

The order made offends against the statute law, was made as indicated, without jurisdiction, and is against natural justice. It is a well known and settled rule of law and the Legislature in the Infants Act fully protects it, that the child must be brought up in the father's religion. In *Talbot* v. *The Earl of Shrewsbury* (1840), 4 Myl. & Cr. 672, it was held that the circumstance that it will be more for the pecuniary interest of a child to be educated in one religious faith than in another will not induce the Court to interfere with his religious education. The Lord Chancellor said at p. 688:

> If the Court were to ever exercise that discretion it would be very difficult to say what was to be the extent of pecuniary benefit which should require the Court's interference—what was to be the price of the child's faith. It would be fraught with extreme danger.

(*Austin* v. *Austin* (1865), 34 Beav. 257; *Hawksworth* v. *Hawksworth* (1871), 6 Chy. App. 539.)

The father's right is to have his children brought up in his own religion (*Andrews* v. *Salt* (1873), 8 Chy. App. 622 at p. 636), and it has been held that this right the father could not release nor could he

> "bind himself conclusively by contract to exercise, in all events, in a particular way, rights which the law gives him for the benefit of his children, and not for his own":

(*Andrews* v. *Salt*, *supra*, at p. 636.)

And in the Guardianship of Infants Act, 1886 (Imperial) (*In re Scanlan, Infants* (1888), 40 Ch. D. 200) this principle was carried out as it is in the Infants Act in British Columbia.

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In my view the adoption under appeal was made without jurisdiction and should be set aside. With great respect the learned judge was without jurisdiction to make the order because of section 93 of the Infants Act. The Children's Aid Society, of Victoria, held the child under the provisions of the Infants Act only and could not give any consent which would do violence to the statutory conditions under which the child was held, *viz.*, section 93 of the Infants Act. The custody of the child was only capable of being changed to "a fit person or society of the same religious persuasion as the child" and there was a society at the time of the hearing of the same religious persuasion as the child, *viz.*, The Children's Aid Society of the Catholic Archdiocese of Vancouver, ready to take the child and offering to do so at the time of the making of the adoption order.

My view is that the adoption order under appeal, being made without jurisdiction, should be set aside. I would allow the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: This is an appeal from an order made under the Adoption Act (R.S.B.C. 1924, Cap. 6) whereby the petition of respondents (husband and wife) praying for leave to adopt an infant Audrey Bland, daughter of appellants, was granted. The natural parents appeal on the ground that, as they are Roman Catholics and the respondents Protestants, the Court had no jurisdiction to make the order; or at all events that it is contrary to law. An order was made by Magistrate Jay under the Infants Act (R.S.B.C. 1924, Cap. 112) placing the child in the care and custody of the Children's Aid Society, of Victoria. That order recites that the religion of the child was "not known." I lay no stress on that recital; I assume the child's parents are of the Roman Catholic faith. It must be held, however, that the infant was a "neglected child," the natural parents could not or did not give it proper care: the neglect was of an aggravated character.

The sole point is whether or not the learned judge had jurisdiction to make the order by virtue of the provisions of the Adoption Act (and other relevant statutes, if any) or if he had jurisdiction, can we find error in law, or the exercise of an unsound discretion which may be reviewed. The contention in

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effect is that under the Adoption Act and the Infants Act the child of Roman Catholic parents (the latter objecting) cannot legally be adopted by a Protestant petitioner.

The Adoption Act passed after the Infants Act was strictly followed in this case unless section 6 reading:

On the hearing of the petition, if the Court is satisfied of the ability of the petitioner to bring up, maintain, and educate the minor properly, and of the propriety of the adoption, having regard to the welfare of the minor and the interest of the natural parents, if living, the Court may make an order for the adoption of the minor by the petitioner.

means that "having regard for the welfare of the minor" it is unlawful for a Protestant to adopt a child of Roman Catholic parentage or a Roman Catholic to adopt a child of Protestant parentage. The order was attacked on this ground also, *viz.*, that the Court could not dispense—as it did—with the consent of the natural parents. It is clear however on the material, that as the parents neglected to provide proper care and maintenance for the child, their consent to the adoption might be dispensed with. The consent of the child's guardian was obtained. Under section 60 of the Infants Act the Children's Aid Society, of Victoria, was the legal guardian.

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Reverting to section 6 of the Adoption Act, has the "welfare" of the child been disregarded? Under this section the Court must inquire into the petitioner's "ability to bring up, maintain and educate the minor properly." It must be satisfied of the petitioner's ability in this respect because of the requirement in the clause following "having regard to the welfare of the child." If the petitioners had not financial ability or moral character to enable them to properly "bring up, maintain and educate the minor" such an order should not be made. To make it, in the absence of these prerequisites, would be to disregard the child's welfare. The Court must be satisfied also as to "the propriety of the adoption" and have regard "to the interest of the natural parents." We are not concerned with the latter feature where their consent was on proper grounds dispensed with.

It may be conceded that the moral and religious welfare of the child is a proper subject for the consideration of the judge making the order. He would too be within his rights if he refused to make an order on the ground that true welfare is not secured by placing an infant (under three years) of the Roman

Catholic faith in the custody and control of a Protestant petitioner. It does not follow however that such an order, if made, is illegal or that it may be set aside. It is a point that might be considered in the discretion of the judge. It was quite open to him to hold, however, that, having regard to opportunities for advancement, which may accrue to the infant, and to the moral and, it may be added, the religious character of the petitioner (apart altogether from his particular tenets of belief) that the welfare of the child, morally and physically, would be fully protected by entering into this new relationship and as he did so decide it is impossible to say that he was clearly wrong. We cannot legislate by adding a new clause to section 6, *viz.*, that a Protestant infant cannot be adopted by a Roman Catholic or a Roman Catholic infant by a Protestant.

MACDONALD, J.A.

The purpose and scope of the Adoption Act should be borne in mind. It is entirely remote from and different to the purposes served by the Infants Act. Not only may an adult husband and wife adopt any child under 21 years of age but an adult bachelor may do so. The child need not be "neglected" within the meaning of the Infants Act. It may have lost its natural parents and yet have ample means for maintenance and support; or the parents may be living. Adoption in any of these cases and in many other circumstances might still be deemed advisable if a willing petitioner is found ready to extend parental care. The child when adopted secures all the rights of a natural-born child including the right of inheritance. A special relationship is established conferring special rights altogether different from the relationship created by any order made under the Infants Act. The adopted child may take the surname of the petitioner. The legal relationship of parent and child is obtained. The child too may be taken by adoption from any place—a children's aid society, foster parents or wherever the minor may be found. The only restriction is that the minor must be unmarried.

There is much to be said for the view that where such a special relationship is brought about, the adopted child becoming *de jure* the child of the petitioner, the ordinary principle *religio sequitur patrem* in so far as it refers to the natural parent, should give way to a new right of the successful petitioner to direct and instruct in morals and religious beliefs.

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If the child to be adopted is over 12 years his or her consent must be obtained (section 5 (1)). If it is an intractable rule that a Roman Catholic child cannot be adopted by a Protestant petitioner such consent would be unavailing. It cannot be successfully contended that if a Roman Catholic child (perhaps over 18 years of age) forms a filial attachment for a Protestant petitioner of moral character and ample means, willing to adopt the minor that there is no power to make the order. The minor at this age might, and doubtless would, adhere to its own religious views or change them if so disposed. The Act is not concerned with that. It follows, therefore, that under the adoption Act a similarity of religious views is not a *sine qua non* to adoption no matter how young the adopted child may be.

I must say, however, that I am in full sympathy with the view that in placing infants of tender years in the custody of others regard should be had for the religious views of the natural parents. It was open to the legal guardian to consider this point and to withhold its consent. It did not do so. Not having withheld consent, as it might with propriety have done, we must apply the law as we find it. I feel too that, while the discretion I referred to should be exercised in cases of this sort, it would not be possible without impairing the main purpose of this special Act to make the question of common religious beliefs in all cases a condition precedent to adoption.

Reliance was placed on section 93 of the Infants Act. It has no bearing on the point in issue. It deals with certain requirements as to religious views when a judge is deciding upon a person or society to whom a child is "committed." We are not remotely concerned with such a case. The Infants Act deals with neglected children or children guilty of criminal acts providing for their care, custody and correction in institutions or foster homes; not with placing children, who need not be neglected or criminal, in a filial relationship where the rights of natural born children are obtained. The Adoption Act may be applied in the case of scores of minors who never come under the purview of the Infants Act. Even if the two statutes are *in pari materia* they cannot

be treated precisely in the same way as if they were merely parts of one Act; and it is clearly not competent for a Court to borrow from one Act

any provision that may be wanting in another which is *in pari materia* with it:

Hardcastle on Statute Law, 2nd Ed., 153.

A provision is found in section 93 of the Infants Act wholly wanting in the Adoption Act and its absence is fatal to this appeal. I may add that I have carefully considered all the cases to which we were referred in a very comprehensive argument but I do not find it necessary to discuss them. It would appear that the case on this point is one of first impression under the Adoption Act of this Province.

I would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellants: *C. H. O'Halloran.*
Solicitor for respondents: *H. A. Beckwith.*

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MERRILL RING WILSON LTD. *v.* WORKMEN'S COMPENSATION BOARD

MERRILL RING WILSON LIMITED *ET AL.* v. WORKMEN'S COMPENSATION BOARD.

Workmen's Compensation Act—Assessments for medical aid—R.S.B.C. 1924, Cap. 278, Secs. 32 and 33.

In levying assessments on employers for the purpose of medical aid, pursuant to section 33 of the Workmen's Compensation Act, the Workmen's Compensation Board are entitled to apportion the additional amounts required over the amount of payments by workmen to meet the cost of medical aid according to the amounts actually assessed against the several employers, and are not required to apportion the amount between the employers contributing thereto according to the amount of their respective pay-rolls. The general assessment referred to in section 33 of the Act is not required to be an assessment against all employers contributing thereto at an equal rate according to the amount of their pay-roll, but may, and should be, so made that the several classes of employers contributing thereto will be assessed according to the hazard of the classes.

Held, also, *per* MACDONALD, C.J.B.C., that the provisions of the Act requiring the Board, on or before the 15th day of March in each year, to adjust the assessments against the several classes of employers so that each class shall be assessed according to the hazard of the class, are directory only and the Board has power, after the expiration of the appointed time, to afterwards make the adjustment required by section 43 of the Act.

Statement

APPEAL by plaintiffs from the decision of MURPHY, J. of the 18th of April, 1932 (reported, 46 B.C. 110), in the consolidated action brought by the plaintiffs on behalf of themselves as well as all other members of sub-class 2 of class 1 created by the Workmen's Compensation Act, included in the industry of logging west of the Cascade Mountains, for certain declarations as to the duty of the Board in regard to making assessments upon employers under the Workmen's Compensation Act. The facts are fully set out in the report of the trial above referred to. On the trial the plaintiffs' action was dismissed. The plaintiffs appealed from the judgment of MURPHY, J., only in so far as the said judgment or order dismissed the plaintiffs' claim for a declaration that the defendant is not entitled to apportion the additional amounts required to meet the cost of medical aid deficiency according to the amounts actually collected from the plaintiffs, but should apportion the same according to the total of the actual pay-rolls of the plaintiffs.

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Argument

The appeal was argued at Vancouver on the 12th of October, 1932, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Mayers, K.C. (*O'Brian, K.C.,* with him), for appellants: The question of medical aid is referred to in sections 32 and 33 of the Act. Section 32 is a general section and section 33 is a special section with regard to medical aid. The matter in question here is undoubtedly under section 33, the special section, and the learned judge below should not have referred to section 32 at all: see *Pretty* v. *Solly* (1859), 26 Beav. 606 at p. 610. The later section should prevail: *British Columbia Electric Railway Company, Limited* v. *Stewart* (1913), A.C. 816 at p. 828; *The King* v. *Justices of Middlesex* (1831), 2 B. & Ad. 818 at p. 821; *Wood* v. *Riley* (1867), L.R. 3 C.P. 26; *Lumsden* v. *Inland Revenue Commissioners* (1914), A.C. 877 at pp. 896-7. Section 33 requires that assessments against employers for medical aid purposes shall be a general assessment, which means an assessment upon all employers contributing thereto at an equal rate upon their pay-rolls.

Craig, K.C. (*Carmichael,* with him), for respondent: The Court may look to the result to which the construction contended for by the appellants would lead, and if it leads to an injustice it should not be adopted when, as here, the section is capable of a construction leading to more equitable results. The object is to see that each employer pays its just share. Some employments are more hazardous than others, and the Act provides for classes for this reason. The appellants' contention that all employers should all pay at the same rate whether the class be hazardous or not leads to an injustice, and the Court leans against a construction that would lead to a hardship. The other sections of the Act shew that assessments for medical aid should be made against classes according to the hazard of the employment. By section 2 compensation includes medical aid. Section 28 provides that for the purpose of maintaining the Accident Fund for payment of compensation, which includes medical aid, the several industries are divided into classes. The whole object of dividing into classes is so that each class may be assessed according to its hazard. Section 32 expressly refers to medical aid, and authorizes assessments by classes. The general assessment referred to

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in section 33 need not be an assessment on all employers at the same rate. The word "general" refers to the fact that all employers, except those specially excepted, are to be included in the assessment. In other words, it refers to the extent, but not to the amount of the assessment. Section 33 provides that the assessments for medical aid are to be so made "as, on the annual adjustment of assessments under this Part, will result in a general assessment . . ." The annual adjustment of assessments under this Part is provided for by section 43, which expressly provides that the adjustment is to be made according to the hazard of the employment. Therefore, section 33, relied on by the appellants, in itself provides that payments for medical aid must be according to the hazard of the employment. In any case the making of a declaration is discretionary and it ought not to be made in this case: *In re Staples. Owen* v. *Owen* (1916), 1 Ch. 322 at pp. 325-6; *Guaranty Trust Company of New York* v. *Hannay & Company* (1915), 2 K.B. 536 at pp. 564-5. The Attorney-General is a necessary party to an action of this kind. *Watson* v. *Mayor, &c., of Hythe* (1906), 22 T.L.R. 245; *Stoke Parish Council* v. *Price* (1899), 2 Ch. 277; *Paddington Corporation* v. *Attorney-General* (1906), A.C. 1; *Nuneaton Local Board* v. *General Sewage Co.* (1875), L.R. 20 Eq. 127; *Bedford (Duke of)* v. *Ellis* (1901), A.C. 1.

Mayers, in reply, referred to *Rattenbury* v. *Land Settlement Board* (1929), S.C.R. 52 at pp. 63-4.

Cur. adv. vult.

10th January, 1933.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The Board made an under-estimate of the money required to pay the cost of medical aid for the year 1931 and, therefore, sought by subsequent assessment to make good the deficiency. The appellants seek an injunction against such assessment. The point at issue depends very largely upon the true construction of sections 32, 33, and 43 of the Workmen's Compensation Act. The fund which the Board is authorized to collect to meet its obligations is named the "Accident Fund" and that term means the fund provided for the payment of compensations, outlays and expenses under Part I. of the Act. The sections above referred to and some others to be referred to are under that heading. For the pur-

pose of assessment to meet its obligations the Board by section 28 is authorized to divide the employers of workmen into classes and by section 35 it may differentiate in the rates to be assessed in respect of each class. For the purpose of creating and maintaining an adequate accident fund the Board by section 32 may assess and collect sufficient funds according to an estimate to be made by the Board:

(*a.*) To provide in connection with section 33 a special fund to meet the cost of medical aid;

and

(*d.*) To provide in each year capitalized reserves sufficient to meet the periodical payments of compensation accruing in future years in respect of all accidents which occur during the year.

Subsection (4) of said section 32 provides:

(4.) In case the estimated assessments in any class prove insufficient, the Board may make such further assessments and levies as may be necessary, or the Board may temporarily advance the amount of any deficiency out of any reserve provided for that purpose, and add such amount to any subsequent assessments.

It will be noted that the Accident Fund is the fund out of which all compensation is paid, whether cash, periodical payments or medical aid.

Section 33, subsection (1) reads as follows:

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Every employer who is required to contribute to the Accident Fund by way of assessment under this Part is hereby authorized and required to retain from the moneys earned by each workman in his employment the sum of one cent for each day or part of day the workman is employed as a contribution toward the cost of medical aid, and to pay the sum so retained to the Board from time to time at the time each assessment is due and payable by the employer, and at such other times as the Board may direct.

And subsection (2):

The moneys received by the Board under subsection (1) shall form part of the Accident Fund, and shall constitute a special fund to be used only in defraying the cost of medical aid. Such additional amounts as are required from time to time to meet the cost of medical aid shall be provided by the Board by assessment upon employers generally in all industries within the scope of this Part, except in respect of employments embraced in any plan for providing medical aid approved by the Board under subsection (4) of section 23. For the purpose of levying and collecting assessments under this subsection, the Board may charge the additional amounts required to meet the cost of medical aid against the funds to the credit of the several classes in such a manner as, on the annual adjustment of assessments under this Part, will result in a general assessment of such additional amounts upon those employers only who are liable to assessment under this subsection.

It is conceded by the Board that all compensation for acci-

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dents in any one year shall be provided for out of the collections for that year and it is provided that an adjustment should be made before the 1st of March of the succeeding year of any differences between the estimates of the actual requirements and the actual requirements, the employers to make up differences and the Board to refund surpluses. The Board's contention is that these provisions are directory only and that it would be impossible to carry on if it were otherwise. That section 43 is not imperative appears particularly from the language of it which requires the deficiency to be made up from employers, owing to circumstances over which the Board has no control such as those mentioned in the 8th paragraph of the statement of defence. The Act deals with matters of great magnitude requiring the exercise of the highest consideration by the Board and because of this the Legislature reposes in the Board discretion in many matters by giving them exceptional powers such as the responsibility of deciding without review upon all questions of fact and law, and while the present question is not one of those but one of jurisdiction the question of deciding that section 43 is imperative or not is not free from doubt and ought to be decided in accordance with the spirit of the whole Act, otherwise mistakes in the assessments or in the adjustments at the 1st of March of the sums required to meet obligations of the Board would lead to grave confusion and injustice, not only to the Board, but to the beneficiaries under the Act. For this reason, and for reasons mentioned by the learned trial judge in his judgment, with which I entirely agree, I think the plaintiffs have failed to make out their case, and would, therefore, dismiss the appeal.

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

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal calls for the consideration of an Act with undoubtedly very complicated provisions and when one considers the great field of industries covered, it will only be after the lapse of considerable time that it can be looked upon as a well defined Code, and grounds for disagreement reach the vanishing point. That time has not yet been reached. Upon full consideration of the matter called in question in this appeal —the Court being assisted by very able argument of counsel

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upon both sides—counsel for the appellants in my opinion has failed to establish that the course adopted by the Board was not the correct one. We have a very able judgment from Mr. Justice MURPHY who sustained the action of the Board in making the challenged assessments. The Workmen's Compensation Board is comprised of three gentlemen appointed by the Government of British Columbia for the carrying out of very extensive powers. The ambit of the Act is very far-reaching and covers the main industries of the Province and reserves to the Board amongst other things the sole determination of all questions of liability for injuries to workmen in all these industries inclusive of even marine officers and sailors upon ships sailing out of the ports of British Columbia, the operators of the ships being resident in British Columbia, and provision for dependants of workmen in case of death without it being necessary to establish negligence where death ensues in discharge of their duty. Here we have a question of the jurisdiction of the assessments of the Board. In passing I might make reference to a very notable case where the jurisdiction of the Board was called in question in *Workmen's Compensation Board* v. *Canadian Pacific Railway Company* (1920), A.C. 184. Upon appeal to the Privy Council in that case their Lordships of the Privy Council decided that under the Act the dependants of the officers and of the crew were entitled to compensation under the Act. It was the case of the loss in foreign waters (Alaska, U.S.A.) of the S.S. "Sophia" of the Canadian Pacific Railway Company—ship, passengers and crew all lost, not one survivor. The Workmen's Compensation Board there had held that the dependants were entitled to compensation. The Railway Company disputing that decision brought an action against the Board and obtained an *interim* injunction. Later the action went to trial and it was held that there was no jurisdiction authorizing the paying of compensation. The Board appealed and this Court by a majority (I dissented) upheld the Court below; then the case went on appeal to the Judicial Committee with the result that their Lordships of the Privy Council reversed the decision of the Courts below, Lord Haldane delivering the judgment of their Lordships upholding the Act and the validity of the right to compensation. Further, in passing, it may be said that the Workmen's Com-

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pensation Board was then constituted as it is now, the chairman (Mr. *Winn, K.C.*) being a member of the Bar of long and high standing and the other two members of parliamentary and extensive industrial experience, all of whom devote their whole time to the administration of the Act. My excuse for speaking somewhat extra-judicially is to indicate that I place very great reliance upon the Board and its decisions when we have had a history which redounds to their skill and ability now extending over some years in administering the provisions of the Act with so little litigation ensuing. Upon a careful consideration of all the points raised and calling for decision in this appeal I do not consider that I can usefully add any other reasons than those given by the learned trial judge whose judgment is under appeal to this Court and that is one upholding the Board in all that it has done.

MCPHILLIPS, J.A.

I would uphold the judgment of the learned trial judge, being of the opinion that the Board proceeded rightly in making the assessments and within its jurisdiction and with a proper understanding of its legal authority conferred under the provisions of the Act. I see here no departure from the true principles of construction of statute law. It follows that, in my opinion, the appeal should be dismissed and the action dismissed.

MACDONALD, J.A.: Appellants' complaint is that the respondent Board failed to comply with the provisions of section 33, subsection (2) of Cap. 278, R.S.B.C. 1924—Workmen's Compensation Act—inasmuch as the additional amounts (*i.e.*, in addition to the 1 cent per day collected from the workman under section 33, subsection (1) required to meet the cost of medical aid was not provided by assessment upon employers generally engaged in all industries within the scope of the Act but by assessments on the different classes into which industries are divided by section 28 according to the risk involved dependent upon the comparative hazard encountered in the work. This contention is based upon the following words in section 33 (2):

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> Such additional amounts as are required from time to time to meet the cost of medical aid shall be provided by the Board by assessment upon employers generally in all industries within the scope of this Part.

It is I think clear that if we were concerned solely with the interpretation of this clause appellants' view would have to

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prevail. When however we look at all relevant sections of the Act it would appear that the difficulty arises because of faulty draftsmanship.

One cannot construe a clause forming part of a section without looking at the context, considering the scope of the Act and all other sections dealing with the same or cognate matters. After doing so one has to decide whether or not the clause referred to is reasonably susceptible to another interpretation bringing it into harmony with the general purpose in view.

Sections 32 and 33 are complementary and must be read together. Section 32 (1) (*a*) reads:

To provide in connection with section 33 a special fund to meet the cost of medical aid;

By reference to the interpretation sections we find that the "Accident Fund" is the fund provided for the payment of all "compensation," the latter work including "medical aid." For the purpose therefore of providing an accident fund, or to confine it to the point in which we are interested—for the purpose of providing a fund for medical aid—the Board makes levies not generally on all employers but on "classes" as outlined in section 28. The assessment may be rated upon the pay-roll "or in such other manner as the Board may deem proper" (section 32 (1)). If we turn to section 35 we find classes still adhered to in fixing rates or assessments corresponding to the relative hazards in the different industries.

Subsection (*a*) of 32 (1) referred to is important as a guide. How may that Special Fund be obtained? One must look at section 32 (1), the controlling section. It is obtained by levying and collecting from "employers in each class." Now are we compelled to say that there must be a radical departure from this scheme by reason of the general words found in section 33 leading to a system of assessment far less fair and equitable; or may these words be modified to fit the frame in which they are found? Must we ignore the scheme of the Act with its division into classes and for one purpose, *viz.*, in respect to medical aid (although it is part of the general accident fund collected from classified groups) treat it as collectible from a general class of taxpayers? I think not. I think we may say that an assessment is levied on employers generally although varied in amount according to the classes affected. The assessment is "upon

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employers generally" and all must contribute but not necessarily the same amount.

Even a grammatical construction reasonably clear must give way if upon the whole it is evident from the context and other sections that it will not, strictly construed, carry out the true purpose of the Act. In *Waugh* v. *Middleton* (1853), 8 Ex. 351 at 356-7 Pollock, C.B. said:

> The learned counsel for the defendants relied upon the grammatical construction of the Act, and contended, that the Court was bound to give effect to it according to that construction. That rule of construction has frequently been adverted to in this Court. But I doubt, if it were laid down as a general rule, that the grammatical construction of a clause shall prevail over its legal meaning, whether a more certain rule would be arrived at, than if it were laid down that its legal meaning shall prevail over its grammatical construction. In my opinion grammatical and philological disputes, and indeed all that belongs to the history of language, is as obscure and leads to as many doubts and contentions as any question of law, and I do not, therefore, feel sure that the rule, much as it has been commended, is on all occasions a sure and certain guide. It must, however, be conceded, that where the grammatical construction is quite clear and manifest and without doubt, that construction ought to prevail, unless there be some strong and obvious reason to the contrary. But the rule adverted to is subject to this condition, that, however plain the apparent grammatical construction of a sentence may be, if it be perfectly clear from the contents of the same document (and the same rule applies in the construction not only of an Act of Parliament, but of deeds, wills, and of any subject of a like nature), that the apparent grammatical construction cannot be the true one, then that which upon the whole is the true meaning, shall prevail in spite of the grammatical construction of a particular part of it.

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I think the underlying principle there outlined may be applied in view of the clear indication found by reading all relevant sections that this assessment is imposed on classes dependent upon the risk: in other words, the clause should be interpreted to avoid conflict with other provisions of the Act dealing with the same subject-matter if at all possible. Once convinced that the intention is clear, words will be modified to carry it out. Nor will lack of skill in draftsmanship defeat the main intention of the Act either to nullify it or to affect it in an important particular. *Salmon* v. *Duncombe* (1886), 11 App. Cas. 627 at p. 634.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellants: *C. M. O'Brian.*

Solicitor for respondents: *J. Fred. Downs.*

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Insurance—Principal and surety—Bond of indemnity—Certain system of audit contained in policy—System of audit changed during currency of bond without notice—Effect on guarantee.

The plaintiff brought action to recover $1,956.70 on a bond of indemnity issued in 1922 and renewed from year to year, by which the defendant undertook to indemnify the plaintiff up to $2,000 for any loss sustained as the result of any act of fraud or dishonesty on the part of one White while acting as assistant clerk, assistant secretary-treasurer, tax-collector and assessor for the plaintiff. On application for the bond in 1922 the plaintiff replied to questions, including one: "How often will a thorough examination of applicant's books be made by an independent auditor or expert accountant? Quarterly. Next 31st December, 1922." The policy contained a stipulation that as the employer has delivered to the company certain statements setting forth the duties and responsibilities of the employee, the moneys entrusted to him, and the safeguards and checks kept upon his accounts and warrants the statements to be true, the agreement was entered into on the condition that the method of examination and checking accounts shall remain in accordance with said statements. The bond also provided that it was a condition precedent to liability of the company that all representations contained in the bond or in the application therefor should be duly performed, and that if there was any material change in the municipal corporation's method of accounting or examination of books without notice to the defendants in writing and their consent being obtained, the bond should be void. The quarterly audit was continued until the year 1927 when the corporation changed its system of audit into what was called a continuous audit, whereby the auditor entered the employee's office from time to time, choosing his own time for doing so, and conducted a partial examination of the books, and at the end of each year made a complete and regular audit. The change of system of audit was not disclosed to the guarantee company. The last renewal of the bond was on the 11th of December, 1930, and thefts to the above amount by White were discovered on the 29th of December following. It was held on the trial in favour of the plaintiff that although the undertaking that a quarterly audit would be had was part of the contract, the change to a "continuous audit" was not a material change in the manner of checking White's books, and that the defendants were therefore liable.

Held, on appeal, reversing the decision of MACDONALD, J., that the change of the system from that of a "quarterly audit" to what was termed a "continuous audit" was a substantial one that precluded the learned

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judge below from going into an inquiry as to the effect of the alteration, as in such a case the surety himself is the sole judge as to whether he will consent to remain liable and he is entitled to his discharge.

Statement

APPEAL by defendant from the decision of MACDONALD, J. of the 16th of March, 1932, in an action to recover from the defendant company the sum of $1,956.70 on a bond of indemnity. On the 11th of December, 1922, the defendant executed a bond for the payment to the plaintiff of the sum of $2,000, the said bond being renewed annually every year thereafter. The condition of the bond was that if one Frederick B. White would faithfully discharge the duties of assistant municipal clerk, secretary-treasurer and tax collector to the plaintiff, and honestly account for and pay over to the plaintiff all moneys coming to his hands on behalf of the plaintiff during his employment as such, the bond would be void. Between the 11th of December, 1930, and the 11th of December, 1931, the said Frederick B. White dishonestly appropriated to his own use the sum of $1,956.70 which was paid to him by ratepayers of the plaintiff municipality, and on the 11th of March, 1931, was found guilty of theft of said moneys and sentenced to one year's imprisonment. The further relevant facts are set out in the head-note and in the reasons for judgment.

The appeal was argued at Vancouver on the 14th to the 18th of October, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Craig, K.C. (*Carmichael,* with him), for appellant: The bond was to secure the corporation against loss through one White who had control of the corporation's finances. The bond was founded on answers by the corporation to certain questions, one of which was: "How often will a thorough examination of applicant's books be made by an independent auditor or expert accountant? Quarterly. Next 31st December, 1922." For about two years they did have quarterly audits, then they changed the system without notice to the appellants, and had what was called "a continuous examination of the books." This meant partial audits at irregular intervals with one complete audit at the end of each year. Secondly, on the renewal of the bond by questionaire they asked if White owed anything to the

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corporation, to which the reply was "No," whereas at that time he had already taken certain sums of the corporation, unknown to them. Thirdly, they conferred additional duties on White. As to the first point, the audits were never complete, and on one occasion there was a lapse of eight months without an audit. There was a material change in the audit that vitiated the contract: see *McCammon* v. *Alliance Assurance Co. Ltd.* (1931), 2 W.W.R. 621; *United States Fidelity & Guaranty Co.* v. *Downey* (1907), 88 Pac. 451; 25 C.J. 1100, note [e] and p. 1104, note 77 [a]; *Elgin Loan and Savings Co.* v. *London Guarantee and Accident Co.* (1905), 9 O.L.R. 569 at p. 573. The company have a right to declare what is material: see *Thomson* v. *Weems* (1884), 9 App. Cas. 671 at p. 683; *Laskey* v. *Bew* (1913), 134 Pac. 358; *Gray* v. *Employer's Liability Assurance Corporation* (1913), 23 W.L.R. 527; *Western Assurance Co.* v. *Harrison* (1903), 33 S.C.R. 473; *Penn Mutual Life Ins. Co.* v. *Mechanics' Savings Bank & Trust Co.* (1896), 72 Fed. 413 at 428. This is a material part of the contract: see 32 C.J. 1291, note 78 [a]; *Imperial Fire Ins. Co.* v. *Coos County* (1894), 151 U.S. 452. The fact that they would have taken the policy at the same price does not affect the materiality of the change: see *Wydrick* v. *Saltfleet and Binbrook Mutual Fire Insurance Co.* (1929), 64 O.L.R. 521 at p. 527; *Globe Savings Co.* v. *Employers' Liability Co.* (1901), 13 Man. L.R. 531 at p. 558. It cannot be said that the alteration in the audit was unsubstantial: see *Bryans* v. *Peterson* (1920), 47 O.L.R. 298 at p. 306; *Egbert* v. *National Crown Bank* (1918), A.C. 903 at p. 908; *Stewart* v. *M'Kean* (1855), 10 Ex. 675. The third point is that additional duties were imposed on White when the contract provided that no additional duties should be given him.

J. W. deB. Farris, K.C., for respondent: The word "owe" does not include criminal defalcations, the corporation having no knowledge of them at the time. The questionnaire in 1927, when this question was answered is not in the bond or attached to it: see *Fowkes* v. *Manchester and London Life Assurance and Loan Association* (1863), 3 B. & S. 917. There were three classifications of thefts, first, one cheque for $38, second, one express order for $79, and thirdly, money coming in under the

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irrigation roll during 1928, 1929 and 1930. There was a complete audit at the end of 1929 and it did not disclose any of these thefts, so there is no material difference between the quarterly examination and the "continuous audit," and a bank receipt would not disclose lack of a proper audit: see *United States Fidelity and Guaranty Co.* v. *The Fruit Auction of Montreal* (1929), S.C.R. 1 at pp. 16-17. This was a proper audit: see *London and General Bank* (1895), 64 L.J., Ch. 866 at p. 877; *In re Kingston Cotton Mills Co.* (1896), 65 L.J., Ch. 673 at p. 675. The misstatements are not material: see *London West* v. *London Guarantee Co.* (1895), 26 Ont. 520 at p. 523; *Mutual Life Insurance Co. of New York* v. *Ontario Metal Products Co.* (1925), A.C. 344; 32 C.J. 1291, sec. 517. The municipality is not responsible after the auditor's failure to perform his duties by checking the adding machine. It is not fair to prove the advantages of a quarterly audit over the continuous (a) That Cumming (the auditor) would have been more diligent in one system than the other; (b) That White (the defaulter) would have failed to adjust his method to changed conditions. As to continuous and quarterly systems of audit in relation to the theft of the $38 cheque, the same factors must be considered in each case. In testing "continuous audit" there are two factors (a) The auditor failed to fully perform his duties by not checking the adding machine; (b) the thief had adjusted his system of falsifications to this system of auditing. In testing a quarterly audit as to the same transactions the same factors must be assumed (a) The auditor would have been no more diligent in checking than he would under the other system; (b) the thief would not have made his falsifications in the way he did but would have attempted to adjust them to the changed system. If these factors are assumed there is no more likelihood of detection in one case than in the other.

Craig, in reply, referred to *Ross* v. *Scottish Union and National Insurance Co.* (1918), 58 S.C.R. 169; Welford's Accident Insurance, 2nd Ed., pp. 21-2; *Venner* v. *Sun Life Ins. Co.* (1890), 17 S.C.R. 394 at pp. 398 and 400; *Jordan* v. *The Provincial Provident Institution* (1898), 28 S.C.R. 554 at p. 563; *Youlden* v. *London Guarantee and Accident Co.* (1913), 28 O.L.R. 161 at p. 171 and *Wydrick* v. *Saltfleet and*

Binbrook Mutual Fire Insurance Co. (1929), 64 O.L.R. 521 at p. 525.

Cur. adv. vult.

10th January, 1933.

MACDONALD, C.J.B.C.: The appellant gave a bond of indemnity to the plaintiff to the amount of $2,000 to make good any default of Frederick Bernard White, one of its employees. The bond was given in 1922 for one year subject to the right to apply for renewal from year to year thereafter. The defalcation of White occurred betweeen the 11th day of December, 1930, and the 11th day of December, 1931, the period of the term of the last renewal of the bond. The bond was founded upon answers by the respondent to the following among other questions and answers which were made the basis of the contract. The important question and answer is:

How often will a thorough examination of applicant's books be made by an independent auditor or expert accountant? Quarterly. Next 31st December, 1922.

It appears that a quarterly audit was had for some years after the original contract but five or six years before the defalcation the respondent changed its system to what it called a continuous audit. On the 4th of June, 1927, its auditor A. F. Cumming was instructed by resolution and letter that the audit fee should include "auditing all municipal books and books of the School Board and those of the hospital; at least three inspections to be made." Cumming thereafter made what he calls a continuous audit. He did not make a quarterly audit or examination of the books. He entered the office when he pleased and conducted from time to time a partial examination of the books and at the end of the year made a complete and regular audit. The appellant relies upon the said undertaking that a quarterly examination would be made by an auditor or expert accountant and says that the so-called continuous audit was not in accordance with that undertaking and was brought about by the respondent's instructions as aforesaid to its auditor. The learned judge finds that although the undertaking was part of the contract yet he was justified in treating it as a representation merely, and that there was only an innocent breach of it.

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Richard C. Janion, general agent for the appellant for British Columbia, called as a witness for the respondent was asked:

What, if any, importance would you attach to [the auditing] in considering whether you would accept the application? Attach a great deal of importance for this reason a quarterly audit gives us far better protection than it would if we had a yearly audit and we would feel safer issuing the bond for a quarterly period than on a longer period.

Then on cross-examination he said:

Are you suggesting if the City of Penticton had put on this application a continuous audit by a competent auditor you would have turned it down? Not necessarily, no.

I should say not. I put it to you, if that application had contained that statement, this bond would have been issued just the same? Which statement do you mean?

That a continuous audit had been substituted for the words "quarterly audit"? We would have accepted it, yes.

MACDONALD, C.J.B.C.

That evidence was relied upon by the learned judge as shewing that what he held to be a mere representation was not material. With much respect I am of opinion that the learned judge was wrong in this. I think that undertaking was part of the contract and not a mere representation and with this question I shall deal presently. The contract was therefore in this respect broken. The answer by the witness Janion cannot be accepted as competent on the question of materiality, if that question is to be admitted at all. The policy contains the following stipulation:

AND WHEREAS the employer has delivered to the company certain statements and a declaration, setting forth, among other things, the duties, responsibilities and remuneration of the employee, the moneys to be entrusted to him, and the safeguards and checks kept and to be kept upon his accounts, and has consented that such declaration and each and every other of the statements therein referred to or contained, so far as the same are material to the contract, shall form the basis of the contract hereinafter expressed to be made.

AND WHEREAS the employer warrants the statements and declaration aforesaid, so far as the same are material to this contract, to be true, and agrees that the method of conducting the business, so far as the said statements and declaration are concerned, shall be in accordance therewith during the currency of this agreement.

It then proceeds:

IT IS HEREBY AGREED AND DECLARED that from the date hereof, up till the 11th day of December, 1923, at 12 o'clock noon, and during any year thereafter, in respect of which the company shall consent to renew this agreement by accepting the aforesaid annual premium, and issuing a renewal receipt as hereinafter provided subject to the provisions of the memorandum and articles of association of the said company, and to the

conditions and provisoes herein contained (which shall be conditions precedent to the right on the part of the employer to recover under this agreement), the company shall, at the expiration of three months next after proof satisfactory to the directors of the loss hereinafter mentioned has been given to the company, make good and reimburse to the employer to the extent of the sum of $2,000, and no further, such pecuniary loss, if any, as may be sustained by the employer by reason of embezzlement or theft of money on the part of the employee in connection with the duties hereinbefore referred to, committed during the continuance of this agreement, . . .

By paragraph 2 of this policy it is agreed that if the agreement be continued beyond the time therein limited the company shall issue a renewal receipt and the agreement thereby become continued for the time specified, and the statements, warranties and conditions made as aforesaid (by the original policy) shall, except as materially varied by any statement in writing made at the time of the renewal of the contract, be deemed to be continued and in full force and effect as therein provided, and shall be deemed to have been made upon the faith of such statements, warranties and conditions so made as aforesaid.

MACDONALD, C.J.B.C.

We were referred in argument to the *United States Fidelity and Guaranty Co.* v. *The Fruit Auction of Montreal* (1929), S.C.R. 1, decided under Quebec law. In its facts that case very much resembles the one at Bar with this important exception, that the policy did not incorporate the statements corresponding to the one here expressed in the policy, and the said Quebec statute excluded implications. The express statement of the policy only could be looked at to determine whether the statements of the term of the contract was a mere innocent representation, which if frank and honest would not avoid the contract. At p. 11 the Supreme Court of Canada said:

Warranties, by force of arts. 2490 and 2491 C.C., in order to be "a part of the contract" must be "expressed in the policy, or so referred to in it as to make part of the policy."

At p. 12 the Court said:

In cases under the law of Quebec, where the insurance company denies its responsibility on the ground that some answer or statement was untrue or that some term or condition was not respected or observed by the insured, the first inquiry is whether such term, condition, answer or statement is set out in full on the face or back of the policy and if it is, it must of course be given effect to; but if it is not, the term, condition, answer or statement cannot be regarded as a warranty or a condition precedent.

The Court in that case held that on the whole the answers and statements of the respondent under the relevant law and cir-

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cumstances were not warranties or conditions precedent, but merely representations which fairly and reasonably interpreted according to the evidence, were substantially true and involved no material concealment. They, therefore, decided in favour of the insured.

The question here therefore is—was the statement that the books would be examined quarterly commencing as I think it means on the 31st of December, 1922, a warranty or condition or was it a mere representation? And here it is that the facts of the two cases differ as will be seen from the excerpt given above from the policy now under consideration and where the statute law applicable to each differs. Section 2491 of the Quebec Code declares that an express warranty is a stipulation or condition expressed in the policy or so referred to in it as to make it a part of the policy. It is stated by the Court in the above case that there are under the Code no implied warranties in fidelity bonds such as the Court was there considering.

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The rule as to materiality is stated in *Egbert* v. *National Crown Bank* (1918), A.C. 903 at pp. 908-9, where the Privy Council quotes with apparent approval the opinion of Cotton, L.J., in *Holme* v. *Brunskill* (1878), 3 Q.B.D. 495, 505:

"The true view, in my opinion, is that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is, without enquiry, evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet that, if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an enquiry as to the effect of the alteration, or allow the question whether the surety is discharged or not to be determined by the finding of a jury as to the materiality of the alteration, or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable, notwithstanding the alteration, and that if he has not so consented he will be discharged."

It is not self-evident that the alteration here is unsubstantial: it was probably the most substantial of any term of the contract. That being so the learned judge was not at liberty to "go into an enquiry as to the effect of the alteration, or allow the question whether the surety is discharged or not to be determined by the finding of a jury as to the materiality of the alteration." In

this case the learned judge acting as a jury decided not only that the undertaking aforesaid was an honest and innocent representation but that it was an immaterial one, contrary to the rule laid down above. The surety here has not consented to be held liable and Janion's ill-considered answer read in connection with his examination-in-chief is of no value. We have to deal with what did happen not with what a witness says would have happened in another event. In June, 1927, the auditor was authorized to make only three audits or examinations of the books and after that date and during the period in which the defalcations occurred only one thorough audit or examination was made: the continuous audit plan was used.

I refer to the evidence of a witness called by the respondent one Rutherford who had been employed by previous auditors of the respondent's books. I refer to this not for the purpose of shewing that the mistake was that of an apparently competent auditor but as shewing his real conception of the meaning of a "continuous audit." I think he makes it appear that no thorough examination of the books by an auditor or expert accountant was made, under his continuous audit.

MACDONALD, C.J.B.C.

The reason at the end of the year you get a bank certificate is because you consider a bank certificate is a necessary part of a thorough audit? Yes.

And you only get it once a year? Once a year.

And again:

Did you get the same pay for one as the other? Yes; but you must understand the work increased from year to year.

The fact is the work was getting too heavy for the remuneration you were getting, so you changed? And other features, too.

To make it easier? To make it easier, yes. . . .

You say you just make a test, pick out some, do you mean? I am referring particularly to the irrigation roll. We would pick out some of the accounts receivable in the roll to see that they were posted correctly.

But not go through them all? Would not go through them all.

Never made any pretence of doing that? No, we did not. . . .

I take it from what you say you did not bring your audit of all the books up to any definite date? Not up to the same finality as we would at the end of the year.

Did you do that in any of these audits during the year? No. . . . I can't say there would be any particular difference because we would carry out similar work except at the end of the year we would carry it to finality and make a statement and receive the bank certificate as to the correctness of the bank balance.

Another ground of appeal was the answer made by the respondent in the application for renewal of the bond in 1930.

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It was asked whether White owed it any money and it answered "No," which answer was incorrect, but not so to its knowledge. I think the case above referred to of *United States Fidelity and Guaranty Co.* v. *The Fruit Auction of Montreal* disposes of this ground of appeal in favour of the respondent and I need not therefore consider it further. The third ground of appeal was that the interest was not correctly given. In view of the result that I have come to that the appellant ought to succeed the interest becomes of no importance.

I would, therefore, allow the appeal and dismiss the action.

MARTIN, J.A. would allow the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree with the reasons for judgment and conclusion of my brother the learned Chief Justice. I merely wish to add that it is made clear to demonstration that the respondent did not carry out the terms of the bond of indemnity in respect to having a quarterly audit and failing in that without proving what could be called in law a waiver of the condition as against the appellant it is idle to contend that there was compliance with the condition otherwise binding on it by substituting a continuous audit. No waiver was established; further there was not even a continuous audit as properly understood, nothing but a haphazard and I might rightly say a perfunctory audit at best. The interest of justice is all one way in this case. The surety (the appellant) is entitled to have it declared that it is under no liability to the respondent upon the bond of indemnity. I would therefore allow the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: Appellant, London Guarantee and Accident Company, Limited, executed a bond for $2,000 to protect respondent municipal corporation against the dishonesty of one of its employees. While acting as assistant clerk, assistant secretary-treasurer, tax-collector and assessor he misappropriated municipal funds. The thefts were discovered December 29th, 1930.

The bond was executed in 1922 and renewed annually. In the first application (November 30th, 1922) respondent replied to questions submitted, among them the following:

How often will a thorough examination of applicant's books be made by an independent auditor or expert accountant? Quarterly. Next 31st December, 1922.

The policy issued contained the following clauses set out in abridged form. [already set out in the judgment of MACDONALD, C.J.B.C.]

After the recitals it is provided:

This agreement is entered into on the condition that . . . the remuneration of the employee and the method of examining and checking his accounts shall remain in every material particular in accordance with the statements and declaration hereinbefore referred to.

In the application for renewal to cover the period in question (December 4th, 1929) a questionnaire was submitted and answered by respondent including the following:

Does he owe any moneys to you at the present time? If so, how much? State particulars. No.

As it later appeared the employee at this time had stolen $1,000 but respondent was not aware of it. I do not think the word "owe" contemplates such an event.

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When the bond was executed in 1922 it was respondent's practice to audit the employees' books quarterly. In June, 1927, however, new auditors were appointed and respondent passed a resolution providing not for quarterly audits but for "at least three inspections." This method continued up to and beyond the date of the defalcations. The inspection provided for properly interpreted in the light of the words used, aided to some extent by the manner in which the work was performed should not be regarded as an audit or as a "thorough" quarterly examination. "Work done pursuant to instructions was described as a "continuous audit": ("intermittent" would be a better term). Under it the auditor might make an examination at any time and at the end of the year a full audit for submission to the council. It was not contemplated that only the audit at the end of the year should be complete. Each quarterly examination had to be "thorough." The casual nature of the inspections is disclosed by this extract from the evidence of the municipal clerk:

Under a continuous audit it would be possible for him to run six months without a check at all? Yes. As intimated I do not know why it should be called "continuous" audit but it has been so styled.

A quarterly audit or "thorough examination" as outlined in the application (the basis of the contract) would be made at fixed periods. Respondent contended that the so-called continuous audit was more satisfactory as employees could not antici-

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pate a visit. That might properly be a subject for discussion before the bond was executed; it is too late to consider it at this stage. Respondent could not materially change one of the conditions of the bond or policy without notice and receipt of approval.

We have no satisfactory evidence as to the nature and extent of the "inspection" from 1927 to the end of 1930, the time material in this action. Respondent did not call Cumming, who made the inspections and yearly audit. It called instead an auditor who acted before the change was made in 1927. He outlined the methods then followed. We are concerned however only with the examinations of later auditors. The change in 1927 called for fresh instructions to comply with the condition in the application for a quarterly audit or a "thorough examination," or for an examination not materially different. Whether later methods were materially different can only be ascertained by considering what was done by Cumming. True, respondent was only obliged to give proper instructions and to see in a general way (*e.g.*, by receipt of reports) that its instructions were carried out. It was not called upon to supervise the auditor's work. But what is done under an engagement with the consent of both parties may throw light on the interpretation of the phrase "at least three inspections." Cumming knew precisely what took place. True, in discovery the municipal clerk said he was familiar with Cumming's work but it is difficult to understand how he could act as supervisor of work necessarily detailed while doing his own work. Further he was not asked to supervise. However his discovery was placed in evidence by appellant and must be accepted on this point at least to shew that in a general way he knew the nature of the auditor's work. He said Cumming

> was in various times during each year, not at any set time. He came in when he chose to come and spent two or three days at a time, half a dozen times a year or oftener.

He could not say how often the cash was checked. He was in

> From time to time he checked the cash in the till without warning; he verified the bank deposits; he verified the entries in various books of account; he checked over sinking fund securities; he obtained certificates from the bankers from time to time (only once a year) he drew my attention to errors or irregularities; he questioned me from time to time as to why certain things were done certain ways; he reported to the municipal

inspector; he asked for an explanation as to anything that did not satisfy him.

He did not say that when the accounts were verified a certificate was obtained from the bank. It is common ground that this certificate was only secured at the end of each year. It is I think obvious that an audit is of little value nor an examination "thorough" unless by a certificate it is shewn that the money the books shew to be on hand is actually in the bank. True, it was stated in argument that the pilfering was done by pocketing irrigation taxes, issuing duplicate receipts and destroying one of them and then treating these taxes as if they had not been paid. In that event a bank certificate would not disclose the thefts although large arrears of this nature might arouse the suspicions of the auditor.

That there was no quarterly audit during the later period is admitted. The clerk gave this evidence:

Do your books indicate that there was any audit completed at the end of any quarter? No.

They rather indicate the contrary? That they were not finished up to each quarter. Yes, they indicate the contrary.

And by saying any quarter I do not necessarily mean the first three months? I took it you did.

Do your books indicate that an audit was finished and completed every three months, and every next three months? No.

It shews the contrary? Yes.

It would of course be more accurate to use the word "thorough examination" in submitting these questions. However there can be little doubt that when an auditor is directed to make a "thorough examination" it means a complete audit.

A proper audit should have disclosed discrepancies at a comparatively early date thus preventing later thefts and relieving appellant from the larger part of its liability. An item of $38.55 proceeds of a dishonoured cheque afterwards paid was investigated. An entry was made to conceal it subsequent to the 31st of August following. In respect to it we have this evidence:

This much is clear that the entry under date of August 21st which makes a false entry to conceal this theft was altered? Yes.

That a theft occurred in May and that subsequent to 31st August an entry was made to conceal the theft, now if there had been a complete check of the books between May and the 31st of August which would be before this entry to conceal the theft was made, it would be likely to be discovered? Not necessarily.

Well, it ought to be. I would think so.

Although the clerk qualified this view to some extent later, I

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am satisfied from all the evidence that his answer should be taken as given, *viz.*, that this theft "ought" to have been discovered. Checking certain additions would have disclosed it. I am satisfied too, judging as best we may in the absence of the one witness who could be of assistance, that these audits were unsatisfactory. That however, as already intimated, does not determine the inquiry. Respondent did not guarantee a perfect audit. It might be that defalcations would pass undiscovered under a quarterly audit but if parties to a contract think that on the whole greater safety lies in an examination quarterly, and so stipulate, it should be adhered to. Its important feature is that the employee's accounts are verified every three months. Appellant would then be reasonably assured that no thefts occurred in that period. That assurance would be of little value unless equal care was taken with the quarterly examination, as with the final yearly audit.

Before leaving the facts—although it is concerned with another point, *viz.*, materiality—I refer to the evidence of Janion, general agent for appellant company. He gave this evidence on cross-examination:

Are you suggesting if the City of Penticton had put on this application a continuous audit by a competent auditor you would have turned it down? Not necessarily, no.

I should say not. I put it to you, if that application had contained that statement, this bond would have been issued just the same? Which statement do you mean?

That a continuous audit had been substituted for the words "quarterly audit"? We would have accepted, yes.

Naturally this admission was stressed by respondent's counsel. The trial judge too largely based his finding of fact upon it. His evidence-in-chief should be read and the form of the questions considered. He did attach importance to a quarterly audit. He said in chief:

A quarterly audit gives us far better protection than it would if we had a yearly audit and we would feel safer issuing the bond for a quarterly period than on a longer period.

The questions quoted too did not fit the case. He was asked if his company would have issued the bond if the application required "a continuous audit by a competent auditor" not an "inspection" or such an audit as was disclosed in evidence. Further he did not say that under these altered circumstances a bond would be offered at the same premium. While some weight

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should be given to this so-called admission, it should not be regarded as conclusive nor given an exaggerated importance. He did not intend that his evidence should differ materially from that of another accountant who testified for appellant as follows:

You heard the evidence given in this case as to how the audit was carried on, did you? Yes, part of it.

What is the substantial difference between a quarterly audit and what they call here a continuous audit as disclosed by the evidence which you have heard? From my viewpoint, a continuous audit would not be conclusive enough. A continuous audit might have periods between one visit of the auditor and the next of six months or even more. There is no definite requirement from the employer to produce a certain statement as to the correctness of the books at any stated period. A quarterly audit each quarter you are certain there is a statement from the auditor certifying the thing to be correct.

The thing to be complete, you mean? Yes. Balanced and brought down and a statement made.

Which of the two in your opinion gives better protection or is there any difference in the protection the insurer gets? There is a difference. I just pointed out the quarterly audit from the insurance company's viewpoint is the safer.

The answer to the question in the application on November 30th, 1922, in respect to "thorough examination quarterly" is part of the contract although omitted from the questionnaire submitted before renewal in December, 1929. A clause in the contract in respect to renewal makes that clear. These terms and conditions too need not be set out in full in the policy, where it is the basis of the contract notwithstanding the provisions of the Insurance Act, B.C. Stats. 1925, Cap. 20, Sec. 14. (*Elgin Loan and Savings Co.* v. *London Guarantee and Accident Co.* (1905), 9 O.L.R. 569.)

We were referred to 32 C.J. p. 1291, note 78 [a] where the law based on American decisions is I think correctly summarized:

If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability, and in order to recover, the assured must shew himself within those terms; and if it appears that the contract has been terminated by the violation on the part of the assured, of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated, or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the

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policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which the contract shall continue or terminate. The Courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made.

Reference was also made to *United States Fidelity and Guaranty Co.* v. *The Fruit Auction of Montreal* (1929), S.C.R. 1 at pp. 16-7, where Rinfret, J. said:

But, what was the representation made by the respondent? What could the appellant fairly and reasonably understand by the answers the respondent made to its questions, if not that the respondent had engaged the services of a reputable accountant, that this accountant would audit the books of Cambridge and Cadieux monthly, and that, in the course of doing so, he would check the accounts and would be expected to perform all the ordinary duties of an auditor? The appellant was thus informed that the respondent would trust to its auditor for these purposes, and its answers implied nothing more. The appellant did not expect that the directors or the officers of the respondent would check the work of their auditor and would review it to find out whether it had been properly carried out. They had the right to believe that it would be, and to assume that it was. Moreover, as stated by one of the expert accountants heard in this case, a review of the auditor's work was quite out of the question. It would not be apparent to anybody who looked at the books that they were not correct. This "would not appear unless one actually set himself down for an absolute investigation."

The insurance company never expected that such investigation would be made. It knew that the respondent, by its answer, meant nothing more than that it undertook to have an auditor, reputed to be competent, and to see that this auditor should make a monthly audit.

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I quote this extract chiefly for the last sentence it contains. Respondent did not "see that this auditor" made a (quarterly) audit; in fact it did not give instructions for "a quarterly thorough examination." When one makes a contract to have a certain thing done by another in a specified way he at least must satisfy himself that the party selected is doing the work in that special way however unsatisfactory the actual work may be.

Whether or not the departure amounts to a material change in the terms of the contract is a question of fact and must be determined according to the varying features of each case. The main facts are not in dispute and inferences may be drawn. The change

is material to an insurance risk when it naturally and substantially increases the probability of that event upon which the policy is to become payable.

It is a matter of substantial probability not of certainty. A definite requirement for a thorough examination was exacted. That such a safeguard was better than "at least three inspections" and much better than the method actually followed seems

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to me to be beyond question. The point may be tested in another way. Let us suppose that when a "thorough quarterly examination" was under consideration before the bond was executed respondent said: "That will not involve an examination of bank balances to see if the amounts shewn to be on hand by the books are on deposit in the bank." Can there be any doubt as to appellant's reply? Or, to come to the point in issue, if respondent stated that its interpretation of a "thorough quarterly examination was at least three inspections" is it not probable that the bond would not be given; at all events at the same premium? Respondent would at least be asked what it meant by "inspections." The test as shewn by the cases is whether or not had the true nature of the examination been disclosed originally we could on a fair consideration of the evidence decide that it would not have influenced a reasonable insurer to decline the risk or to stipulate for a higher premium. Further, the fact that the question is asked in a specific way, *viz.*, "a thorough examination" has a bearing on materiality. It shews that faith is placed in its efficacy.

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In view of these considerations and keeping in mind the terms of this contract, *viz.*, that "this agreement is entered into on the condition . . . that the method of examining and checking his accounts shall remain in every material particular in accordance with the statements and declarations." I think there is no doubt that the terms of the contract were not adhered to. Just as these stipulations were made the basis of the contract so was a particular kind of examination made the basis of the audit. Further on the question of onus I think when respondent, wittingly or not, changed the character of the audit, it was obliged to shew that the change did not affect the risk. It offered no evidence to satisfy this burden. There was in fact no evidence available as it simply passed on a resolution containing ambiguous instructions to the auditor making no effort to see that even, as framed, these instructions were carried out.

I would allow the appeal.

Appeal allowed.

Solicitor for appellant: *J. Fred. Downs.*

Solicitor for respondent: *M. M. Colquhoun.*

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CORKILL v. VANCOUVER RECREATION PARKS LTD.

CORKILL AND CORKILL v. VANCOUVER RECREATION PARKS LIMITED.

Damages — Negligence—Husband and wife—Injury to wife — Husband's right of action—Servitium et consortium.

It is a tort actionable at the suit of a husband to take away, imprison or do physical harm to his wife if the act is wrongful as against the wife, and the husband is thereby deprived of her society or services, and the husband is entitled to damages for the loss of the wife's services as housekeeper and the loss of her society and companionship.

Statement

ACTION by husband and wife for recovery of damages for injury to the wife. Tried by MURPHY, J. at Vancouver, on the 21st of February, 1933.

Gill, for plaintiffs.
Bull, K.C., for defendants.

28th February, 1933.

Judgment

MURPHY, J.: At the trial I reserved the question of damages to be awarded the husband so that the matter of recovery for *consortium* might be further considered.

The law is set out in Salmond on Torts, 7th Ed., 513-4, as follows:

> It is a tort actionable at the suit of a husband to take away, imprison, or do physical harm to his wife, if (a) the act is wrongful as against the wife, and (b) the husband is thereby deprived of her society or services. A husband has a right as against third persons to the *consortium et servitium* of his wife, just as a master has a similar right to the *servitium* of his servant. Any tortious act, therefore, committed against the wife is actionable at the suit of her husband, if he can prove that he was thereby deprived for any period of her society or services (*per quod consortium et servitium amisit*).

From this it would appear that there are two grounds on which the husband is entitled to damages, *servitium,* the loss of the wife's services as housekeeper, etc., *consortium,* the loss of her society and companionship.

Now it is true that in the present case the wife was not absent from the home but, as a result of the accident, she has been since

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in a highly nervous condition which not only renders it impossible for her to fulfil her household duties but clearly I think makes her a very different person from the standpoint of companionship and society. She has been unable to control this condition up to the present and that loss of control I find to be directly attributable to the accident. Under these circumstances I think the husband is entitled to have damages assessed not only for loss of services but also for loss of society and companionship. So that the matter may be taken to a higher tribunal, if thought advisable, I will assess these damages separately. I award the husband $200 for loss of *servitium* and $200 for loss of *consortium*.

Judgment for plaintiffs.

REX v. JUNG SUEY MEE.

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REX v. JUNG SUEY MEE

Statute, construction of—Chinese Immigration Act—Applicant for entry—Examination by controller—Order for deportation—Habeas corpus—Appeal—R.S.C. 1927, Cap. 95, Sec. 10, Subsec. 2.

Subsection 2 of section 10 of the Chinese Immigration Act provides, *inter alia*, that if, on the preliminary hearing of an applicant for entry into Canada, the controller is not satisfied that such person is entitled to remain in Canada, the hearing shall be thereupon adjourned for forty-eight hours or for such longer period as the controller may see fit, and an opportunity shall be given such person to consult with duly accredited legal counsel.

Upon the applicant arriving at Victoria, she was examined the following day by the immigration inspector, and three days later by the controller, who then ordered that she be deported. An application for discharge from custody on *habeas corpus* proceedings on the ground that the controller had not complied with the requirements of section 10 (2) of said Act, was dismissed.

Held, on appeal, affirming the decision of GREGORY, J., that although the controller did not follow the procedure strictly, the applicant was given an opportunity to retain counsel after the preliminary hearing by the inspector, and no injustice was done to her, the order of the controller should therefore be sustained.

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July 6.

REX v. JUNG SUEY MEE

Per McPHILLIPS, J.A.: The provisions of section 10, subsection 2 is not imperative but merely directory, and the appeal should be dismissed. *Re Yee Foo* (1925), 56 O.L.R. 669, followed.

Statement

APPEAL by defendant from the order of GREGORY, J. of the 26th of June, 1931, quashing a writ of *habeas corpus* issued herein on the 12th of June, 1931, and refusing an application of Jung Suey Mee for discharge from custody. Jung Suey Mee, otherwise described as Choy Hung Tin, arrived from China on the steamship Tyndarus on the 23rd of February, 1931, and was examined by George A. Hart, the immigration inspector at Victoria on the 24th of February, 1931, and on the 27th of February following the applicant (defendant) was examined by the controller. Two other witnesses were then called and after they had been examined the applicant was recalled and asked questions in relation to the answers given by the other two witnesses. The application for entry into Canada was rejected by the Controller who ordered her deportation to China as a person of Chinese origin. Before taking these proceedings the applicant appealed to the minister from the decision of the controller, and the controller's decision was affirmed.

The appeal was heard at Victoria on the 6th day of July, 1931, before MACDONALD, C.J.B.C., McPHILLIPS and MACDONALD, JJ.A.

Argument

O'Halloran, for appellant: The controller did not hold an examination as required by section 10 of the Chinese Immigration Act, as the examination that was held was not adjourned for forty-eight hours. The appellant is a Canadian citizen. The examination as held was improper: see Phipson on Evidence, 7th Ed., p. 106; *Ross* v. *Helm* (1913), 3 K.B. 462.

Crease, K.C., for the Crown: She failed to satisfy the controller as to her identity under section 5, clause (*c*) of the Act, and a further examination was not necessary. The controller is not bound by the same rules of evidence and the same lines of procedure as required in ordinary Courts of Justice: see *In re Low Hong Hing* (1926), 37 B.C. 295 at p. 303; *Wilson* v. *Esquimalt and Nanaimo Ry. Co.* (1922), 1 A.C. 202; *Re Yee Foo* (1925), 56 O.L.R. 669. As to the forty-eight hour adjournment, that is merely directory, she did not want counsel and no

injustice was done: see *The King* v. *Lim Cooie Foo* (1930), 43 B.C. 54.

O'Halloran, in reply: The non-compliance with section 10 (2) is entirely separate from the question of evidence: see *Reg.* v. *Ellis* (1844), 6 Q.B. 501.

MACDONALD, C.J.B.C.: I think the appeal must be dismissed. The evidence of the girl herself makes it perfectly clear that she is impersonating someone else, and that she is not entitled to be admitted to Canada. In that respect the finding of the controller is right.

MACDONALD, C.J.B.C.

The only other point that arises in the case is that the controller did not follow the procedure pointed out by the statute. I think it is clear that he did not follow that procedure strictly speaking, that is to say, instead of formally adjourning the first preliminary hearing for forty-eight hours he merely allowed the case to rest for forty-eight hours before rehearing it again. So far as the justice of the case is concerned she was not injured by that, because she was given the opportunity to obtain any advantage she might be entitled to from the adjournment, and she did not take advantage of that though advised that she might retain counsel. Where large powers are entrusted to a public officer, they may well be improperly exercised, and where Parliament has laid down a course of procedure the officer should follow that course of procedure, and if he does not, may be open to censure. On that question in this case I do not propose to pass an opinion either one way or the other. I am satisfied no injustice has been done to her. I think therefore that the order of the controller must be sustained, and she must be deported.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal fails. The evidence of the applicant is not convincing that there is Canadian citizenship or Canadian domicil. In truth her change of position is so complete, and with such detail, that she is another person than the person she said she was in the first instance, that it is idle for her to hark back to her first story. The later statement is upon oath submitted to her in conformity with the law of her country of origin, the oath was taken in that form, and we can assume reasonably that she has undertaken thus to swear

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to the true facts, and that those facts are as stated. Those facts prove beyond a question of doubt that she has neither Canadian citizenship nor Canadian domicil.

MCPHILLIPS, J.A.

With regard to section 10 of the Chinese Immigration Act, providing for a forty-eight-hour adjournment being given, the procedure was such that it can be reasonably said the statute was complied with, then there was an adjournment of forty-eight hours really between the inspector's hearing and the controller's hearing. But apart from that we have the decision of the Court of Appeal of Ontario in *Re Yee Foo* (1925), 56 O.L.R. 669, where that Court held that that provision was not an imperative provision; and I may say that that was clearly brought out, because the learned Chief Justice of Ontario held to the contrary. In giving a dissenting opinion, he said that section 10 made it imperative that the controller should adjourn the hearing for forty-eight hours, therefore it is clear that the Court of Appeal of Ontario has held that it is not an imperative provision, but merely directory. And therefore I do not see why we should disagree with that opinion, when we try as far as we can to have uniformity of decision in Canada on Federal statute law. I certainly do not disagree with the opinion of the Court of Appeal of Ontario. And therefore the only objection which seemed to me at first to be rather formidable, is swept away. And the facts sweep the case away anyhow.

MACDONALD, J.A.

MACDONALD, J.A.: I take the same view as the Chief Justice.

Appeal dismissed.

Solicitors for appellant: *O'Halloran & Harvey.*
Solicitors for respondent: *Crease & Crease.*

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Jan. 10.

MARSHMAN v. BREADIN AND CHRISTIE

MARSHMAN v. BREADIN AND CHRISTIE: SCOTT & PEDEN, GARNISHEES.

Attachment of debts—Garnishee order—Agreement to pay debt to judgment debtors after service of garnishee order—Creditors' Relief Act, R.S.B.C. 1924, Cap. 59—R.S.B.C. 1924, Cap. 97.

The plaintiff having recovered judgments against the judgment debtors, a garnishee order was issued on the 24th of February, 1932, attaching moneys in the hands of the garnishees for a debt owing by them to the judgment debtors. Prior to this the garnishees had purchased certain cattle from the judgment debtors, and on proceedings taken in the County Court the bill of sale was set aside, on the ground that it was in fraud of the creditors. By agreement in writing between the garnishees and the judgment debtors of the 10th of June, 1932, the garnishees agreed to return the cattle to the judgment debtors, less some of which had been destroyed by order of the Government, also the sum of $350, allowed them by the Government for the cattle destroyed. The garnishee issue was tried on the 4th of July, 1932, when it was held that on the date of the garnishee order the garnishees were not indebted under obligation or liable to the judgment debtors and the garnishee summons was dismissed.

Held, on appeal, reversing the decision of LAMPMAN, Co. J., that the garnishees agreed to pay the $350 to the judgment debtors as a debt owing by them to the judgment debtors after the service of the garnishee order, and the $350 had been impressed in the hands of the garnishees with a charge in favour of the appellant as from the service of the garnishee order on the 24th of February, 1932, and the plaintiff is entitled to an order against the garnishees for this sum.

Statement

APPEAL by plaintiff from the decision of LAMPMAN, Co. J. of the 6th of July, 1932, holding that the garnishees (respondents) were not at the date of the garnishee order (February 25th, 1932) herein indebted, under obligation or liable to the judgment debtors, and dismissed the application. The plaintiff recovered judgments against the judgment debtors on the 22nd of January, 1932, on the 13th of February, 1932, and on the 22nd of February, 1932, and on the 25th of February following a garnishee order was issued against the garnishees. The garnishees, to whom the judgment debtors owed $1,600, purchased by bill of sale from the judgment debtors seventeen cows, a Jersey bull, a colt and a filly for $605. The garnishees had removed the cattle with the exception of one cow and the two

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horses, and shortly after the sheriff, under the plaintiff's execution, seized the cow and the two horses, and on an interpleader issue between the plaintiff and the garnishees, the above bill of sale was declared void, and on appeal the judgment of LAMPMAN, Co. J. was affirmed. Some of the cattle taken over by the garnishees were declared turbercular by the authorities and destroyed, for which they received $350 from the Government, and shortly after the judgment of the Court of Appeal, an agreement in writing dated the 10th of June, 1932, was entered into between the garnishees and the judgment debtors that the bill of sale be thereby cancelled and the transaction thereby evidenced be reversed and that the remaining animals should be deemed to be the property of the judgment debtors and that the garnishees should pay to the judgment debtors $222.47 being the said sum of $350 received by them from the Government less a sum of $110.03 they claimed to deduct in respect of moneys disbursed on account of the judgment debtors, which deduction on the hearing of this appeal was disallowed as against the appellant. On the trial of the garnishee issue as to the right of the plaintiff to the $350 received by the garnishees from the Government for the destroyed cattle, the plaintiff's claim was dismissed.

The appeal was argued at Vancouver on the 5th of October, 1932, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Prior, for plaintiff: The bill of sale was declared fraudulent and void as against the plaintiff who is entitled to the money received by the garnishees for the destroyed cattle: see *Ex parte Blaiberg* (1883), 23 Ch. D. 254 at p. 258; *Commercial Bank* v. *Wilson* (1868), 14 Gr. 473; *Marks* v. *Feldman* (1870), L.R. 5 Q.B. 275 at pp. 281-2; *Lanning, Fawcett & Wilson, Ltd.* v. *Klinkhammer* (1916), 23 B.C. 84; *Gerrie* v. *Rutherford* (1885), 3 Man. L.R. 291; *G. A. Hankey & Co.* v. *Vernon* (1926), 36 B.C. 401. We have priority over the other creditors: see *Slinger* v. *Davis* (1914), 20 B.C. 447; *R. B. Anderson & Son* v. *Dawber* (1915), 22 B.C. 218. The subsequent agreement between the garnishees and the debtors did not affect the liability of the garnishees: see *Beauchamp* v. *Messer and Hanham, Garnishee* (1910), 3 Sask. L.R. 59.

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D. S. Tait, for respondents: The question is decided by the Act. The former judgment only applied to the three animals that had not been taken away by the garnishees. The bill of sale remains good as between the parties: see Parker on Frauds on Creditors and Assignments, 235; *Holmes* v. *Holmes* (1913), 6 Sask. L.R. 171; *Goldsmith* v. *Russell* (1855), 5 De G. M. & G. 547; *Reese River Silver Mining Co.* v. *Atwell* (1869), L.R. 7 Eq. 347; *Cornish* v. *Clark* (1872), L.R. 14 Eq. 184; *Bott* v. *Smith* (1856), 21 Beav. 511; *Donohoe* v. *Hull Bros. & Co.* (1895), 24 S.C.R. 683 at pp. 688 and 697; 5 C.E.D. (Ont.), p. 391, note (dd); *McKay* v. *Bank of Montreal* (1932), 3 D.L.R. 226.

Prior, in reply, referred to *Meharg* v. *Lumbers* (1896), 23 A.R. 51.

Cur. adv. vult.

10th January, 1933.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The plaintiff (appellant) recovered judgments against the judgment debtors on the 22nd of January, 1932, on the 13th of February and on the 22nd of February, 1932. On the 24th of February, 1932, the garnishee order was issued attaching moneys in the hands of the garnishees as for a debt owing by them to the judgment debtors. The sheriff certified that on the 25th of February, 1932, he had no warrants of execution in his hands other than those of the appellant. The garnishees had purchased certain cattle from the judgment debtors prior to this time and on proceedings taken in the County Court the bill of sale was set aside on the ground that it was in fraud of creditors. The garnishees on the 10th of June, 1932, returned the cattle less some which had been destroyed by the order of the Government and also the amount of $350 allowed them by the Government for the cattle destroyed. The garnishee issue was tried on the 4th day of July, 1932, and at that time the said agreement of the 10th of June was not known to the appellants or their agents and was not mentioned to the Court by either of the other parties to the suit. The learned judge therefore held in ignorance of the agreement of the 10th of June that the garnishees owed the appellants nothing whereas the said sum of $350 had been impressed in the hands of the

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garnishees with a charge in favour of the appellant as from the service of the garnishee order on the 24th of February, 1932. (*R. B. Anderson & Son* v. *Dawber* (1915), 22 B.C. 218.) The agreement of the 10th of June was concealed from the appellant by the garnishees and the judgment debtors. On this appeal the appellant's solicitor moved for leave to adduce the evidence of the said concealment which is contained in his affidavit sworn on the 16th day of September, 1932, and I would grant the leave.

It further appears that the garnishees paid or agreed to pay the said sum of money over to the judgment debtors as a debt owing by them to the judgment debtors after the service of the garnishee order. That order, therefore, bound the money in appellant's favour until the final disposal of the proceedings. In these circumstances the appellant is entitled to an order against the garnishees for the sum of $350 with full costs including further evidence admitted. To this extent the appeal is allowed.

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

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am in agreement with the reasons for judgment of my learned brother the Chief Justice, and would allow the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: The appellant is a judgment creditor of the defendants Breadin and Christie and the respondent garnishees. Appellant obtained an order attaching all debts, obligations, etc., owing by respondent to the judgment debtors for $467.70. Respondents denied liability. On trial of this issue before LAMPMAN, Co. J., it appeared that sometime previously respondents purchased some livestock from the judgment debtor but before delivery of three of them they were seized by the sheriff at the instance of the appellant. An issue was directed to determine whether or not the bill of sale under which the present respondents claimed the animals was valid and it was held that it constituted a fraudulent preference and was void as against the sheriff and this appellant. On appeal this judgment was affirmed.

Some of the cattle covered by the bill of sale were found to

be tubercular and were ordered to be slaughtered and respondents herein, as purchasers, claimed and received the compensation payable by the Government amounting to $350. It is this sum that appellant, as judgment creditor, seeks to attach on the ground that the bill of sale having been set aside, and respondents still holding the fund it is due and owing to the judgment debtor and subject to attachment and that appellant, as the only creditor with an execution in the hands of the sheriff, is entitled to be paid this amount to the exclusion of any other creditors of the judgment debtor. It is, he submits, a sum that may be attached by way of equitable execution. LAMPMAN, Co. J. declined to accede to this claim and the garnishee summons was dismissed. From that order this appeal is brought.

MACDONALD, J.A.

On the trial of the first issue it was held, as stated, that the bill of sale referred to was null and void against the sheriff and this appellant. What follows? Jessel, M.R. in *Ex parte Blaiberg* (1883), 23 Ch. D. 254 at p. 258 said:

> What is the meaning of being fraudulent and void "as against" a person who has a security upon or a demand against the goods? Surely it must mean void in order to give effect to that security or that demand. I cannot understand the words "as against" in any other sense. If it meant "void to all intents and purposes," why did not the Act say so? If the bill of sale is to be void as against the sheriff that must mean void for the purpose of letting in his claim. That is the obvious meaning. The bill of sale remains good as against the person who gave it. That seems to me to be the meaning of declaring a deed fraudulent and void as against a particular person; it makes it void merely to the extent of his claim. The result would be that if an execution was put in, without any bankruptcy of the grantor, the execution creditor must be satisfied out of the goods in priority to the bill of sale holder.

It was held that the bill of sale was good as between the parties but if void as against appellant it can only be good to the extent of the excess, if any, after satisfying appellant's claim. It is wholly void as against appellant (*Commercial Bank* v. *Wilson* (1868), 14 Gr. 473 at pp. 480 and 481.

As to the debt being attachable I think there is no doubt. As found, the respondents received the $350 from the Government because it had a bill of sale. The bill of sale, although good between the parties (to the extent of any excess) is wholly void as against the appellant and this sum therefore is the subject of a "claim or demand" (section 3, Cap. 17, R.S.B.C. 1924)

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at the instance of the judgment creditor. It is a liability and an action could be maintained to recover it.

After the attaching order was served an agreement was entered into between the judgment debtor and respondents (garnishees) whereby it was agreed that the bill of sale should be cancelled and regarded as *non est,* so that the moneys in question should be treated as the property of the judgment debtors. Such an agreement, whether intended to defeat the primary creditor or not, cannot be permitted to operate to defeat the legal rights acquired. I agree with the views expressed by Wetmore, C.J. in *Beauchamp* v. *Messer and Hanham, Garnishee* (1910), 3 Sask. L.R. 59 and the same principles are applicable in this case.

The question remains as to whether appellant alone should share in the fruits of this attachment. There is a certificate by the sheriff that when the order was served no other writ or warrant of execution or certificate under the Creditors' Relief Act was in his hands. Appellant therefore is entitled to payment of the moneys attached. *Slinger* v. *Davis* (1914), 20 B.C. 447 and *R. B. Anderson & Son* v. *Dawber* (1915), 22 B.C. 218 may be usefully referred to. See also section 34 of Cap. 59, R.S.B.C. 1924.

I would allow the appeal.

Appeal allowed.

Solicitor for appellant: *C. J. Prior.*
Solicitors for respondents: *Tait & Marchant.*

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1933

March 17.

BILLINGSGATE FISH LTD. v. BRITISH COLUMBIA SUGAR REFINING CO. LTD.

Nuisance—Smoke, fumes and ashes—Damage to business and property—Right of tenant to sue for damages.

A tenant carrying on a fish business is entitled to recover damages for a nuisance which affects his use and enjoyment of the leased premises, notwithstanding his knowledge of the existence of the nuisance when he entered into the lease.

Statement

ACTION for damages arising out of an alleged nuisance. The plaintiff leased a portion of a wharf constructed by the Vancouver Harbour Commissioners, where he carried on a smoked and fresh fish business, the premises consisting of a smoke-house and storage space. The wharf was on Burrard Inlet immediately adjoining the property of the defendant. The defendant used on its premises a chimney which from time to time emitted quantities of black smoke, fumes, ashes or dust, which were deposited on the premises of the plaintiff to the injury of the fish. The plaintiff claims that owing to the damage thus caused to its business and property, it was compelled to relinquish the premises and carry on its business elsewhere. Tried by MACDONALD, J. at Vancouver on the 10th of March, 1933.

Fletcher, for plaintiff.
Hossie, K.C., and *Ghent Davis,* for defendant.

17th March, 1933.

MACDONALD, J.: Plaintiff seeks to recover damages from defendant arising out of an alleged nuisance created and maintained by the defendant.

Judgment

It appears that, prior to May, 1931, the plaintiff had been carrying on a smoked and fresh fish business upon a wharf at the foot of Gore Avenue in the City of Vancouver. He then moved and became a tenant of the Vancouver Harbour Commissioners upon the wharf constructed by such Commissioners

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on Burrard Inlet, immediately adjoining the property of the defendant, which had been for years carrying on an extensive sugar-refining business. The premises leased by the plaintiff consisted of a smoke-house and storage space. The defendant had in use upon its property a chimney, which, I find, from time to time emitted quantities of black smoke, fumes, ashes or dust which were deposited on the premises of the plaintiff to the injury of its fish, both fresh and smoked. Plaintiff, under the circumstances, repeatedly complained of the damage which was thus caused to its business and property, but the nuisance thus created by the defendant was not remedied though the defendant was well aware of its existence. Plaintiff alleges that consequent upon such loss and damage to its business, it was compelled to relinquish use of the premises and to carry on its business elsewhere.

Defendant contended that the plaintiff had misconceived its action and that, if any wrong had been committed and damage ensued, redress therefor could only be obtained by action on the part of the Harbour Commissioners and not by the defendant. No authority was cited to support such contention. Upon the facts here presented I do not think it is tenable. In my opinion the law is otherwise. 46 C.J., p. 738, states it to be as follows:

A lessee is entitled to recover damages sustained by him during his tenancy from the maintenance of a nuisance which affects his enjoyment and use of the premises, although he leased the property or renewed his lease thereof after the creation of the nuisance, and with knowledge of its existence, for a tenant who "comes to a nuisance" should be accorded the same degree of protection as one who purchases property near an existing nuisance.

A number of American decisions are referred to, in support of this proposition.

To the same effect Garrett on the Law of Nuisances, 3rd Ed., at pp. 234-5, states:

The Court will not grant an injunction at the instance of the owner as distinguished from the occupier in respect of a nuisance not necessarily permanent in character; such, for instance, as that caused by smoke, which may at any time cease with a different mode of user of the premises, or the noise of machinery. . . . *Simpson* v. *Savage* (1856) 3 Jur. (N.S.) 161; 26 L.J., C.P. 50; 1 C.B. (N.S.) 347; *Jones* v. *Chappell* (1875), L.R. 20 Eq. 539; 44 L.J., Ch. 658; *Mumford* v. *Oxford, Worcester and Wolverhampton Railway Co.* (1856), 1 H. & N. 34.

Sir G. Jessel, M.R., in *Jones* v. *Chappell, supra,* after

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referring to *Simpson* v. *Savage, supra,* says (L.R. 20 Eq. at p. 543):

The injury is a temporary nuisance, because the saws might be stopped and the steam-engine might cease working at any moment. It is only an injury to the occupier, and the landlord cannot bring an action, because before his estate comes into possession the nuisance may have ceased, or the person committing it may choose to make it cease the moment the estate comes into possession.

The case of *Mumford* v. *Oxford, Worcester and Wolverhampton Railway Co., supra,* illustrates the rights of redress respectively of an owner and his tenant, as to a nuisance in an adjoining property affecting their use and occupation. There was in that case a hammering and noises in a shed adjoining the plaintiff's property and they, as landlords, complained that this constituted a great nuisance to them, but at the trial Bramwell, B. instructed the jury along the lines which resulted in a verdict for the defendants. Then upon appeal Pollock, C.B. at p. 35, said as follows:

The hammering and noises may be stopped and the shed removed at any time. In order to give a right of action to a reversioner the injury must be of a permanent character. It was so laid down in *Baxter* v. *Taylor* (1832), 4 B. & Ad. 72, where it was held that an action would not lie by a reversioner against a stranger for entering on land held by a tenant on lease, though such entry was in the exercise of an alleged right of way.

Alderson, B. to the same effect said:

A reversioner cannot maintain an action for an injury not necessarily permanent. This injury is not, in its nature, permanent. Till the reversioner comes into possession he is not prejudiced.

Bramwell, B., who was the trial judge, stated his view of the law as follows:

I am of the same opinion. The action should have been brought by the tenant. In point of law, there could not have been the alleged damage to the reversion; therefore there was nothing to leave to the jury.

Then defendant took the ground that, even if it had committed a nuisance, it was relieved from liability through the result of a conversation with the chairman of the Harbour Commissioners after complaint had been made. It appears that the chairman changed his attitude as to the complaint and, according to the managing director of defendant company, gave his approval to the continuance of the nuisance. It was stated that this course was followed in the interest of the coal industry of the Province. I doubt if the chairman could thus bind the Harbour Commissioners but, in any event, it would not, as

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between the plaintiff and defendant, have any legal effect. A landlord could not thus impose the burden upon its tenant, of suffering from a nuisance caused by an adjoining occupant of land. He might perchance indemnify the wrongdoer from any liability, but this is not even suggested.

A contention was made and evidence adduced that the use of pulverised coal, and the consequent nuisance, was unavoidable, because there was not at the time of such user known to science, and available to industry, any means of preventing the escape of non-combustible substances consequent upon the use of such coal as fuel. While this may have been true as to their using pulverized coal, still it was submitted and proved that the wrong done might have been avoided, with very little expense, by the use of oil. Thus this ground proves of no benefit to the defendant by way of excuse or avoidance of its responsibility.

The premises leased by plaintiff were suitable and intended for the purpose of its business so it follows that the plaintiff should be awarded damages for the nuisance and loss which ensued. The damage is divided into two heads: First, the destruction of fish or rendering it unfit for sale. Then the more serious complaint on the part of the plaintiff was that he lost custom, through being unable to supply fish suitable for sale in his business. I gave counsel for the plaintiff an opportunity of presenting a written argument as to the damages claimed. It has not afforded me much assistance as to damages arising from a nuisance. The difficulty is apparent and I am left practically in the same position as is indicated in Halsbury's Laws of England, Vol. 10, p. 340, as follows:

> In cases of injury to property by reason of negligence or nuisance, or misrepresentation, although damages may usually be ascertained with approximate precision by reference to the general principle, there are few rules to aid the Court in the application of that principle.

Plaintiff submits that his business was injured through loss of profits consequent upon the nuisance to the extent of $3,619. I am satisfied that the business was affected by the actions of the defendant. The books of the plaintiff are in a very unsatisfactory condition and they do not support a loss to this extent nor one approaching such a large amount. While deciding that the plaintiff suffered an injury to its business through the nuisance I cannot with the evidence supplied ascertain "with

approximate precision" the extent of such loss. This applies as well to the cost of moving resulting from the same cause. Still I do not think the plaintiff should be completely deprived of damages in this respect. I have not the same difficulty however as to the fish which were damaged through the nuisance. I think a fair amount to allow the plaintiff for all damages would be $400. There will be judgment accordingly with costs.

Judgment for plaintiff.

IN RE SUCCESSION DUTY ACT AND ESTATE OF ISAAC UNTERMYER, DECEASED.

Succession duty—Property within and without the Province—Deceased not resident in Province—Method of calculation—R.S.B.C. 1911, Cap. 217, Sec. 7; B.C. Stats. 1921, Cap. 58, Sec. 2; B.C. Stats. 1921 (Second Session), Cap. 44, Sec. 3; R.S.B.C. 1924, Cap. 244, Secs. 7 and 10.

Under sections 7 and 10 of the Succession Duty Act, R.S.B.C. 1924, Cap. 244, the proper course to find the tax on property within the Province is to take the net value of the whole estate; then follow section 7 by looking down the first column of Schedule "D" and placing the net value in its proper place; then look (in this case) in the second column for the percentage opposite the said net value; then multiply this percentage by the amount of the British Columbia estate (after first deducting therefrom its proportion of debts).

Statement

RETURN of a summons granted to the minister of finance under section 34 of the Succession Duty Act and issued to the executors of the Estate of Isaac Untermyer, Deceased, to shew cause why duty should not be paid forthwith or on a date to be fixed by the judge, and motion by the executors under section 43 of the Act, to determine the amount of duty. Deceased died on August 31st, 1926, domiciled in New York, leaving property both within and without the Province. The gross value of his estate both within and without the Province was $1,810,054.77 and the total debts were $42,683.47, leaving a balance of $1,767,371.30. The British Columbia estate was $641,974 and

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IN RE SUCCESSION DUTY ACT AND ESTATE OF ISAAC UNTERMYER, DECEASED

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the proportion of debts chargeable to the British Columbia estate was $15,138.58 (being the proportion of the total debts which the British Columbia estate bore to the total estate), leaving $626,835.42 as the amount of personalty taxable in British Columbia. The property passed to wife and son. The assessor took the figure of $1,767,371.30 and opposite it he extracted the percentage of 23.67 per cent. from the second column of Schedule "D" (being 16 per cent. plus 7.67 per cent). He then took 23.67 per cent on $626,835.42, namely, $148,371.94, and claimed this as the tax. The question was, by what method of calculation the British Columbia estate should be assessed under the Succession Duty Act.

Heard by MURPHY, J. in Chambers at Vancouver, on November 28th, 1932, and January 10th and 16th, 1933.

Argument

J. W. deB. Farris, K.C., for the executors: The Province has no right to ask the Court to order payment of duty under section 34 if the assessor has determined an excessive amount. Section 7 does not claim the maximum rate applicable. Schedule "D" is a graduated scale. Each group is taxable on its corresponding rate: see *In re Succession Duty Act and Estate of Joseph Hecht, Deceased* (1923), 33 B.C. 154. The property is classified and arranged by breaking it up into various groups. The fact that section 7 uses the word "rate" in the singular is immaterial: see Interpretation Act, R.S.B.C. 1924, Cap. 1, section 23 (2); *Conelly* v. *Steer* (1881), 50 L.J., Q.B. 326. For the construction of a taxing statute see *Royal Trust Co.* v. *Minister of Finance for British Columbia* (1921), 91 L.J., P.C. 8 at p. 12; *The Stockton and Darlington Railway Company* v. *Barrett* (1844), 7 M. & G. 879; *Cox* v. *Rabbits* (1878), 47 L.J., Q.B. 391; *Oriental Bank Co.* v. *Wright* (1880), 50 L.J., P.C. 1 at p. 7; *In re Thorley* (1891), 60 L.J., Ch. 538; *Clifford* v. *Commissioners of Inland Revenue* (1896), 65 L.J., Q.B. 582 at p. 585; *Inland Revenue Commissioners* v. *Tod* (1898), 67 L.J., P.C. 46; *Horan* v. *Hayhoe* (1903), 73 L.J., K.B. 135; *Whiteley Lim.* v. *Burns* (1908), 77 L.J., K.B. 467 at p. 469. Section 10 does not apply to a non-resident.

Beeston, for Minister of Finance: The estate comes under R.S.B.C. 1924, Cap. 244. The *Hecht* case (although decided

by the Court of Appeal in 1923) came under R.S.B.C. 1911, Cap. 217, and not under 1921 (Second Session), Cap. 44, because Hecht died in 1919 and the Court of Appeal was there dealing with the old 1911 rates. The present section 7 is quite different to its predecessor. The executors have ignored net value entirely. The words are, "the group" not "the respective groups." Our Interpretation Act differs from the Imperial Interpretation Act (1889), 52 & 53 Vict. The context indicates that the words are to be taken as read. Changing "rate" to "rates" in section 10 does not affect section 7. Section 10 was applied in the *Hecht* case because that litigation was not pending when that section was brought in by 1921, Cap. 58. As to taxing statutes see *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (1920), 90 L.J., K.B. 117; *Attorney-General* v. *Carlton Bank* (1899), 2 Q.B. 158 at p. 164. In any case the executors cannot now object to the amount. Following the assessment they confined their objection to an appeal on the valuation of the property: see *Untermyer Estate* v. *Attorney-General for British Columbia* (1929), S.C.R. 84.

Argument

Farris, in reply: We admit that section 10 was considered in the *Hecht* case. The result will be a substantial increase in the tax from that reckoned by us but by breaking up even the whole net value into groups the amount would be $105,349 and not $148,371.94. The classification in section 7 "is for the purposes of the schedule" and these are ignored unless the groups in the schedule are made the basis of the classification. The proper method would be to take a half of one per cent. on $5,000, then one and a half per cent. on $10,000, and so on up to 23.67 per cent. of $767,371.30. Add these various groups together and you get $296,686.78 which would be the tax if all the property were within the Province. Multiply this by the proportion which the British Columbia estate bears to the total net estate and you have $105,349 as the proper tax.

17th January, 1933.

Judgment

MURPHY, J.: The contention, that section 10 does not apply to a non-resident, seems to me to be without foundation. The Succession Duty Act, Sec. 5, taxes property situate within the Province without reference to residence of the deceased. Sec-

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IN RE SUCCESSION DUTY ACT AND ESTATE OF ISAAC UNTERMYER, DECEASED

Judgment

tion 10 is a part of the machinery to fix the rate of such taxation. It is conceded that the constitutionality of these sections is a closed matter so far at any rate as this Court is concerned. It has been already decided that the property on which it is proposed to levy taxation is property situate within the Province. *Untermyer Estate* v. *Attorney-General for British Columbia* (1929), S.C.R. 84. This being my view and the construction of section 10 having been determined by the Court of Appeal in the case of *In re Succession Duty Act and Estate of Joseph Hecht, Deceased* (1923), 33 B.C. 154 the only section that calls for consideration by me is section 7. In my opinion the duty has been correctly assessed by the department of finance. The primary requirement of section 7 is to classify for purposes of Schedule "D" the property of the deceased on the basis of net value. I think this means that the first thing to be determined is the net value of the estate and when this is ascertained to use it as a measuring rod to classify the estate for purposes of Schedule "D." Obviously there are as many classes of estates as there are net values if net value be used as a measuring rod. There may be a ten thousand dollar class, a twenty thousand dollar class, a million dollar class and so on. Having determined what class of estate in terms of net value is in question the next step is to classify it for purposes of Schedule "D." The first column of Schedule "D" is designed to cover all estates in terms of their net values. In other words, it classifies estates according to their net value. In order to classify any particular estate for purposes of Schedule "D" on the basis of net value the first column of Schedule "D" alone is to be regarded since that alone deals with net value. The classification is done by regarding the net value of the estate, as already determined, in the light of said first column. You apply your measuring rod of net value, already used to classify the estate, to said first column and find thereby the class set out therein corresponding to the class into which the estate has fallen. If the estate has been found to be in the million dollar class then for the purposes of Schedule "D" it is to be regarded as an estate of that class to be dealt with in reference to said first column. It is so dealt with by taking the next step required by said section 7, *i.e.*, by arranging it in said first column, that is, by setting it in the

place therein assigned to an estate of the net value of one million. The rate of duty is then fixed, where wife and children are concerned, by looking at the rate set out in the second column and finding what rate stands opposite the group in which the estate has been placed as aforesaid. This is what the department has done. The language of the section is cumbrous but if the requirements are worked out step by step, as directed, I think the meaning is clear. I am fortified in this conclusion by the history of section 7. The former section, which the one under discussion displaced, admittedly imposed graduated rates. Unless it was intended to change this why was the former section repealed and said section 7 enacted?

Judgment

I fix March 1st, 1933, as the date upon which the amount of succession duty not now in dispute is to be paid and May 1st, 1933, as the date for payment of the remainder.

Order accordingly.

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IN RE WARD, AN INFANT.

DILL v. CHILDREN'S AID SOCIETY OF CATHOLIC ARCHDIOCESE OF VANCOUVER

IN RE WARD, AN INFANT. DILL v. THE CHILDREN'S AID SOCIETY OF THE CATHOLIC ARCHDIOCESE OF VANCOUVER.

Infant — Custody — Neglected children—Meaning of—Apprehension—Religious persuasion of parents—R.S.B.C. 1924, Cap. 101, Secs. 3, 17 and 19; Cap. 112, Secs. 56 (j) and 93.

An infant girl born of Roman Catholic parents in 1920, both her parents being dead, was handed over by her mother just before her death in August, 1931, to the care of Mrs. Effie Dill, who is a Protestant. The child was well looked after and happy in the Dill home. On an information and complaint in July, 1932, by one Foran on behalf of the Children's Aid Society of the Catholic Archdiocese of Vancouver, acting for the superintendent of neglected children, that said infant is a neglected child of the Roman Catholic faith and that she be apprehended under section 56 of the Infants Act by reason of being without proper guardianship, it was held that the official guardian comes within section 56 of the Infants Act and that there was not a proper guardianship within the meaning of the Act, and the child should be transferred to the care of the Children's Aid Society.

Held, on appeal, reversing the decision of ELLIS, Co. J., that section 56 applies to neglected children only, and the finding of neglect is a prerequisite to the child's apprehension. Under said section no order will be given to take a child from a home where it is receiving with the assent of the official guardian, proper care and guardianship, and be forcibly removed to another environment.

Per MACDONALD, J.A.: It is only after a finding that the child is neglected that the provisions of section 93 of the Infants Act can be invoked.

Statement

APPEAL by plaintiff from the order of ELLIS, Co. J. of the 14th of July, 1932, on an information and complaint by one J. S. Foran, agent of the Children's Aid Society of the Catholic Archdiocese of Vancouver, that May Ruth Ward of Steveston in the County of Vancouver is a neglected child of the Roman Catholic faith, being 12 years old, and that she be apprehended under section 56 (*j*) of the Infants Act by reason of her being without proper guardianship, her parents who were Roman Catholics, being dead. The infant was born in 1920 and before the mother died in August, 1931, she left the child in the care of Mrs. Dill, with whom she has been living continuously ever

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since. Mrs. Dill is a Protestant but it is conceded that the child is well provided for, that she is happy and fond of Mrs. Dill, who gives her the same care and attention as her own children. It was held by the learned judge that the official guardian comes within section 56 of the Infants Act, that there has not been a proper guardianship within the meaning of the Act, and an order was made that the child be transferred to the Children's Aid Society of the Catholic Archdiocese of Vancouver.

The appeal was argued at Vancouver on the 5th of December, 1932, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and MACDONALD, JJ.A.

G. F. H. Long, for appellant: Both acts must be read together. The application should not be acceded to unless she is a neglected child or unless she consents as she is over twelve years old: see *In re Haddon* (1927), 38 B.C. 328. Section 56 (*j*) of the Infants Act should be interpreted according to the Guardianship of Infants Act: see Beal's Cardinal Rules of Legal Interpretation, 7th Ed., p. 402. The learned judge had no jurisdiction to remove the official guardian. On the legal interpretation of the sections applicable see *Rex* v. *Loxdale* (1758), 1 Burr. 445. The religious question does not arise here: see *Ward* v. *Laverty* (1925), A.C. 101.

Argument

A. deB. McPhillips, for respondent: We have to shew neglect but the religion of the parents must also be taken into account. A certain state of affairs is considered neglect. The guardian must give a proper guardianship and religion is an essential element in guardianship, and he has no right to bring up children in any religion except that of the parents: see *In re Howard* (1909), 14 B.C. 307; *Barker* v. *Edger* (1898), A.C. 748 at p. 754. As to whether the guardianship was properly carried out, the discretion of the learned judge below is exercised and he should not be interfered with. A guardian is in a different position from a parent as he is a trustee as to the welfare of the child. That the judge's discretion is exercised see *In re Thain* (1926), Ch. 676 at p. 686.

Long, replied.

Cur. adv. vult.

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10th January, 1933.

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

MACDONALD, J.A.: Respondent relies on section 56 (*j*) of the Infants Act (R.S.B.C. 1924, Cap. 112) reading as follows:

> 56. The Superintendent and every officer of any children's aid society who is authorized in writing by the Superintendent, or by the Superintendent of Provincial Police, every other person who is authorized in writing by the Superintendent, every constable or officer of the Provincial Police or of any municipal police, and every Probation Officer, may apprehend, without warrant, and bring before a judge, as neglected, any child apparently under the age of eighteen years who is within any of the following classes or descriptions:— . . .
>
> (*j*.) Whose home by reason of neglect, cruelty, or depravity is an unfit place for the child, or who has no proper guardianship, or who has no parent capable and willing to exercise proper parental control over the child:

MACDONALD, J.A.

The trial judge held that there was "no proper guardianship" in this case, because presumably the official guardian under the Equal Guardianship of Infants Act, R.S.B.C. 1924, Cap. 101, Sec. 17, did not furnish that personal care, oversight and attention demanded of one having the custody and control of a child. It is quite obvious why he did not attempt to exercise the equivalent of parental control. He stated, however, in his reasons for judgment that the official guardian "was satisfied that Mrs. Dill (appellant) was a proper person to leave the child with and that correspondingly the child was having a good bringing up." Without attempting to define the duties of the official guardian, it is apparent that on the state of facts found, coupled with the excellent care given by appellant to this twelve-year-old child that it does not lack proper care or guardianship. The official guardian expressed willingness to abide by any order the Court might make. Obviously that assent, if material, may be taken as given in respect to any order made on appeal.

The caption to section 56, properly enough, is "The Apprehension of Neglected Children." "Neglect" in care, custody, control and guardianship resulting in injury to the child is a prerequisite to apprehension. No one under section 56 can secure an order to take a child from a home where it is receiving proper attention; or where, as in the case at Bar (the parents being dead) it is receiving with the assent of the official guar-

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dian, proper care and guardianship, and forcibly remove it to another environment however attractive it may be. This section applies to neglected children only and this child is not neglected. It is only too after a finding that the child is neglected that the judge "in determining on the person or society to whom the child is to be committed" must follow the directions outlined in section 93.

The real basis of the application is that the appellant is not of the same religious faith as the deceased parents of the child. It cannot be held, however, that a child of Roman Catholic parentage found in a Protestant home (and the converse is also true) must *per se* be regarded as a "neglected" child.

I would allow the appeal.

Appeal allowed.

Solicitor for appellant: *G. F. H. Long.*
Solicitor for respondent: *A. deB. McPhillips.*

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HANSEN
v.
TAYLOR

HANSEN v. TAYLOR.

Real property—Judgment—Registration—Cancellation under authorization of judgment creditor—Subsequent reregistration of judgment—Application to cancel reregistration—B.C. Stats. 1914, Cap. 43, Secs. 72 and 74—R.S.B.C. 1924, Cap. 117, Sec. 232.

The plaintiff had registered a judgment against the defendant's lands. Under an arrangement that the defendant would pay a certain sum in cash and the balance of the debt in monthly instalments, the plaintiff authorized the district registrar of titles in writing to vacate the registration of his judgment against the defendant in so far as the same affected said lands. The district registrar of titles thereupon cancelled the registration in compliance therewith. Subsequently the plaintiff reregistered the judgment against said lands. The defendant's application to the registrar to cancel said reregistration was refused. The defendant then applied under section 232 of the Land Registry Act for cancellation of the reregistration.

Held, that the reregistration of the plaintiff's judgment was illegal and void. The statutory effect of the registrar's action in cancelling the registration of the judgment was to settle the substantive rights of the parties in so far as registration of the judgment against said lands was concerned and caused the judgment to be released for all time in the sense that it could never again be registered as a charge under the provisions of the Execution Act and the Land Registry Act.

Statement

APPLICATION for cancellation of the reregistration of a judgment against lot 191, Hastings Townsite, City of Vancouver. The facts are set out in the reasons for judgment. Heard by MURPHY, J. in Chambers at Vancouver on the 23rd of March, 1933.

J. W. deB. Farris, K.C., Henderson, K.C. and *D. McKenzie*, for the application.

Mayers, K.C., Harold B. Robertson, K.C., and *Ian Shaw*, *contra*.

30th March, 1933.

Judgment

MURPHY, J.: In November, 1914, Hansen had a judgment registered against the lands of Taylor, the petitioner herein.

Taylor was desirous of being a candidate for the mayoralty of the City of Vancouver at the then forthcoming election. Taylor owned lot 191, Hastings Townsite, City of Vancouver, and desired to have this lot freed from the registration of Hansen's judgment in order that he might qualify as a candidate for the mayoralty pursuant to the Vancouver Incorporation Act, 1900. He accordingly sent one Bell to negotiate with Hansen and his solicitor to effect this purpose. It was verbally arranged between these parties that if Taylor would undertake to make an immediate payment of the sum of $100 on account of such judgment and thereafter on the 15th of each month, commencing on December 15th, 1914, pay the sum of $25 until the said judgment was fully satisfied the said Hansen would authorize the district registrar of titles at Vancouver to vacate the registration of the said judgment as against said lot 191. The $100 was paid and Hansen gave to Taylor the following document:

In The Supreme Court of British Columbia

Between:

Hans Hansen

Plaintiff

Judgment

And:

L. D. Taylor

Defendant

To the District Registrar of Titles, Vancouver, B.C.

I the undersigned Hans Hansen hereby authorize you to vacate the registration of my judgment against L. D. Taylor in so far as the same affects lot 191, Hastings Townsite, City of Vancouver.

Dated this 30th day of November, A.D. 1914.

Sgd. H. HANSEN, 515 Holand St.,
Plaintiff, New Westminster.

Witness:
ARTHUR R. CREIGHTON, Student-at-Law,
38 Royal Avenue, New Westminster.

WHITESIDE, EDMONDS & WHITESIDE,
Plaintiff's Solicitor.

It was not intended that the said judgment should be released in whole or in part but it was intended to qualify Taylor as a mayoralty candidate by obtaining the cancellation of the registration of said judgment against lot 191. Taylor caused the above set out document to be taken to the land registry office and the registrar of titles thereupon cancelled the said judgment in

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so far as it constituted a charge against said lot 191. Substantive rights of the parties must be decided under the relevant statutes as they stood at the time the cancellation was effected unless retroactive legislation affecting such rights has since been passed: Halsbury's Laws of England, Vol. 27, sec. 305; *In re Waverley Type Writer. D'Esterre* v. *Waverley Type Writer* (1898), 1 Ch. 699; 67 L.J., Ch. 360. There has been no legislation dealing with a case such as the one at Bar where the cancellation of a judgment in the land registry books has been brought about by the judgment creditor. The only section referred to in argument was section 37 (2) of the Execution Act, R.S.B.C. 1924, Cap. 83, which reads:

> Registration of a judgment under this Act shall include the reregistration of same, which may be effected in the same way that a judgment is registered or the registration of same is renewed.

This section was originally passed in 1915 and probably was merely declaratory of the law as it then stood. At any rate it cannot have any bearing on the case under consideration since it makes no reference to judgments, cancellation of which has been brought about by the act of the judgment creditor, and does not purport to be retroactive. The section conferring authority upon the registrar to deal with Taylor's application for cancellation as against said lot 191 was section 72 (2) of the Land Registry Act Amendment Act, 1914, Cap. 43, which reads:

> The registrar shall cancel the registration of any judgment in whole or as to any specified land upon satisfactory proof of the judgment having been satisfied, or the whole or such specified land having been released therefrom.

The clear meaning of this section is I think that the registrar before cancelling the registration must have before him proof which he regards as satisfactory that the specified land has been released from said judgment. The registrar did cancel the registration of the Hansen judgment as against lot 191 on December 5th, 1914, and caused the proper entries to be made in the land registry books. So far as appears from the evidence the registrar accepted the document above set out signed by Hansen as satisfactory proof that lot 191 had been released from said judgment. That I think is a matter with which this Court

is not concerned. It was for the registrar to decide what proof he would require subject to appeal if any party was dissatisfied. In my view this section means that once the registrar has accepted what he considers satisfactory proof, and has acted thereon by cancelling the registration of the judgment as against a parcel of land, and caused the proper entries to be made to effect such cancellation then, so far as the Land Registry Act is concerned, said judgment can never again be registered as against the parcel of land from which it has been released where no appeal against the registrar's action is taken. It is true that this result was not contemplated by Hansen when he signed the document of November 30th, 1914. He did however intend that the registration of the judgment should be cancelled as against lot 191 so that Taylor might be qualified to be a candidate for the mayoralty. As stated, in my view, this involved the release of the judgment for all time as against the particular parcel of land in question so far as making the judgment a charge under the Land Registry Act against such parcel is concerned if the registrar did actually cancel the registration. Everyone is supposed to know the law and Hansen by having set the law in motion by his own act cannot be heard to complain of the legal consequences even if he did not intend them. I am fortified in this view by section 153 of the Land Registry Act, R.S.B.C. 1911, Cap. 127, which as amended by section 74 of the Land Registry Act Amendment Act, 1914, reads as follows:

Judgment

In every case of cancellation of a charge, Crown debt, or judgment, the estate or interest in respect of which such charge, Crown debt, or judgment shall have been registered shall be deemed to be discharged and released from the date of entry thereof on the register; and in those cases where a reconveyance, surrender, or transfer would have been otherwise necessary, such memorandum in said Form 0 as aforesaid shall operate as a reconveyance, surrender, or transfer in favour of the person entitled to the equity of the land in question, and the charge, Crown debt, or judgment shall not longer affect the land in respect of which it was registered.

If my opinion is correct then the reregistration of Hansen's judgment against lot 191 in February of this year was illegal and void. The statutory effect of the registrar's action in December, 1914, was to settle the substantive rights of the parties in so far as registration of the judgment against lot 191

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was concerned. His action, as a matter of law, caused the judgment to be released for all time in the sense that it could never again be registered as a charge under the provisions of the Execution Act and the Land Registry Act against said lot 191.

It was contended in argument that an action would have to be brought in order to invalidate this last registration. Procedure is of course governed by the existing law. In my opinion section 232 of the Land Registry Act authorizes the present proceedings. The act of reregistering this judgment was done without notice to Taylor. He thereupon applied to the registrar to cancel same, which application the registrar rejected. These facts I think bring the subject-matter sufficiently within section 232 to allow applicant to proceed thereunder. The cancellation of the existing reregistration of said judgment against said lot 191 is hereby directed. Costs to Taylor against Hansen.

Judgment

Application granted.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada, or to the Judicial Committee of the Privy Council:

Bland v. Agnew (p. 491).—Special leave to appeal to the Supreme Court of Canada refused, 16th June, 1933. See (1933), S.C.R. 345; 3 D.L.R. 639.

Blumberger v. Solloway, Mills & Company, Limited (p. 241).—Reversed by Supreme Court of Canada, 7th February, 1933. See (1933), S.C.R. 163; 3 D.L.R. 86.

Merrill Ring Wilson Limited *et al.* v. Workmen's Compensation Board (p. 506).—Affirmed by the Judicial Committee of the Privy Council, 28th July, 1933. See (1933), 4 D.L.R. 57; 3 W.W.R. 110.

Rex v. Stewart (p. 17).—Reversed by Supreme Court of Canada, 15th June, 1932. See (1932), S.C.R. 612; 4 D.L.R. 337.

Cases reported in 45 B.C. and since the issue of that volume appealed to the Supreme Court of Canada:

Andler *et al.* v. Duke *et al.* (p. 96).—Reversed by Supreme Court of Canada, 11th October, 1932. See (1932), S.C.R. 734; 4 D.L.R. 529.

Baldwin and Baldwin v. Bell and Hay (p. 234).—Reversed by Supreme Court of Canada, 28th November, 1932. See (1933), S.C.R. 1; 1 D.L.R. 232.

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ATTACHMENT OF DEBTS—*Continued.*

to the judgment debtors, less some of which had been destroyed by order of the Government, also the sum of $350, allowed them by the Government for the cattle destroyed. The garnishee issue was tried on the 4th of July, 1932, when it was held that on the date of the garnishee order the garnishees were not indebted under obligation or liable to the judgment debtors and the garnishee summons was dismissed. *Held*, on appeal, reversing the decision of LAMPMAN, Co. J., that the garnishees agreed to pay the $350 to the judgment debtors as a debt owing by them to the judgment debtors after the service of the garnishee order, and the $350 had been impressed in the hands of the garnishees with a charge in favour of the appellant as from the service of the garnishee order on the 24th of February, 1932, and the plaintiff is entitled to an order against the garnishees for this sum. MARSHMAN v. BREADIN AND CHRISTIE: SCOTT & PEDEN, GARNISHEES. - - **537**

ATTACHMENT OF DEBTS ACT — *Garnishee—"Employee"—"Wages or salary"—R.S.B.C. 1924, Cap. 17, Sec. 3.*] The defendant was appointed official Italian police Court interpreter in Vancouver, and by his terms of service he was paid for interpreting cases in the police Court, $2.50 for one case per day; $4 for two cases per day, and not more than $5 per day for any number of cases. He was not obliged to be present in Court continuously, but was paid only for the work he actually did. He received a cheque at the end of each month for his services. The plaintiff issued a garnishing order against the City of Vancouver, and the city in compliance with the order paid the sum claimed into Court. On the plaintiff's application to set aside the order:—*Held*, that as the defendant is paid wages or salary as an employee of the city within the provisions of section 3 of the Attachment of Debts Act, he is entitled to exemption and the garnishee order should be set aside. TODD v. DEPAOLA: CITY OF VANCOUVER, GARNISHEE. - - **278**

AUDIT—System of contained in policy—System of audit changed during currency of bond without notice—Effect on guarantee. - **515**
See INSURANCE.

AUTOMOBILE—Insurance against liability for injuries—Insured's car driven by another with his consent—Passenger injured in accident—Passenger obtains judgment against driver for damages—Execution unsatisfied

AUTOMOBILE—*Continued.*

—Action by insured as trustee for driver. - - - - - **383**
See INSURANCE, AUTOMOBILE.

AUTOMOBILE INSURANCE. -
See under INSURANCE, AUTOMOBILE.

AWARD. - - - - - **349**
See INSURANCE, FIRE. 1.

BANKRURTCY. - - **260**
See STOCK-BROKER. 1.

BETTING—Telegraphic information relating to—Distributing betting information—"Wilfully and knowingly"—Interpretation of—"*Mens rea*"—Criminal Code, Sec. 235 (*i*). **459**
See CRIMINAL LAW. 4.

BILL OF SALE—Validity—Fraudulent preference—County Court—Jurisdiction—Form of interpleader order. - - - - - - - **59**
See INTERPLEADER. 1.

BOND OF INDEMNITY—Certain system of audit contained in policy—System of audit changed during currency of bond without notice—Effect on guarantee. - - - **515**
See INSURANCE.

BOOK ACCOUNTS—Assignment of. **447**
See CHOSE IN ACTION.

BOUNDARY—Land. - - - **441**
See VENDOR AND PURCHASER.

BRITISH NORTH AMERICA ACT—Sec. 96. - - - - **375**
See HUSBAND AND WIFE.

BROKER AND CLIENT—Stocks and bonds delivered broker as collateral—Conversion—Evidence of — Access to broker's books—Privilege—Appeal. - - - - - - **241**
See STOCK EXCHANGE.

BUCKETING—Right of action by trustee against other brokers based on—Fraud—Agency—Personal liability of directors. - - **260**
See STOCK-BROKER. 1.

BUILDING—Construction of—Permit—By-law—Validity—*Mandamus.* **475**
See MUNICIPAL LAW. 1.

BURDEN OF PROOF. - - **443**
See NEGLIGENCE. 9.

BY-LAW—Validity—Construction of building—Permit. - - - **475**
See MUNICIPAL LAW. 1.

CERTIORARI. - - **152, 232**
See EXCISE ACT.
HABEAS CORPUS. 2.

CHILDREN — Ill-treatment of — Offence against Provincial Act. - **267**
See CONSTITUTIONAL LAW. 2.

2.——*Neglected—Committed to care of Children's Aid Society—Liability for maintenance—Residence prior to commitment.* - - - - - - - - - **1**
See INFANTS ACT. 3.

CHINESE IMMIGRATION ACT—Applicant for entry—Examination by controller—Order for deportation—*Habeas corpus*—Appeal. - **533**
See STATUTE, CONSTRUCTION OF.

CHOSE IN ACTION—*Book accounts—Assignment of—Equities to which subject—Registration of assignment — Effect of — Registration under Companies Act—Effect of—R.S.B.C. 1924, Cap. 16—B.C. Stats. 1929, Cap. 11, Secs. 133 (8) and 138.*] Registration of an assignment of book accounts under the Assignment of Book Accounts Act confers no greater rights upon the assignee than he had by virtue of the assignment; the effect of registration is to preserve those rights as against creditors, subsequent purchasers or mortgagees. The fact that the assignment is also registered under the Companies Act has no effect as against existing superior equities. BURRARD DRYDOCK COMPANY LIMITED v. BANK OF TORONTO AND VULCAN ENGINEERING WORKS LIMITED. - - - - - - **447**

CODICIL—Effect of. - - - - **273**
See INSURANCE, LIFE.

COLLISION AT INTERSECTION—Negligence — Gratuitous passenger — Damages—Evidence. - **401**
See MOTOR-VEHICLES. 2.

COMPANY—Dissolution. - - - **195**
See PARTNERSHIP AGREEMENT.

2.——*Land in name of—Transferred to individuals—Deed not registered—Sold by individuals at profit—Liability of company for tax.* - - - - - - **406**
See TAXATION. 1.

CONCURRENT WRIT OF SUMMONS AND SERVICE—Order for issuance of—Affidavit in support—Sufficiency of—Application to set aside order and service of writ. - - - - - - - - - **264**
See PRACTICE. 10.

CONSTITUTIONAL LAW—Deserted wife—Application for order against husband — Magistrate — Powers of — Prohibition. - - - **375**
See HUSBAND AND WIFE. 1.

2.——*Ill-treatment of children—Offence against Provincial Act—Section 79 of Infants Act—Validity—R.S.B.C. 1924, Cap. 112, Sec. 79.*] Section 79 of the Infants Act provides that: "Any person who, having the care, custody, control, or charge of a child under the age of 18 years, ill-treats, neglects or abandons or exposes such child, or causes or procures to be ill-treated, neglected, abandoned, or exposed, shall be liable, on summary conviction, to a fine not exceeding one hundred dollars, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding three months." *Held*, to be *intra vires* of the Provincial Legislature. REX v. DOWDELL. - - - - - - - - **267**

CONTRACT—*Agreement to place insurance with a company—Personal skill and confidence involved in contract — Assignability — Parties — Novation.*]—An agreement for the purchase of bonds of the defendant company contained a covenant by the defendant that during the lifetime of the bonds the placing of all insurance taken out by the defendant should be under the control of the company purchasing the bonds. The latter company thereafter assigned all its insurance business, including the benefit of all pending contracts, to the plaintiff company, which had been incorporated for the purpose of taking over all said insurance business. The defendant refused to place any of its insurance with the plaintiff company. In an action on the covenant:—*Held*, that the rule that a contract which involves in its performance an element of personal skill or personal confidence is not assignable applies to the covenant in this contract, and the action was dismissed. ROYAL FINANCIAL INSURANCE LIMITED v. NATIONAL BISCUIT AND CONFECTION COMPANY LIMITED. **294**

2.——*Mineral claims — Agreement for sale—Breach—Damages—Former judgment—Parties—Intervention—Res judicata.*] On the 18th of May, 1925, the defendants, owners of the Red Top group of mineral claims near Stewart, B.C., gave an option

CONTRACT—*Continued.*

to one Johnson for the purchase of the claims for $250,000 and $1,000 was paid on account thereof. Johnson was acting as agent for the plaintiff, and on the 25th of May following, a formal agreement was prepared to carry out the preliminary agreement, and on being signed by the defendants and Johnson a further $1,000 was paid. The agreement was delivered by the parties to Dexter Horton National Bank in Seattle, along with an escrow agreement containing a bill of sale of the property, a term of the escrow providing that in case of default the bank, unless and until the defendants had demanded the return to them of their bill of sale, might accept any past due payment whereupon the agreement would be reinstated. The plaintiff and two of his associates then proceeded to work the property and expended considerable money in development. The next payment under the option of $10,000 fell due on the 20th of July, but it was not paid. The defendants did not withdraw the bill of sale from the bank, and on the 8th of August following, the plaintiff, with the financial assistance of one Duthie, paid $10,000 into the bank, and he and Duthie then proceeded to Stewart to examine the property. They told the defendants that the $10,000 was deposited in the bank, but when they attempted to enter the property they were forcibly ejected by the defendants. The plaintiff then telegraphed the bank to stop payment of the $10,000 to the defendants. The defendants then proceeded to Seattle and brought action against the bank to recover the $10,000. The plaintiff intervened under the provision of a Washington statute, and by order of the Court made with the consent of the parties the money was paid into Court and the question of the right to the fund was left to be decided as between the plaintiff and the defendants. Later the Court, with a jury, decided the fund belonged to the plaintiff. In an action for damages by reason of the defendants' breach of contract in ousting the plaintiff from the property, the defence was raised that the defendants, by bringing their action in the State of Washington, attorned to the jurisdiction and were bound by any judgment given on a cross-action by the present plaintiff, that the plaintiff should have then brought these proceedings, that the claim was therefore *res judicata*, and he was estopped from bringing this action. It was held that the onus was on the defendants to establish that the plaintiff was estopped, and in this they failed. The damages were assessed as follows: $2,000 being the payments made under the option, $2,000 special damages, and $6,000 general damages, in all $10,000. *Held*, on appeal, affirming the decision of McDONALD, J. (McPHILLIPS, J.A. dissenting), that by the case and statute law of the State of Washington, where a foreign plaintiff resorts to the Courts of that State to enforce a claim, not against the respondent but against the bank in which the subject in controversy is defined, the respondent cannot intervene except on the basis of a claim to that particular fund, and the defence of *res judicata* therefore fails. QUICKSTAD V. McNEILL AND CONNORS - - - - - - **81**

3.——*Oral—Enforcement of.* - **455**
See INSURANCE, FIRE. 2.

4.——*Sale of block of company shares—Action for payment—Defence of lack of title to part of block and fraud in procuring them.*] In an action to compel performance of a contract to purchase 750,000 shares of the capital stock of a certain company, the plaintiff recovered judgment on the trial. *Held*, on appeal, reversing the decision of FISHER, J., that the appeal should be allowed on the ground that at least a part of the block of shares for which the plaintiff delivered certificates were trust shares to which the plaintiff had no title. *Per* McPHILLIPS and MACDONALD, JJ.A.: The Court will not exercise its discretionary powers to order specific performance when to do so would condone a breach of trust or sanction unconscionable dealings with respect to one of the parties. The agreement must be free from the taint of deception. Nor does it avail to say that only part of the agreement is affected by fraud, thus pointing to modification. It is wholly vitiated and the purchaser is absolved from all obligations under it. Nor is it necessary that fraud should be pleaded. If title is disputed and fraud is disclosed in the course of the evidence adduced in support of the vendor's allegation of ownership, the Court will not enforce the contract: further, the Court will not force a purchaser of shares to take shares, the right to which he may have to contest with third parties. McTAVISH BROTHERS LIMITED V. LANGER. - - - - - - **310**

CONTRIBUTORY NEGLIGENCE. - **462**
See NEGLIGENCE. 3.

CONVERSION—Evidence of. - **241**
See STOCK EXCHANGE.

CONVEYANCE—Execution of. - **441**
See VENDOR AND PURCHASER.

CONVICTION—Appeal—Trial by jury—Juryman previously convicted of indictable offence—Disqualification of juror—New trial. - **17**
See CRIMINAL LAW. 7.

2.——*The Opium and Narcotic Drug Act, 1929 — Detention for deportation — Right of appeal—Deportation order made prior to termination of imprisonment—Validity* - - - - - - **321**
See HABEAS CORPUS. 3.

COSTS—Appeal to Supreme Court of Canada—Deposit of security for respondent's costs—Abandonment of appeal and respondent's costs thereof paid. - - **211**
See PRACTICE. 2.

2.——*Security for.* - **67, 369**
See DEFAMATION.
PRACTICE. 7.

3.——*Taxation—Four defendants in action—Action dismissed against one defendant with costs—Taxing officer not to apportion the costs—Rule 977.* - - **292**
See PRACTICE. 3.

4.——*Taxation — Judgment against all defendants with costs—No apportionment by taxing officer—Item 13 of Appendix "N"—Distribution.* - - - - **207**
See PRACTICE. 4.

5.——*Taxation—Appendix "N," items 6 and 7.* - - - - - - - **79**
See PRACTICE. 1.

COUNTY COURT—Jurisdiction. - **59**
See INTERPLEADER. 1.

COUNTY COURTS ACT—*Cause of action —Splitting demands—Jurisdiction—R.S.B.C. 1924, Cap. 53, Sec. 35.*] Section 35 of the County Courts Act provides that "It shall not be lawful for the plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the County Courts," etc. C. M. purported to sell a car to the defendant under a conditional sale agreement for $2,800, $1,000 payable at once and the balance in monthly payments of $100 each for eleven months, and a $700 payment at the end of the twelfth month, the plaintiff signing twelve promissory notes for the subsequent payment in favour of C. M. The $1,000 payment was made and C. M. then assigned the conditional sale agreement to the plaintiff, and after endorsing the defendant's notes, handed them over to the plaintiff. The first two notes were paid by C. M. to the plaintiff, but none of the others being paid the plaintiff brought two actions in the County Court, one on the first eight notes that were not paid of $100 each, and a second on the last two notes of $100 and $700 respectively, and recovered judgment. *Held*, on appeal, upholding objection to the jurisdiction of the Court below, that where promissory notes relating to the sale of one specific article are all overdue and in the hands of one person it is a division of the cause of action contrary to said section 35 for that person to bring successive actions on said notes. RITHET CONSOLIDATED LIMITED v. WEIGHT. - - - - - **345**

COURT OF APPEAL—*Ex parte* order for leave to proceed *in forma pauperis* —Application to set aside—11 Henry VII., Cap. 12—Whether in force—Court of Appeal Rule 21. - - - - - - **230**
See PRACTICE. 5.

CREDITORS' RELIEF ACT. - **537**
See ATTACHMENT OF DEBTS.

CRIMINAL LAW—*Charge of being in possession of opium—Opium dross found on accused—Whether included in "opium"—Can. Stats. 1929, Cap. 49, Sec. 2, Subsecs. (i) and (k).*] By subsection (*i*) of section 2 of The Opium and Narcotic Drug Act, 1929, "'Opium' means and includes crude opium, powdered opium, and opium prepared for smoking, or in any stage of such preparation," and by subsection (*k*) of said section "'prepared opium' includes dross and all other residues remaining when opium has been smoked." Two policemen found the accused with two packages of opium dross in his pockets. On speedy trial under Part XVIII. of the Criminal Code for unlawfully having in his possession a drug, to wit: opium, contrary to said Act, the charge was dismissed. *Held*, on appeal, reserving the decision of LAMPMAN, Co. J., that dross is included in opium within the meaning of said subsections and the accused is guilty of the charge as laid. REX v. CHAN SAM. - - **341**

2.——*Indian reservation—Killing pheasants thereon by one other than an Indian —Conviction under Game Act—Effect of the Indian Act—R.S.C. 1927, Cap. 98, Secs. 2, 34, 35, 36, 117 and 156; R.S.B.C. 1924, Cap. 98, Sec. 9.*] An appeal to the County Court from the conviction of a white man for shooting a pheasant in the close season on an Indian reserve was dismissed. *Held*, on appeal, affirming the decision of SWANSON, Co. J. (MACDONALD, C.J.B.C. and

CRIMINAL LAW—*Continued.*

MACDONALD, J.A. dissenting), that the conviction is valid as founded upon a Provincial statute respecting property and civil rights, an exclusive jurisdiction of the Province under the B.N.A. Act, and the legislation is not *ultra vires* in respect to Indian Reserves. REX v. MORLEY. - **28**

3.——*Practice—Criminal libel—Trial—Disagreement of jury—Discharge of accused—Later application to have indictment further proceeded with—Refused—Criminal Code, Secs. 962 and 1045.*] The accused was indicted on a charge of criminal libel by the Grand Jury at the (1931) Fall Assizes in Vancouver, and on the trial the jury disagreeing, the case was traversed to the following Spring Assizes, when on the case coming up for further trial, counsel for the private prosecution, in the presence of counsel for the Crown and for the defendant, asked that the case be stayed, to which counsel for the Crown gave a formal consent and counsel for the defence had no objection, and the Court stayed the proceedings. Counsel for the defendant then moved for the discharge of the accused which, after discussion, was ordered by the Court without objection by counsel for the Crown or for the private prosecution. Counsel for the defendant applied for an order for payment of the costs under section 1045 of the Criminal Code, and an order was made to this effect and the costs were taxed. At the Fall Assizes of 1932 an application was made by counsel for the private prosecution to the presiding judge to have this indictment further proceeded with, stating that the Attorney-General was willing to remove the stay of proceedings which already existed. *Held,* that the application should be refused, as there is no authority in the Criminal Code allowed the Attorney-General, after granting a stay of proceedings upon an indictment, to remove the stay and allow such indictment to be again proceeded with. The proper procedure would be for the Crown to prefer another "charge." REX v. TAKAGISHI. **281**

4.——*Receiving telegraphic information relating to betting—Distributing betting information—"Willfully and knowingly"—Interpretation of—"Mens rea"—Criminal Code, Sec. 235 (i).*] The General News Bureau Incorporated operated a general news service in the City of Vancouver and had installed in its office a teletype machine which is a later improvement on the telegraph in that the words of each message received are automatically printed out, and the information is then forwarded by the accused through telephones to its subscribers. Racing sheets were found on the accused's premises with the names of horses engaged in racing on various racecourses. The results of races and their betting odds and the news was forwarded to the newspapers in Vancouver as part of a syndicate service. On a charge against accused that it did wilfully and knowingly receive a message by telegraph conveying information relating to betting, contrary to section 235 (*i*) of the Criminal Code:—*Held,* that the inclusion of the words "wilfully and knowingly" in the section expresses the intention of Parliament that the prosecution shall establish the *mens rea* of the accused either directly or by inference from facts from which only one conclusion can be drawn. The evidence should go further than merely to shew that certain individuals had engaged in betting on the races published. The gravamen of the offence is in the corrupt and intentional receipt of such information for use in betting operations in which is must be shewn the accused had some active part, and this should be clearly established. The furnishing of racing news to newspapers in Vancouver as part of a syndicate service without any proof of active participation in betting operations, is not sufficient to sustain a conviction under said section, and accused is acquitted. REX v. GENERAL NEWS BUREAU INCORPORATED. - - - - - - **459**

5.——*The Juvenile Delinquents Act, 1929—Exclusiveness of jurisdiction—Duty of judge of Supreme Court or Court of Assize—Can. Stats. 1929, Cap. 46, Sec. 9—Criminal Code, Sec. 1120.*] Where a person charged with an indictable offence is brought before a judge of either the Supreme Court or a judge of Assize, and he establishes that because of his age The Juvenile Delinquents Act, 1929, confers exclusive jurisdiction upon the Juvenile Court, the only course open to the judge, where section 9 of the said Act does not apply, is to quash the charge and the Crown may take whatever steps it sees fit in respect to the matter. REX v. ROOS. **235**

6.——*Theft with violence—Jury—Crown counsel's address—Indirect comment on accused's failure to testify—Misdirection—R.S.C. 1927, Cap. 59, Sec. 4, Subsec. (5).*] Counsel for the Crown in a criminal prosecution, after dealing with the evidence for the prosecution, said: "I think there should be some explanation." THE COURT: Be careful, Mr. *MacNeill. MacNeill*: Should there not be some explanation on the part

CRIMINAL LAW—*Continued.*

of the defence? THE COURT: Mr. *MacNeill*, be careful. Counsel for the accused then asked that the jury be dismissed and that there be a new trial. This application was refused and the case proceeding to its termination, the accused was convicted. *Held*, on appeal, affirming the decision of FISHER, J., that the remarks by Crown counsel in no way indicated what it was that needed explanation or who the person was who could give it, and cannot be distorted into "comment" within the meaning of subsection (5) of section 4 of the Canada Evidence Act. REX V. FERRIER. - **136**

7.——*Trial by jury—Conviction—Appeal—Juryman previously convicted of indictable offence—Disqualification of juror—New trial—R.S.B.C. 1924, Cap. 123, Sec. 6 (a)—Criminal Code, Secs. 81, 921, 1011 and 1013 (c).*] The defendant was convicted on a charge of attempting to incite to mutiny His Majesty's forces at Work Point Barracks at Victoria, under section 81 of the Criminal Code. After the conviction it was found that one of the petit jurors had been convicted of two separate indictable offences of theft and had not obtained a free pardon. The defendant then appealed from his conviction on the sole ground that said juror was "absolutely disqualified for service as a juror" under section 6 of the Jury Act and section 921 of the Criminal Code. *Held*, on appeal, MACDONALD, C.J.B.C. dissenting, that as there was no attempt to answer the appellant's affidavits clearly setting out the absolute disqualification of the impeached juror, and as this goes to the constitution of the jury, their verdict cannot stand and there should be a new trial. [Reversed by Supreme Court of Canada]. REX V. STEWART. - - - - - - **17**

CRUELTY—Condonation and reconciliation. - - - - - - **354**
See JUDICIAL SEPARATION.

DAMAGE—Business and property—Right of tenant to sue for damages. - - - - - - **543**
See NUISANCE.

DAMAGES—Contributory negligence—Ultimate negligence—Motor-truck stalled on street-car tracks—Run into by street-car. - **462**
See NEGLIGENCE. 3.

2.——*Mineral claims—Agreement for sale—Breach of contract.* - - **81**
See CONTRACT. 2.

DAMAGES—*Continued.*

3.——*Negligence—Collision at intersection—Gratuitous passenger.* - **401**
See MOTOR-VEHICLES. 2.

4.——*Negligence—Husband and wife—Injury to wife—Husband's right of action—Servitium et consortium.*] It is a tort actionable at the suit of a husband to take away, imprison or do physical harm to his wife if the act is wrongful as against the wife, and the husband is thereby deprived of her society or services, and the husband is entitled to damages for the loss of the wife's services as housekeeper and the loss of her society and companionship. CORKILL AND CORKILL V. VANCOUVER RECREATION PARKS LIMITED. - - - - **532**

5.——*Negligence—Pedestrian crossing street to board street-car—Run down by motor-car.* - - - - - **285**
See MOTOR-VEHICLES. 3.

6.——*Physicians and surgeons—Injured shoulder—Erroneous diagnosis—Failure to advise X-ray—Evidence of care taken.* **179**
See NEGLIGENCE. 5.

DEBENTURES—Failure to pay interest. - - - - - - - **430**
See MUNICIPAL LAW. 2.

DEFAMATION—*Libel—Report by "Commissioners" on hospitals in Vancouver—Justification—Qualified privilege—Publication—Costs.*] The plaintiff owned and operated the Grandview Private Hospital in Vancouver. The three defendants, Haywood, MacEachern and Walsh, Doctors of Medicine, were appointed by the Provincial Government, the City of Vancouver and the Vancouver General Hospital to make a survey of the Hospital situation in greater Vancouver, and after making an inspection of the hospitals they made a detailed report which included the following: "Grandview Hospital. This institution is in charge of a lay woman who was graduated from the London Homœopathic Hospital. This hospital is in a poor locality of the city and those using it are of very moderate means. At the time this building was visited it was dirty, odorous and very poorly equipped for the class of work attempted. It has accommodation for fifteen patients. There are no facilities for sterilization, the whole place seemed to be in a very poor condition and the impression was gained that very questionable work might be done here without interference." In an action for damages for libel:—*Held*, that if the words were published "without lawful justification or excuse" they consti-

DEFAMATION—*Continued.*

tuted a libel and on the evidence the Commissioners' plea of justification fails, but in making their report they were fulfilling a task undertaken on behalf of their employers and under such circumstances the occasion was privileged and the plaintiff having failed to shew any malice the action as against them is dismissed. *Held*, further, that as the city, upon receipt of the Commissioners' report, gave instructions to have it printed and subsequently circulated it, and the Vancouver General Hospital having received copies of the printed report and circulated them, publication is established in both cases and they are equally liable in damages. NEWTON V. CITY OF VANCOUVER *et al.* - - - - - **67**

DEPORTATION—Detention for—Right of appeal — Deportation order made prior to termination of imprisonment—Validity. - - **321**
See HABEAS CORPUS. 3.

2.——*Order for — Habeas corpus — Appeal.* - - - - **533**
See STATUTE, CONSTRUCTION OF.

DIRECTORS—Personal liability of. **260**
See STOCK-BROKER. 1.

DITCHES—Construction of by municipality without providing outlet—Overflow —Faulty construction—Lands rendered unfit for truck gardening—Unprecedented rainfall — Right of municipality to convey water to nearest waterway—Duty of owner to maintain his drains. - **335**
See NEGLIGENCE. 2.

DIVORCE—*Maintenance—Petition by wife —After decree absolute—Jurisdiction—Misconduct by wife—Right to raise on application as bar to maintenance—R.S.B.C. 1924, Cap. 70, Sec. 17—Divorce rule 65 et seq.*] A petition for maintenance under divorce rule 65 *et seq.* can be entertained after the decree absolute. A respondent who has not brought to the attention of the Court alleged misconduct of the wife as a bar to the divorce, cannot later raise such a defence as a bar to the allowance of maintenance. BENON V. BENON. - **238**

DRAINAGE—*Ditch constructed by municipality to drain highway—Subsequent extension of ditch to drain other lands—Flooding of land from ditch—Liability of municipality.*] In an action for damages the plaintiff claimed that water from an area beyond an elevated strip of land (the Aase area) was improperly brought by the defendant municipality through a ditch that was constructed in order to drain a public road adjoining his land, the municipality extending the ditch through the elevated strip of land to the Aase area beyond, and drawing the water from that area into the ditch, thus causing it to overflow and damage his property. It was held on the trial that the water beyond the elevated strip would not reach the plaintiff's land in the course of nature, and the plaintiff was entitled to damages. *Held*, on appeal, reversing the decision of FISHER, J. (MCPHILLIPS, J.A. dissenting), that on the evidence the essential facts are lacking to support the finding of the learned trial judge, namely, that the defendant is responsible for the water from the Aase area being discharged into the ditch adjoining the plaintiff's property. *Per* MACDONALD, C.J.B.C.: What happened is that the foreign water has filled the ditch to such an extent as to leave insufficient room for the plaintiff's water. The plaintiff does not prove that Aase's water was brought to and flooded his land. He does not prove a tort. He claims damages as a matter of right but he has not proved his right by either a grant, contract, prescription, or estoppel, if indeed it would be acquired by any one of them. *Per* MACDONALD, J.A.: The only basis for complaint by respondent is that for a short distance between his property and the Aase area a so-called height of land intervenes and that this natural barrier should have determined the policy in construction of ditches. The onus is on the respondent to establish that while the lands were in a material state this ridge extended east and west far enough to prevent water from the Aase area from seeping southerly to his property. This he failed to do and he cannot successfully claim that the plaintiff committed a tort in extending the ditch northerly. GEALL V. THE CORPORATION OF THE TOWNSHIP OF RICHMOND. - - - **249**

DROSS—Whether included in opium. **341**
See CRIMINAL LAW. 1.

EVIDENCE. - - - - - **401**
See MOTOR-VEHICLES. 2.

2.——*Onus of proof.* - - **12**
See STOCK-BROKER. 2.

EXCISE ACT — *Seizure of foreign vessel within territorial waters—Alcohol on board —Conviction of owner—Habeas corpus— Certiorari — Vessel bound from Seattle, U.S.A., to Alaska — Jurisdiction — R.S.C.*

EXCISE ACT—*Continued.*

1927, Cap. 42, Sec. 111—Can. Stats. 1930, Cap. 18, Sec. 9.] The accused, a foreigner, owned a foreign vessel that cleared from Seattle, U.S.A., bound for Alaska. The vessel was seized in the territorial waters of British Columbia and accused was convicted on a charge with respect to alcohol found on board, under section 181 of the Excise Act. On *habeas corpus* proceedings with *certiorari* in aid:—*Held*, that assuming the waters in question are territorial waters, they are so placed that passage over them is necessary or at least convenient, and generally used for the navigation of open seas and should be deemed international in that sense. The accused is a foreigner sailing a foreign vessel from a foreign port bound on a foreign voyage, passing through territorial waters, so placed that passage over them is convenient and generally used as the most direct route for vessels such as the accused's *en route* from Seattle to Alaska. Jurisdiction must be given by express and specific legislation, and there being the absence of such, want of jurisdiction has been established by the accused and he is entitled to his discharge. REX v. HARDY. - **152**

EX DEBITO JUSTICIÆ. - - - **430**
See MUNICIPAL LAW. 2.

EXECUTION—Unsatisfied. - **383**
See INSURANCE, AUTOMOBILE.

EXECUTION CREDITOR—Bill of sale—Validity—Fraudulent preference—County Court—Jurisdiction—Form of interpleader order. - **59**
See INTERPLEADER. 1.

EXEMPTION—Writ of *fi. fa.* - **290**
See PRACTICE. 9.

FIXTURES—*Logging company—Rails and ties of railway, telephone line and unloading outfit—Purpose and intention of annexation as factor.*] A logging company, having bought and paid for railway rails, ties, a telephone line and an unloading outfit, including a donkey-engine, moved them on to a leased premises to be used by it as aids to the removal of timber, and they were so used up to the time of its bankruptcy. *Held*, that they were not fixtures belonging to the owner of the fee, under whom said company was a tenant or licensee, but were chattels belonging to the company. CANADIAN CREDIT MEN'S TRUST ASSOCIATION, LIMITED AND DINNING v. INGHAM. - **300**

FOREIGN COMPANY—Security for costs—Carrying on business—Company—"Residence"—County Court Order XVIII., r. 1 (*a*). - - **369**
See PRACTICE. 7.

FOREIGN VESSEL—Seizure of within territorial waters. - - **152**
See EXCISE ACT.

FOREST ACT—*Timber licence—Cutting of timber — Royalties — Liability of owner of licence—R.S.B.C. 1924, Cap. 93, Sec. 127 (1).*] Section 127 (1) of the Forest Act provides, *inter alia, that* "Every holder of a timber licence on lands whereon any timber or wood is cut in respect of which any . . . royalty . . . is . . . payable under this Act, . . . and every person dealing in any timber . . . and every person operating a mill or other industry which cuts such timber . . . shall keep books of account of all timber and wood cut for or received by him, and shall render monthly statements thereof . . . and . . . the licensee, or person dealing . . . or operating . . . shall pay monthly all such sums of money, as are shewn to be due, to the minister." Having become owner of timber licence No. 7994 by assignment, the defendant bank entered into a contract with R. whereby it granted R. the right to cut and remove the timber referred to in the licence. R. cut and removed the timber for a certain time and then became bankrupt, when $774.20 was due in royalties in respect of timber cut. In an action against the bank for the royalties so due:—*Held*, that the point for decision is whether or not the timber in question was "cut for and received by" defendant, and as in the opinion of the Court it was not, the action fails. ATTORNEY-GENERAL OF BRITISH COLUMBIA v. THE BANK OF MONTREAL. - - - - **453**

FRAUD—Agency. - - - **260**
See STOCK-BROKER. 1.

FRAUDULENT PREFERENCE — County Court—Jurisdiction. - - **59**
See INTERPLEADER. 1.

FUGITIVE FROM JUSTICE—Force to effect arrest — Firing revolver—Bullet ricochetting hits fugitive—Jurisdiction—Criminal Code, Secs. 30 and 41. - - - **471**
See POLICE OFFICERS.

GAME ACT — Conviction under—Killing pheasants on Indian Reservation by one other than an Indian—Effect of the Indian Act. - **28**
See CRIMINAL LAW. 2.

GAME OF CHANCE—Cross-word competition—Order refusing use of mails. - - - - - - - - **116**
See POST OFFICE.

GARNISHEE—"Employee"—"Wages or salary." - - - - - **278**
See ATTACHMENT OF DEBTS ACT.

2.——*Parties—Proceedings taken without prejudice to claims of others not before the Court.* - - - - - - **486**
See INTERPLEADER. 2.

GARNISHEE ORDER—Agreement to pay debt to judgment debtors after service of garnishee order. - **537**
See ATTACHMENT OF DEBTS.

2.——*Application to set aside—Necessity of entering appearance before application.* - - - - - - - - - - **360**
See PRACTICE. 8.

GOVERNMENT OFFICIALS—Tort by. - - - - - - - - **116**
See POST OFFICE.

GRATUITOUS PASSENGER—Negligence—Collision at intersection—Damages—Evidence. - - - - **401**
See MOTOR-VEHICLES. 2.

GUARDIANSHIP — Neglect of parents—Adoption — Religion of parent—Welfare of child. - - **491**
See INFANT. 2.

HABEAS CORPUS. - - **152, 533**
See EXCISE ACT.
STATUTE, CONSTRUCTION OF.

2.——*Certiorari in aid—Warrant—Arrest—Proceedings based on section 26 of The Opium and Narcotic Drug Act, 1929—Applicability of Immigration Act—R.S.C. 1927, Cap. 93, Sec. 42—Can. Stats. 1929, Cap. 49, Sec. 26.*] Applicant was arrested on a warrant after having been given his liberty on *habeas corpus* proceedings, following a previous arrest with a view to deportation under section 26 of The Opium and Narcotic Drug Act, 1929. On *habeas corpus* proceedings with *certiorari* in aid:—*Held*, that as the return shews that the proceedings herein are based on section 26 of The Opium and Narcotic Drug Act, 1929, and only such provisions of the Immigration Act can be relied upon as section 26 makes applicable, and the provisions authorizing arrest contained in section 42 of the Immigration Act are inapplicable to proceedings under said section 26, there is no legal authority to issue the warrant under

HABEAS CORPUS—*Continued.*

which the applicant is held and he is entitled to his liberty. *In re* IMMIGRATION ACT AND SUE SUN POY. - - **232**

3.——*Conviction under The Opium and Narcotic Drug Act, 1929 — Detention for deportation—Right of appeal—Deportation order made prior to termination of imprisonment—Validity—R.S.B.C. 1924, Cap. 52, Sec. 6—Can. Stats. 1929, Cap. 49—R.S.C. 1927, Cap. 93, Sec. 22 (2).*] Where, pursuant to section 26 of The Opium and Narcotic Drug Act, 1929, an alien, on the termination of his imprisonment imposed on conviction under the Act, is detained pending deportation and he applies for *habeas corpus*, but is refused release, an appeal from such refusal lies to the Court of Appeal under section 6(*d*) (vii.) of the Court of Appeal Act, the proceedings being civil and not criminal. An accused was convicted of having opium in his possession and sentenced to two and a half years' imprisonment on the 29th of October, 1929. A Board of Inquiry under section 22 (2) of the Immigration Act held a special sitting in the penitentiary on the 27th of May, 1930, when, after the accused had been examined an order was made for his deportation upon the expiration of his sentence and a warrant by the deputy minister of immigration for his deportation was issued on the 27th of March, 1931. On his release from the penitentiary on the 24th of December, 1931, accused was detained by the immigration authorities for deportation. An application for his release upon a writ of *habeas corpus* with *certiorari* in aid was dismissed. *Held*, on appeal, reversing the decision of McDONALD, J. (MACDONALD, C.J.B.C. *dubitante*), that the Board of Inquiry, in holding a sitting, examining the accused, and issuing an order for his deportation prior to the termination of his sentence, acted prematurely and wholly without jurisdiction because it essayed to exercise a power of adjudication before it had acquired it. The deportation order is therefore void and accused should be released. REX v. SUE SUN POY. **321**

HIDDEN DEFECT—Liability of landlord. - - - - - - **147, 362**
See LANDLORD AND TENANT. 2.

HUSBAND AND WIFE—*Constitutional law—Deserted wife — Application for order against husband—Magistrate—Powers of—Prohibition—R.S.B.C. 1924, Cap. 67, Sec. 4—B.C. Stats. 1862, Cap. 116—B.N.A. Act, Sec. 96.*] On the issue of a summons against a husband under the Deserted Wives' Maintenance Act, the husband applied for an

HUSBAND AND WIFE—*Continued.*

order *nisi* to shew cause why a writ of prohibition should not issue to the police magistrate to prohibit him from proceeding on the summons on the ground that the Deserted Wives' Maintenance Act is *ultra vires* the legislative powers of the Province, the Legislature having no power to appoint any person to deal with the matters in question, and the appointment of a magistrate as prescribed in said statute is *ultra vires* the Province and contrary to section 96 of the British North America Act. The application was dismissed. *Held,* on appeal, affirming the order of MORRISON, C.J.S.C. on another ground, *viz.*: that as the Act entitled "An Act to protect the Property of a Wife deserted by her Husband" passed by the Colony of Vancouver Island on July 10th, 1862, contained the principle which is now embodied in the Deserted Wives' Maintenance Act by which the Chief Justice of Vancouver Island and magistrates were given jurisdiction to make orders protecting the earnings and property of the wife from claims by the husband, the additional duty of deciding such questions was thereby imposed upon magistrates and so on that ground the application was properly dismissed. DIXON v. DIXON. - - **375**

2.——*Decree for alimony—Non-payment —Attachment proceedings do not lie.*] An order for payment of alimony is an order for the payment of money and enforceable under Divorce Rule 79 (*a*); it is not enforceable by attachment for non-compliance therewith. MACPHERSON v. MACPHERSON. - - - - - - - - - - **435**

3.——*Negligence—Injury to wife—Husband's right of action—Servitium et consortium.* - - - - - - - **532**
See NEGLIGENCE. 7.

4.——*Order allowing wife to swear husband was dead before certain date—Petition by second husband to rescind order—Status to attack order.* - - - - - **297**
See JUDGMENTS AND ORDERS.

5.——*Voluntary transfer of property by wife to husband—No independent advice—Undue influence — Onus.*] The defendant who was a soldier married the plaintiff, a French woman, in France in 1919. They came to Vancouver in the same year and, with a war bonus in which the wife had an interest, made a first payment on a home, the deed for the property being in their joint names. The husband was employed in the city fire department, and in September, 1931, when a fire chief, he went to a firemen's convention in California, remaining

HUSBAND AND WIFE—*Continued.*

away for two weeks. By this time they had four children. On his arrival home from California late at night his wife was not there, and when she came in some time later an altercation arose between them as to a Frenchman with whom the wife was on friendly terms, and the husband ordered her out of the house. She went to the house of a friend and the next morning the husband went to the place where she was staying and told her he wanted to take her to a lawyer for the purpose of obtaining a divorce. They went to the office of Mr. *Nicholson,* a barrister, who had not seen them before, and his evidence was that he considered himself acting for both parties when instructed to draw up a quit-claim deed transferring the wife's half interest in their home to the husband, and that she signed it voluntarily, saying as she did so that she was willing to sign as her husband had undertaken to look after the children. The plaintiff averred that she thought they went to the lawyer solely for the purpose of obtaining a divorce and did not know that she was signing a quit-claim deed. An action for the cancellation of the quit-claim deed was dismissed. *Held,* on appeal, affirming the decision of CAYLEY, Co. J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the plaintiff's marital conduct was indefensible and on the question of conflict of evidence between her and the solicitor the learned trial judge was amply justified in accepting the evidence of the solicitor. Since their quarrel there was not fiduciary relationship between the husband and the wife, and there was no evidence of undue influence. She signed the document voluntarily, the fact of her husband looking after the children being given by her as a reason for doing so, and the appeal should be dismissed. HEATHORN v. HEATHORN. - - - - - - **413**

INDEPENDENT ADVICE—Undue influence —Onus — Voluntary transfer of property by wife to husband. **413**
See HUSBAND AND WIFE. 5.

INDIAN RESERVATION — Killing pheasants thereon by one other than an Indian — Conviction under Game Act—Effect of the Indian Act. - - - - - - - - **28**
See CRIMINAL LAW. 2.

INFANT — *Custody — Neglected children—Meaning of—Apprehension—Religious persuasion of parents—R.S.B.C. 1924, Cap. 101, Secs. 3, 17 and 19; Cap. 112, Secs. 56 (j) and 93.*] An infant girl born of Roman Catholic parents in 1920, both her parents

INFANT—*Continued.*

being dead, was handed over by her mother just before her death in August, 1931, to the care of Mrs. Effie Dill, who is a Protestant. The child was well looked after and happy in the Dill home. On an information and complaint in July, 1932, by one Foran on behalf of the Children's Aid Society of the Catholic Archdiocese of Vancouver, acting for the superintendent of neglected children, that said infant is a neglected child of the Roman Catholic faith and that she be apprehended under section 56 of the Infants Act by reason of being without proper guardianship, it was held that the official guardian comes within section 56 of the Infants Act and that there was not a proper guardianship within the meaning of the Act, and the child should be transferred to the care of the Children's Aid Society. *Held,* on appeal, reversing the decision of ELLIS, Co. J., that section 56 applies to neglected children only, and the finding of neglect is a prerequisite to the child's apprehension. Under said section no order will be given to take a child from a home where it is receiving with the assent of the official guardian, proper care and guardianship, and be forcibly removed to another environment. *Per* MACDONALD, J.A.: It is only after a finding that the child is neglected that the provisions of section 93 of the Infants Act can be invoked. *In re* WARD, AN INFANT. DILL v. THE CHILDREN'S AID SOCIETY OF THE CATHOLIC ARCHDIOCESE OF VANCOUVER. - - - - - - - - - - **552**

2.——*Neglect of parents—Guardianship—Adoption—Religion of parents—Welfare of child—R.S.B.C. 1924, Cap. 6, Sec. 5 (2); Cap. 112, Sec. 93.*] Audrey Bland, the seventh child of Charles and Jean Bland, who were Roman Catholics, was born on the 30th of December, 1929. In February, 1932, the father becoming involved in a charge of drunkenness and the children being neglected, Audrey Bland was on the 11th of February, 1932, by order of George Jay, a judge within the Infants Act, committed to the custody of the Children's Aid Society, of Victoria, the order reciting that the religion of the child was "not known." On the 16th of May, 1932, Herbert Agnew and his wife, who were Protestants, petitioned for leave to adopt the infant under the Adoption Act, and it appeared that the petitioners were able to bring up, maintain and educate the infant, and the Children's Aid Society, of Victoria, consenting thereto, the petition was granted in accordance with the provisions of the Adoption Act. On appeal by the natural parents, mainly on the ground that the foster parents were of a different religious persuasion to that of the infant's father:—*Held,* affirming the order of McDONALD, J. (McPHILLIPS, J.A. dissenting), that it is not unlawful for a Protestant to adopt a child of Roman Catholic parentage or a Roman Catholic to adopt a child of Protestant parentage, and where parents have neglected to provide proper care and maintenance for their child their consent to the adoption may be dispensed with. The welfare of the infant has paramount consideration with the Court, and in the circumstances of this case her interests would be thoroughly looked after by the foster parents. BLAND v. AGNEW. - **491**

INFANTS ACT. - - - - **267**
See CONSTITUTIONAL LAW. 2.

2.——*Infant belonging to village—Maintenance — Village municipality — Whether "municipality" within the Act — R.S.B.C. 1924, Cap. 112, Sec. 80, Subsecs. (1) and (8)—R.S.B.C. 1924, Cap. 183.*] On an application to enforce an order made against the Village of Mission under section 80 (8) of the Infants Act, for the maintenance of a child belonging to the village:—*Held,* that the Village of Mission is a "village municipality" within the Village Municipalities Act and the question is whether the Village of Mission is a "municipality" within the meaning of the Infants Act. As the word is not defined in the Infants Act the Interpretation Act applies and the definition of "municipality" there does not include "village municipality." A village municipality is therefore not a "municipality" within the meaning of that word as used in the Infants Act, unless under section 7 of the Village Municipalities Act it has been declared to be a municipality under the Infants Act, and the application is dismissed. *Re* RILEY AND CHILDREN'S AID SOCIETY v. CORPORATION OF THE VILLAGE OF MISSION. - **330**

3.——*Neglected children—Committed to care of Children's Aid Society—Liability for maintenance — Residence prior to commitment—R.S.B.C. 1924, Cap. 112, Secs. 57, 80 and 91—B.C. Stats. 1928, Cap. 18, Secs. 3 and 4.*] Section 80 of the Infants Act provides that "(1.) Any judge shall, upon the application of any society to whose custody or control a child is committed, make an order for the payment by the municipality to which the child belongs for a reasonable sum . . . for the expense of supporting the child by the society. . . . (2.) For the purposes of this section, any child shall be deemed to belong to the municipality in which the child has last resided for the period of one year. . . ." Section 3 of the

INFANTS ACT—*Continued.*

amending Act of 1928 recites: "Provided that no child shall be deemed to belong to a municipality or to have acquired a residence therein for the purposes of this section by reason only of the fact that the child has resided in the municipality as an inmate of a home or institution in which the child was placed. . . ." The parents of the two children in question (7 and 8 years old) with their family came to New Westminster from Manitoba in March, 1929, but in the following July moved to the Municipality of Surrey. During the same month the mother became ill and she left the two children in the Academy of the Sisters of St. Ann in New Westminster, where they remained. Shortly after the mother was taken to the Mental Hospital in Essondale, and later the father falling into unemployment, the two children, on application to the Juvenile Court in New Westminster, were declared "neglected children" and committed to the care of the Children's Aid Society of the Catholic Archdiocese of Vancouver, but the order made no provision for the costs of their care and custody. On the application of the Children's Aid Society an order was made on the 15th of January, 1932, that the City of New Westminster do pay said society $4 per week in respect of each infant from the 23rd of October, 1930, until they attain the age of 18 years. *Held*, on appeal, reversing the order of MORRISON, C.J.S.C. (MACDONALD, C.J.B.C. dissenting), that it is impossible legally to hold that those children "reside" in or "belong to" the City of New Westminster within the meaning of the Infants Act, and the appeal should be allowed. *In re* CAROLINE D. JOHNSON AND MARY C. JOHNSON, INFANTS. - **1**

IN FORMA PAUPERIS—*Ex parte* order for leave to proceed in—Application to set aside—11 Henry VII., Cap. 12—Whether in force—Court of Appeal Rule 21. - - - - **230**
See PRACTICE. 5.

INSURANCE—*Principal and surety—Bond of indemnity—Certain system of audit contained in policy—System of audit changed during currency of bond without notice—Effect on guarantee.*] The plaintiff brought action to recover $1,956.70 on a bond of indemnity issued in 1922 and renewed from year to year, by which the defendant undertook to indemnify the plaintiff up to $2,000 for any loss sustained as the result of any act of fraud or dishonesty on the part of one White while acting as assistant clerk, assistant secretary-treasurer, tax-collector

INSURANCE—*Continued.*

and assessor for the plaintiff. On application for the bond in 1922 the plaintiff replied to questions, including one: "How often will a thorough examination of applicant's books be made by an independent auditor or expert accountant? Quarterly. Next 31st December, 1922." The policy contained a stipulation that as the employer has delivered to the company certain statements setting forth the duties and responsibilities of the employee, the moneys entrusted to him, and the safeguards and checks kept upon his accounts and warrants the statements to be true, the agreement was entered into on the condition that the method of examination and checking accounts shall remain in accordance with said statements. The bond also provided that it was a condition precedent to liability of the company that all representations contained in the bond or in the application therefor should be duly performed, and that if there was any material change in the municipal corporation's method of accounting or examination of books without notice to the defendants in writing and their consent being obtained, the bond should be void. The quarterly audit was continued until the year 1927 when the corporation changed its system of audit into what was called a continuous audit, whereby the auditor entered the employee's office from time to time, choosing his own time for doing so, and conducted a partial examination of the books, and at the end of each year made a complete and regular audit. The change of system of audit was not disclosed to the guarantee company. The last renewal of the bond was on the 11th of December, 1930, and thefts to the above amount by White were discovered on the 29th of December following. It was held on the trial in favour of the plaintiff that although the undertaking that a quarterly audit would be had was part of the contract, the change to a "continuous audit" was not a material change in the manner of checking White's books, and that the defendants were therefore liable. *Held*, on appeal, reversing the decision of MACDONALD, J., that the change of the system from that of a "quarterly audit" to what was termed a "continuous audit" was a substantial one that precluded the learned judge below from going into an inquiry as to the effect of the alteration, as in such a case the surety himself is the sole judge as to whether he will consent to remain liable and he is entitled to his discharge. CORPORATION OF THE DISTRICT OF PENTICTON V. LONDON GUARANTEE AND ACCIDENT COMPANY, LIMITED. - - - - - **515**

INSURANCE, ACCIDENT—*Time indemnity —"At once and continuously after the occurrence."*] The plaintiff, insured under an accident policy of the defendant company, was wholly disabled by an accident to his knee on April 9th, 1930. The "total loss of time" clause of the policy provided that "If injury such as is before described shall at once and continuously after the occurrence of the accidental event wholly disable the insured from performing each and every duty pertaining to his occupation the insurer will pay said accident indemnity for such period, not exceeding five years, as the insured shall be so disabled after the first three days." Immediately after the accident the plaintiff was taken to the hospital at Campbell River and wholly prevented from working until May 19th when he tried to get work, and on June 1st he commenced working in a logging camp where he remained three weeks as a signalman at full pay, but finding his knee gave him pain necessitating first aid treatment every night, he returned to his home in Vancouver, and entering the General Hospital was operated on, a dislocated cartilage being removed from his knee, and he was wholly and continuously disabled until October, 1931, when he was recommended to the Workmen's Compensation Board as fit for light work. On May 22nd, 1930, the plaintiff had been paid the full amount of indemnity then earned and gave the company a receipt and release in full of all claims with respect to the injuries sustained on April 9th, 1930. When in the Vancouver General Hospital he made a further claim which the company rejected. In an action on the policy the plaintiff obtained judgment as and for a continuous total disability. *Held*, on appeal, reversing the decision of FISHER, J. (MCPHILLIPS, J.A. dissenting), that the plaintiff's claim for further payments under the policy did not fall within the words "at once and continuously after the occurrence of the accidental event" and the appeal should be allowed. MATTHEWS V. THE CONTINENTAL CASUALTY COMPANY. - - - - **213**

INSURANCE, AUTOMOBILE — *Insurance against liability for injuries—Insured's car driven by another with his consent—Passenger injured in accident—Passenger obtains judgment against driver for damages—Execution unsatisfied—Action by insured as trustee for driver—B.C. Stats., 1925, Cap. 20, Sec. 24.*] H. insured his car in the defendant company, and left it with R., giving him permission to use it for his own purposes. R., with T. B. as a passenger, ran into a lamp-post and T. B. received injuries from which he died nine days later.

INSURANCE, AUTOMOBILE—*Continued.*

W. B. as administrator of T. B.'s estate, brought action against R., recovered judgment for $1,000, and a writ of execution was returned *nulla bona*. H. then brought action on behalf of R. against the defendant company under the policy for the amount of the judgment obtained by W. B. against R., and recovered judgment. *Held*, on appeal, reversing the decision of FISHER, J. (MCPHILLIPS, J. A. *dubitante*), that the plaintiff as the assured cannot sue as trustee for R., there being neither a legal nor an equitable trust, and the action should be dismissed. *Vandepitte* v. *Preferred Accident Insurance Company of New York*, 102 L.J., P.C. 21; 49 T.L.R. 90; (1932), 3 W.W.R. 573; (1933), A.C. 70; 1 D.L.R. 289, followed. HORNBROOK V. TORONTO CASUALTY FIRE AND MARINE INSURANCE COMPANY. - **383**

INSURANCE, FIRE—*Loss of profits insured — Policy — Construction — Arbitration — Award.*] It was provided in a fire-insurance policy for $10,000 against loss of profits, that "If during the term of this policy, such merchandise or any portion thereof shall be destroyed or damaged by fire, this company shall be liable for any loss of profits and/or commissions in respect of such merchandise which may result from such fire, to be ascertained as follows, *viz.*, (a) The amount of the fire loss occasioned by damage to or destruction of the merchandise for which the company or companies insuring the same are liable shall first be ascertained as determined by adjustment; (b) The loss of profits insured under this policy shall be based on the amount of said fire loss as determined under the above paragraph (a); (c) The loss of profits as determined under paragraph (b) shall not exceed the amount of profits which the assured would have realized immediately preceding the fire in the ordinary course of the assured's business from or out of the sale of such merchandise which has been damaged or destroyed." On March 19th, 1930, a fire occurred on the assured's premises and the parties proceeded to determine the amount of the loss by arbitration, as provided in the policy. The arbitrator found that the fire caused damages to the extent of $49,000 and awarded an amount equivalent to the average net profit made by the plaintiff on the sale of its merchandise during the year ending January 31st, 1930, *i.e.*, the sum of $2,182.95. A motion to set aside the award was dismissed. *Held*, on appeal, affirming the order of MACDONALD, J., that on the sale of merchandise a merchant cannot arrive at his "profit" until he has deducted the

INSURANCE, FIRE—*Continued.*

expenses incurred in earning it. It is the intention of the policy that overhead expenses in carrying on the business must be deducted in arriving at the insured's "profits" and the arbitrator reached a right conclusion. FAMOUS CLOAK AND SUIT COMPANY LIMITED v. THE PHŒNIX ASSURANCE COMPANY LIMITED. - - - - **349**

2.——*Oral contract—Right to enforce—Agent—Authority of—Policy written after fire.*] Where it is admitted that a contract for fire insurance is one that can be made orally, in an action thereon it is not necessary for the insured to shew that the agent with whom the contract was made was authorized to bind the insurers by such a contract. The loss insured against occurred when the only existing contract was an oral one, but the insurers afterwards issued a policy which was not signed and not intended to be signed by the insured. *Held,* that this did not prevent the insured from suing on the oral contract and they were not obliged to sue for rectification of the policy where it did not conform to the oral contract. *Held,* further, that the fact that the insured accepted the policy after the loss but without knowing then that it differed from the oral contract, did not affect their rights to enforce the original contract. HOCHBAUM *et al.* v. PIONEER INSURANCE COMPANY *et al.* - - - - - - - - - - **455**

INSURANCE, LIFE — *Will — Declaration, subsequent to will in favour of preferred beneficiary—Subsequent codicil—Effect of—B.C. Stats. 1925, Cap. 20, Secs. 28, 29 and 102.*] R. P. Clark took out a policy of life insurance in the Manufacturers' Life Insurance Company for $5,000 in April, 1925. By his will of the 11th of September, 1926, he appointed The Royal Trust Company his executor. The beneficiary under the policy was changed by various declarations until finally by declaration of R. P. Clark on the 18th of July, 1930, the policy was made payable to his wife and she became the preferred beneficiary. The defendant Shimmin, authorized trustee of the estate of R. P. Clark & Company, Limited, recovered judgment against Mrs. Clark on the 1st of March, 1932, for $5,900. R. P. Clark made a codicil to his will on the 31st of March, 1932, whereby if the codicil prevailed the moneys payable under the policy would be subject to the terms of the will. R. P. Clark died on the 8th of April, 1932, and on May 12th following all moneys due from the Manufacturers' Life Insurance Company to Mrs. Clark under the policy were attached

INSURANCE, LIFE—*Continued.*

to answer the Shimmin judgment. On an issue between The Royal Trust Company as plaintiff and R. L. Shimmin as defendant to determine the disposition of the money payable on the insurance policy:—*Held,* that although a codicil to a will operates as a revival of the will and is republished by the codicil and thus for many purposes the date of the original will is shifted to the date of the codicil, the republication did not necessarily make it operate for all purposes, the rule being subject to the limitation that the intention of the testator is not to be defeated thereby. The intention of the testator is clearly expressed in his declaration of July 18th, 1930, and there is no statement in the codicil that such previous intention had been changed. In order to destroy the benefits which R. P. Clark intended should be acquired by his wife, a document indicating such intention should have been executed by him. The plaintiff fails in the issue and judgment should be for the defendant. THE ROYAL TRUST COMPANY v. SHIMMIN. - - - - - - **273**

INSURANCE, MARINE—*Advances made to repair vessel—Part of price due—Insurable interest.*] G., having contracted to tow certain logs for a company, entered into a further contract with the defendant company whereby the defendant agreed to construct a tow-boat to be used for the towing operations. As security for payment of the price of the boat (about $6,000), G. assigned to the defendant the moneys payable to him under the towing contract. On the 13th of June, 1928, G. was given possession of the boat and the defendant took out a policy of insurance on the boat with the plaintiff company. In November following the boat was damaged and the insurers retained the defendant company to make the repairs to the extent of $3,200, which amount the plaintiff paid the defendant under the insurance policy. At the time the boat was damaged G. still owed the defendant $2,000 on the purchase price. In June, 1929, G. paid for the boat in full and received from the defendant a bill of sale, the defendant up to that time being the registered owner thereof. In an action to recover the moneys paid under the insurance policy, on the ground that the defendant had no insurable interest in the boat:—*Held,* that the defendant had an insurable interest and had a right to collect the insurance money for the benefit of itself and G. and the action should be dismissed. QUEEN INSURANCE COMPANY OF AMERICA v. HOFFAR-BEECHING SHIPYARDS LIMITED - - - - - **233**

INTEREST—Failure to pay—Municipal debentures. - - - - **430**
See MUNICIPAL LAW. 2.

INTERPLEADER—*Execution creditor—Bill of sale—Validity—Fraudulent preference—County Court—Jurisdiction—Form of interpleader order—R.S.B.C. 1924, Cap. 53, Secs. 40 (1) and 86; Cap. 97, Sec. 3.*] M. brought action in the County Court against B. for wages on the 4th of January, 1932. On the 13th of January following B. transferred to S. & P. by bill of sale a herd of cows and two horses. M. obtained judgment and an execution being issued on the 22nd of January, the sheriff seized one of the cows and the two horses. On the trial of an issue ordered to decide as to the ownership of the animals seized it was held that the bill of sale was void under section 3 of the Fraudulent Preferences Act, and M. recovered judgment. *Held*, on appeal, affirming the decision of LAMPMAN, Co. J., that the appeal should be dismissed. *Per* MACDONALD, C.J.B.C.: Section 86 of the County Courts Act confers jurisdiction upon the County Court in interpleader. The learned judge not having founded his decision on fraud, it was contended he had no jurisdiction under section 40 (1) of said Act unless there was fraud. If there was want of *bona fides* in giving the bill of sale this would amount to fraud and entitle him to try the issue. The evidence discloses that the bill of sale was obtained by fraud and it is open to this Court to give the judgment that should have been given in the Court below, and the conclusion there arrived at should be affirmed. *Per* MARTIN, J.A.: By section 86 of the County Courts Act general jurisdiction over interpleader is conferred on the County Court in matters within its jurisdiction, and there is nothing in either the County Courts Act or the Fraudulent Preferences Act disbarring parties to an interpleader issue from establishing their title to the property in dispute by invoking any statute which declares an opposing instrument of title to said property to be "utterly void" under certain circumstances by reason of the acts of the parties concerned in its creation. *Held*, further, *per* MARTIN, J.A., that the issue to be tried was incorrectly stated in the interpleader order by being broken up into two "questions," the first improperly relating to the validity of the bill of sale and the second properly being in substance "whether at the time of the seizure by the sheriff the goods seized were the property of the claimants as against the execution creditor." The second was the sole and only question to be tried and the addition of another is contrary to precedent, misleading, and should be struck out. MARSHMAN V. SCOTT & PEDEN. - **59**

2. —— *Garnishee — Parties—Proceedings taken without prejudice to claims of others not before the Court—Order—Appeal.*] In June, 1931, R. P. Clark (now deceased), being indebted to the plaintiff bank, assigned to the bank as security for the debt certain moneys due him from R. J. Cromie. There being other claimants, an order was made at the instance of the bank that the money so owing, being the sum of $17,487.59, be paid into Court. The money was claimed by the Bank of Toronto under an alleged prior assignment; by the personal representative of said R. P. Clark, and by the authorized trustee in bankruptcy of R. P. Clark & Company (Vancouver) Ltd. The bank then procured from the Court an issue in which the question to be tried was whether the Dominion Bank is entitled to said moneys as against the trustee in bankruptcy, the order containing a clause that the proceeding was to be taken without prejudice to the claim of the Bank of Toronto and to the matters in dispute between the trustee in bankruptcy and the late R. P. Clark. On the trial of the issue it was found that the indebtedness of Clark to the Dominion Bank was $15,762.20, to which sum the bank was entitled, and that the balance of the moneys paid into Court belonged to the trustee in bankruptcy. *Held*, on appeal, that the issue should have been framed to enable the judge to dispose of the claims of all the claimants. The order under review should be set aside and the matter referred back to the Court below for final determination with all parties interested represented. THE DOMINION BANK V. THE AUTHORIZED TRUSTEE OF R. P. CLARK & COMPANY (VANCOUVER) LIMITED. **486**

INVITEE—Apartment flat—Porch on back used by tenants—Railing on porch gives way when leaned against by tenant—Tenant falling is injured —Hidden defect—Liability of landlord—Repairs. - **147, 362**
See LANDLORD AND TENANT. 2.

ISSUE. - - - - - - - **290**
See PRACTICE. 9.

JUDGMENT. - - - - - - **290**
See PRACTICE. 9.

2.——*Registration — Cancellation under authorization of judgment creditor—Subsequent reregistration of judgment—Application to cancel reregistration.* - **556**
See REAL PROPERTY.

JUDGMENTS AND ORDERS—*Order allowing wife to swear husband was dead before certain date—Petition by second husband to rescind order—Status to attack order.*] The petitioner sought to rescind an order obtained by his wife allowing her to swear that her former husband was dead for more than seven years prior to the making of the order. The order was obtained solely for the purpose of assisting her in obtaining a government pension. The petitioner alleged that the order was obtained by deceiving the Court, and she had used it so as to lead him to believe that she was free to marry him. *Held*, that a person seeking to set aside an order of this nature must shew that he had an interest at the time which was affected by the order, and as he has failed to satisfy the Court that he has now or had at the time the order was made, any interest whatever in the order, or the effect that might result therefrom, the petition should be refused. *In re* HOLL: *In re* COWPER. - - - - - - **297**

JUDICIAL SEPARATION — *Cruelty—Condonation and reconciliation — Trivial acts revive past cruelty—Memorandum of agreement of settlement of marital differences after close of pleadings signed by parties but not acted upon—Effect of.*] On a petition by the wife for a decree of judicial separation on the ground of cruelty, beginning the 11th of August, 1931, and continuing with intervening condonation and reconciliations until July 5th, 1932, after the pleadings were closed a memorandum of settlement drawn by a solicitor was entered into by the husband and wife on the 23rd of September, 1932. The terms of the settlement were not carried out but previous to the trial respondent moved to amend his answer to plead the agreement as a settlement of the differences between the parties, and as an estoppel, and the petitioner replied denying that she was bound thereby, as the respondent had elected to treat the agreement as a nullity and had not acted upon it. *Held*, that this document was without effect as it was a mere statement of intention regarding their future conduct and had not been acted upon and therefore did not preclude the petitioner from obtaining her remedy. The original cruelty was revived by slight acts of cruelty which occurred on the 5th day of July, 1932, thereby entitling the petitioner to a decree of separation and the custody of her children. COLDICUTT v. COLDICUTT. - **354**

JURISDICTION. - - - - **152**
See EXCISE ACT.

JURY—Crown counsel's address—Indirect comment on accused's failure to testify—Misdirection. - **136**
See CRIMINAL LAW. 6.

2.——*Trial by — Conviction — Juryman previously convicted of indictable offence—Disqualification of juror—New trial.* - **17**
See CRIMINAL LAW. 7.

JURYMAN—Previously convicted of indictable offence—Disqualification of—New trial. - - - - - **17**
See CRIMINAL LAW. 7.

JUVENILE DELINQUENTS ACT, 1929, THE—Exclusiveness of jurisdiction—Duty of judge of Supreme Court or Court of Assize. - **235**
See CRIMINAL LAW. 5.

LAND—Flooding of from ditch—Ditch constructed by municipality to drain highway—Subsequent extension of ditch to drain other lands—Liability of municipality. - **249**
See DRAINAGE.

2.——*Sale of—Mutual mistake as to boundary adjoining a highway—House built by purchaser on wrong property—Rectification—Execution of conveyance—Effect of.* - - - - - - - - - **441**
See VENDOR AND PURCHASER.

LANDLORD AND TENANT—*Receiver in mortgage action—Order that tenants attorn and pay rent to receiver—Service of order on tenants—Whether creation of relationship of landlord and tenant.*] The mere service of an order obtained by the receiver in a mortgage action, ordering tenants to attorn and pay rent to the receiver does not create the relationship of landlord and tenant between the receiver and the tenant where the mortgage antedated the creation of the tenancy between the mortgagor and the tenant, and where the mortgagor was allowed to remain in possession by the mortgagee after default. *Evans* v. *Elliott* (1838), 8 L.J., Q.B. 51, and *Towerson* v. *Jackson* (1891), 61 L.J., Q.B. 36 applied. MANUFACTURERS LIFE INSURANCE COMPANY v. DAVID SPENCER LIMITED *et al.* - **451**

2.——*Suite above a store — Defective premises—Personal injuries to tenant's wife —Demised premises—Liability of landlord.*] The defendant, who was the owner of a store building containing two suites above the store, rented one of the suites to the plaintiff R. J. Agnew. There was access to the suites by stairs both at the front and the back, and at the back was a porch which

LANDLORD AND TENANT—*Continued.*

was common to the two suites. The tenant's wife, who lived in the suite, leaned against the railing on the porch when cleaning a rug and the railing giving way, she fell to the ground below sustaining injuries. *Held*, that a finding in the plaintiff's favour as to the railing being a trap would not avail them unless it was found that it existed with respect to a portion of the building which the defendant had not demised and which was under his control as landlord, but the railing formed a portion of this so-called porch and the porch was a part of the demised premises and so treated by the tenants in their joint user, the plaintiffs therefore have no redress. [Affirmed on appeal.] AGNEW AND AGNEW v. HAMILTON. - - - - - - **147, 362**

LEASE—Arena. - - - - **161**
See MECHANICS' LIENS.

LIBEL—Action for. - - - **264**
See PRACTICE. 10.

2.——*Criminal—Trial—Disagreement of jury—Discharge of accused—Later application to have indictment further proceeded with—Refused—Criminal Code, Secs. 962 and 1045.* - - - - - **281**
See CRIMINAL LAW. 3.

3.——*Report by "Commissioners" on hospitals in Vancouver—Jurisdiction—Qualified privilege—Publication—Costs.* - **67**
See DEFAMATION.

LIFE INSURANCE. - - - -
See under INSURANCE, LIFE.

MAGISTRATE—Powers of. - **375**
See HUSBAND AND WIFE. 1.

MAILS—Order refusing use of—Cross-word competition—Game of chance. - - - - - - - **116**
See POST OFFICE.

MAINTENANCE—Infant belonging to village—Village municipality—Whether "Municipality" within the Act. - - - - **330**
See INFANTS ACT. 2.

2.——*Neglected children—Liability for.* - - - - - - - - - - **1**
See INFANTS ACT. 3.

3.——*Petition by wife—After decree absolute—Jurisdiction—Misconduct by wife—Right to raise on application as bar to maintenance.* - - - - - **238**
See DIVORCE.

MANDAMUS. - - - - **475**
See MUNICIPAL LAW. 1.

MARINE INSURANCE. - -
See under INSURANCE, MARINE.

MECHANIC'S LIEN—*Amendment of plaint—Trial—Amendment of affidavit of lien in accordance with amended plaint—R.S.B.C. 1924, Cap. 156, Secs. 19 and 20.*] The plaintiff entered into a contract with the defendant for the building of a house, and in the course of construction certain extras were authorized and ordered by the defendant. The plaintiff filed an affidavit of lien for $393.17 for extras on the 10th of February, 1931. By order of the 4th of May following the plaintiff was allowed to amend his plaint claiming $590 under the contract and reducing his claim for extras to $288.17. On the trial the plaintiff applied to amend the affidavit of lien by claiming the amount set out in the amended plaint. *Held*, that a substantial and not a meticulous compliance with the statute is required, the test being whether the parties concerned were misled in the circumstances. The onus as to prejudice is on the party objecting to the registered claim and as the evidence does not disclose that the defendant is prejudiced by anything contained in the claim, section 20 of the Act should be applied and the amendment allowed. RICHARDSON v. LOHN. - - - - - - - - - **224**

MECHANICS' LIENS—*Lease of arena for six-day bicycle race—Race-track installed by lessee—Track to be removed after race—Right to lien thereon—R.S.B.C. 1924, Cap. 156, Sec. 6.*] The Canadian Cycle Race Association obtained a lease from the Vancouver Arena Company for its arena for the purpose of holding a six-day bicycle race, the association to have the exclusive use of the arena for the six days and two full working days without charge immediately prior to the race for the purpose of erecting and installing a race-track and necessary equipment, and the same time after the race to remove the same. Portions of the race-track along the fence of the arena at the sides were fixed to the freehold in a slight way but the ends were built up and fixed in a substantial way to the arena structure, and solidly nailed wherever the special nature of the track demanded for safety. The track was removed immediately after the race, but the bicycle race proved a financial failure and the workmen and those supplying material for building the track recovered judgment in a mechanic's lien action for a lien on the premises. *Held*, on appeal, affirming the decision of CAYLEY,

MECHANICS' LIENS—*Continued.*

Co. J. (MACDONALD, C.J.B.C. dissenting), that the defendant is the owner of the land with knowledge of the construction of the race-track and the building in which it was installed is admittedly part of the land. Upon the true construction of the statute, temporary alterations and changes in or additions to a building which are essential to the use and purpose for which it was designed, are a proper foundation for a mechanic's lien for the work done and material furnished thereupon, and this is particularly so as to property employed in the production of shows and entertainments, the alterations and additions to the buildings and land of which would of necessity be continuous and relatively frequent, and the judgment establishing the liens should be affirmed. STIRN V. VANCOUVER ARENA COMPANY LIMITED AND LEWIS. - - **161**

MEDICAL AID—Assessments for. - - - - - - **110, 506**
See WORKMEN'S COMPENSATION ACT.

2.——*Cost of.* - - - - **110, 506**
See WORKMEN'S COMPENSATION ACT.

"MENS REA." - - - - - **459**
See CRIMINAL LAW. 4.

MINERAL CLAIMS—Agreement for sale—Breach—Damages. - - - **81**
See CONTRACT. 2.

MISDIRECTION. - - - - **136**
See CRIMINAL LAW. 6.

MOTOR-TRUCK. - - - - **462**
See NEGLIGENCE. 3.

MOTOR-VEHICLE — Pedestrian crossing road contrary to city by-law—Run into by taxi-cab—Satisfactory explanation by driver wanting—Liability. - - - **307**
See NEGLIGENCE. 8.

MOTOR-VEHICLES — *Collision between motor-cycle and automobile—Plaintiff passenger on motor-cycle—Defendant driving automobile negligent—Motor-cycle operated contrary to Motor-vehicle Act—Right of action of plaintiff—R.S.B.C. 1924, Cap. 177, Sec. 19A.*] The plaintiff was a passenger on a motor-cycle driven by G. proceeding northward on the Gorge Road in the Municipality of Saanich. The defendant who was parked on the proper side of the Gorge Road backed his car across the road just as the motor-cycle was approaching, in such a position that the driver of the motor-cycle could not, with the exercise of reasonable care, avoid running into him, and the plaintiff was injured. It was found that the accident was due to defendant's negligence, but the evidence disclosed that the driver of the motor-cycle at the time of the accident was not sitting on the driver's seat (the plaintiff being on the seat and behind the driver) and was driving in contravention of section 19A of the Motor-vehicle Act. *Held*, that the civil right of the plaintiff has not been affected in any way by G. having committed an offence under the Motor-vehicle Act that in no way contributed to the accident, and he is entitled to recover damages from the defendant. GAMON V. EASTMAN. - - - - - - **23**

2.——*Negligence—Collision at intersection — Gratuitous passenger — Damages—Evidence.*] The plaintiff was a gratuitous passenger in the defendants' car as he was driving easterly on Twelfth Avenue in the City of Vancouver shortly after three o'clock in the morning. There was a stop sign on Commercial Drive where it crossed Twelfth Avenue, and one S., who was driving a car southerly on Commercial Drive approached the intersection at from 25 to 35 miles an hour, and although he checked his car he continued across the intersection without stopping, and was run into by the defendant who was going at a moderate rate of speed. It was held on the trial that both drivers were guilty of negligence. *Held*, on appeal, reversing the decision of MACDONALD, J., that the defendant, who was driving at a moderate rate of speed and had the right of way, could reasonably advise himself that the law would be observed. The driver S. was travelling at an excessive speed when approaching the intersection, proceeded through without observing the stop sign, and paid no attention to his obligations under the traffic laws as regards the defendant. He was wholly responsible for the accident. *Per* MARTIN, J.A.: The case of *Hall* v. *Tinck* (1932), 45 B.C. 540 is not properly founded on *Kennedy Lumber Co. Ltd.* v. *Porter* (1932), 1 W.W.R. 230, owing to the difference between the British Columbia Act and that of Saskatchewan on the right of way of vehicles at intersections. HENDERSON V. DOSSE. - - - **401**

3.——*Pedestrian crossing street to board street-car—Run down by motor-car—Negligence—Damages.*] A pedestrian crossing the road at an intersection to board a street-car has a right to expect that an on-coming automobile driver, coming from a distance,

MOTOR-VEHICLES—*Continued.*

will see him and not come too close to the crossing for safety; further, that he would slacken his speed and have his car under such control that it could be stopped almost instantly. JAMES AND JAMES v. PIEGL. - - - - - - - - - - **285**

MUNICIPALITY—Liability of. - **249**
See DRAINAGE.

2.——*Maintenance of infant.* - **330**
See INFANTS ACT. 2.

MUNICIPAL LAW—*Construction of building — Permit — By-law — Validity — Mandamus—R.S.B.C. 1924, Cap. 179, Sec. 54, Subsec. (56).*] The Central Hotel in the City of Kamloops, having been partially destroyed by fire, the owner's application for a permit to repair was refused on the ground that the repairs contemplated were in excess of 40 per cent. of the value of the building before the damage occurred, and under section 7A of By-law 719 the permit could not be granted. By section 7A "Any wooden building within the First-Class Fire Limits which has been or may hereafter be damaged by fire, decay or otherwise to an amount greater than 40 per cent. of the replacement value of the building immediately before the necessity for repairs or rebuilding arose, shall not be repaired or rebuilt, but shall be removed under the provisions of section 162 of the Municipal Act." The power to pass by-laws on the question of repairs is only given by subsection (56) of section 54 of the Municipal Act as follows: "For regulating the erection of buildings and preventing the erection of wooden buildings, or any addition thereto or alteration thereof, and also for regulating and preventing any alteration to any existing wooden buildings within the fire limits of the municipality, either in the way of repairs or otherwise, unless the authority in writing of the fire wardens and building inspector for the time being of such municipality for such alteration is first obtained." On an application for an order directed to the building inspector to shew cause why a writ of *mandamus* should not issue directing him to issue a permit for the repair of the building:—*Held*, that in relation to the subject-matter of a by-law, the powers of the corporation must be exercised strictly within the limits and in the manner prescribed by the statute, section 7A purports to set up a standard or guide of its own to direct or control the repairing of buildings damaged by fire and makes no reference to the authority in writing re-

MUNICIPAL LAW—*Continued.*

ferred to in said subsection (56). Section 7A does not conform to the rule and is therefore invalid. *Held*, further, that the building inspector having given his reasons for refusal of a permit, effect should not be given to any objection to granting the permit, raised for the first time after the application for a writ of *mandamus* is launched, and the *mandamus* to issue a permit should be granted. *In re* HOMFRAY AND BUILDING INSPECTOR OF THE CITY OF KAMLOOPS. - - - - - - - - **475**

2.——*Municipal debentures—Failure to pay interest—Application to appoint commissioner — Ex debito justitiæ — R.S.B.C. 1924, Cap. 179; B.C. Stats. 1932, Cap. 39, Sec. 19.*] The plaintiff, who was the owner of a $1,000 debenture of the defendant municipality to which were attached $30 coupons payable half-yearly for interest, presented the $30 coupon thus attached which was payable on the 1st of September, 1932, at the bank where it was payable on the 20th of September, 1932, and payment thereof was refused. Proceeding by petition under Part XXIII. of the Municipal Act, he obtained an order authorizing the appointment of a commissioner for the Corporation of the District of North Vancouver:—*Held*, on appeal, affirming the order of MCDONALD, J. (MCPHILLIPS, J.A. dissenting), that upon its being shewn that there has been failure to provide, which means failure to pay, the learned judge below has no discretion in the matter, but must *ex debito justitiæ* make the order authorizing the appointment of a commissioner. WHITEHEAD v. THE CORPORATION OF THE DISTRICT OF NORTH VANCOUVER. **430**

NEGLECTED CHILDREN — Committed to care of Children's Aid Society—Liability for maintenance — Residence prior to commitment. - **1**
See INFANTS ACT. 3.

2.——*Meaning of — Apprehension — Religious persuasion of parents* - **552**
See INFANT. 1.

NEGLIGENCE—Collision at intersection—Gratuitous passenger—Damages—Evidence. - - - - **401**
See MOTOR-VEHICLES. 2.

2.——*Construction of ditches by municipality without providing outlet—Overflow —Faulty construction—Lands rendered unfit for truck gardening — Unprecedented rainfall—Right of municipality to convey water to nearest waterway—Duty of owner*

NEGLIGENCE—*Continued.*

to maintain his drains—Evidence of land surveyors and engineers—R.S.B.C. 1924, Cap. 179, Sec. 297.] The plaintiff, who carried on truck gardening on his lands within the defendant municipality, brought action against the municipality for damages, claiming that through faulty construction of ditches carrying surface water to a point close to his property where no provision was made for carrying it away, the water overflowed the ditches and entering his property rendered it unfit for market gardening and destroyed his crops. *Held,* that in order to succeed the plaintiff must shew that the defendant brought water on his lands, which has done damage to him and in this he failed. The evidence discloses that the natural flow of water on the area in question was in the same direction as that taken by the ditches, and the ditches as constructed retarded rather than accelerated the flow on to the plaintiff's lands. The damage to the plaintiff's lands would appear to be due to unprecedented rains during the year in which his crops were destroyed. *Held,* also, that the evidence of engineers experienced in topographical work, with proper plans shewing topography of country in vicinity of *locus,* with details of contours and explanatory models was entitled to more weight than evidence of land surveyors lacking adequate details. *Held,* also, that plaintiff's damage, if any, was caused or accentuated by failure of the plaintiff to maintain his drains. ANGUS v. THE CORPORATION OF THE DISTRICT OF BURNABY. - - - - - - - **335**

3.——*Damages—Contributory negligence—Ultimate negligence—Motor-truck stalled on street-car tracks—Run into by street-car—B.C. Stats. 1925, Cap. 8.*] A motor-truck driver, after sending a look-out into the street to see that the way was clear, backed his truck from his garage on the east side of Richards Street about 300 feet north of Davie Street in Vancouver, intending to go north. On getting well over to the west side of the road, the front of his car being on the west tracks of the defendant company, his car stalled. At this time a southbound car of the defendant had stopped on the north side of Davie Street over 300 feet away, but the street-car came on before the truck-driver could get his car started, and running into him did extensive damage to the truck. In an action for damages, the learned trial judge found both parties equally at fault and assessed the damages equally between them. *Held,* on appeal, *per* MACDONALD, C.J.B.C. and MACDONALD, J.A., that there was no evidence of negligence on the part of the truck-driver and the appeal should be allowed. *Per* MARTIN and MCPHILLIPS, JJ.A. (affirming the decision of FISHER, J.): That the truck became stalled on the tram tracks because of the plaintiff's own negligence, and as there was common and continued negligence by both vehicles the learned trial judge properly, on the facts, applied the degree of fault of contributory negligence by making them equally liable. The Court being equally divided the appeal was dismissed. PETROLEUM HEAT & POWER LIMITED v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED. - - - - **462**

4.——*Damages—Pedestrian crossing street to board street-car—Run down by motor-car.* - - - - - - - **285**
See MOTOR-VEHICLES. 3.

5.——*Damages — Physicians and surgeons—Injured shoulder—Erroneous diagnosis—Failure to advise X-ray—Evidence of care taken.*] The plaintiff fell on the pavement, and injuring her shoulder consulted the defendant, a practising physician and surgeon, who after examination concluded she only had a bad sprain. The doctor advised her to massage the shoulder and report in four or five days. She did not see the doctor again but her shoulder did not improve, and three months after the last interview with the defendant she consulted another doctor, who on taking an X-ray examination found her shoulder was dislocated, the lateness of the discovery necessitating a major operation. The plaintiff recovered judgment in an action for damages. *Held,* on appeal, reversing the decision of MACDONALD, J., *per* MACDONALD, C.J.B.C. and MACDONALD, J.A., that where a shoulder is injured and dislocation is suspected, the fact that the surgeon consulted does not advise the taking of an X-ray after applying the recognized tests and giving the usual instructions, does not necessarily constitute negligence on his part, even where it is subsequently disclosed that his diagnosis was erroneous. *Per* MARTIN, J.A.: That the appeal should be allowed on the ground that the trial judge had not passed upon an important, if not the most important piece of evidence upon which the question of the defendant surgeon's alleged negligence turned, namely, that after the second visit he gave her instructions to report to him in four or five days, but with this she did not comply. To send the case back for a new trial would not be justified in the circumstances, the

NEGLIGENCE—*Continued.*

defendant's evidence supported as it is by other evidence, should be believed and the action fails. MOORE AND MOORE v. LARGE. - - - - - - - - - - - **179**

6.—*Driving automobile.* - - - **23**
See MOTOR-VEHICLES. 1.

7.——*Husband and wife—Injury to wife—Husband's right of action—Servitium et consortium.* - - - - - **532**
See DAMAGES. 4.

8.——*Motor-vehicle—Pedestrian crossing road contrary to city by-law—Run into by taxi-cab—Satisfactory explanation by driver wanting—Liability.*] The plaintiff crossed a street near the middle of a block and contrary to the provisions of a city traffic by-law. It was a bright, clear day and she looked both ways for traffic before starting across but on nearly reaching the opposite side of the road she was struck by a taxi-cab driven by the defendant. *Held,* that as the defendant did not give a satisfactory explanation as to how the accident happened the Court is bound to draw the inference that he was not keeping that careful look-out which the driver of a motor-vehicle is bound to keep, and that his negligence in that regard was the proximate cause of the accident. HOCKING v. BRITISH COLUMBIA MOTOR TRANSPORTATION LIMITED. - **307**

9.——*Street-car — Stopped with jerk — Passenger thrown down—Burden of proof—Pleadings—Trend of trial—Effect of.*] Although particulars have been applied for and supplied in a negligence action, where the trial broadens and evidence is adduced and argument submitted with respect to other acts of negligence, the Court should be governed by the trend of the trial in reaching a decision. *Scott* v. *Fernie* (1904), 11 B.C. 91, applied. The mere happening of a jerk when the street-car was about to stop does not of itself bespeak negligence on the part of the motorman or the company, and a passenger who is thrown down in the vestibule when about to alight, must, in order to succeed in an action for damages, prove such negligence by affirmative evidence. HYDE AND HYDE v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED. - - - - - - - **443**

NEW TRIAL—Trial by jury—Conviction—Appeal—Juryman previously convicted of indictable offence—Disqualification of juror. - **17**
See CRIMINAL LAW. 7.

NOVATION. - - - - - **294**
See CONTRACT. 1.

NUISANCE — *Smoke, fumes and ashes—Damage to business and property—Right of tenant to sue for damages.*] A tenant carrying on a fish business is entitled to recover damages for a nuisance which affects his use and enjoyment of the leased premises, notwithstanding his knowledge of the existence of the nuisance when he entered into the lease. BILLINGSGATE FISH LIMITED v. BRITISH COLUMBIA SUGAR REFINING COMPANY LIMITED. - - **543**

ONUS. - - - - - - - - **413**
See HUSBAND AND WIFE. 5.

OPIUM—Possession of—Opium dross found on accused—Whether included in "Opium"—Can. Stats. 1929, Cap. 49, Sec. 2, subsecs. (*i*) and (*k*). - - - - - - - - **341**
See CRIMINAL LAW. 1.

OPIUM AND NARCOTIC DRUG ACT, 1929, THE. - **232, 321**
See HABEAS CORPUS. 2, 3.

PARENTS — Neglect of — Guardianship—Adoption—Religion of parents—Welfare of child. - - **491**
See INFANT. 2.

2.——*Religious persuasion of.* - **552**
See INFANT. 1.

PARTIES—Intervention. - - - **81**
See CONTRACT. 2.

2.——*Novation.* - - - - **294**
See CONTRACT. 1.

PARTNERSHIP AGREEMENT—*No transfer of interest without consent of partners—Transfer of a partner's interest—No consent obtained—Transfer of assets to an incorporated company—Dissolution—Right to an accounting — Pleadings — Right of amendment—R.S.B.C. 1924, Cap. 191, Secs. 34 and 41.*] Five East Indians entered into a partnership on equal terms under written agreement of the 16th of October, 1916, under the name of "Mayo Lumber Company." The agreement contained a clause that no partner could sell his share in the partnership without the consent in writing of the other partners. On October 2nd, 1917, one partner, Sheam Singh, sold two-sevenths of his interest to one Inder Singh, and on July 19th, 1920, Inder Singh sold his interest to the plaintiff. Two of the original partners, Mayo Singh and

PARTNERSHIP AGREEMENT—*Continued.*

Kapoor Singh acquired all the interests in the partnership with the exception of the share held by the plaintiff, and on November 24th, 1932, they incorporated the Mayo Lumber Company, Limited with a capital of $100,000, divided into 1,000 shares of $100 each, and on the 3rd of December following in consideration of $70,000, they transferred to the incorporated company all the assets of the Mayo Lumber Company except a 50-ton Shay locomotive and a donkey-engine, taking 700 shares of the incorporated company as payment in full for said assets, and later by resolution they transferred to the incorporated company the said locomotive and donkey-engine for $29,800, receiving in lieu thereof 268 shares of the incorporated company. The remaining 30 shares of the incorporated company were then offered to the plaintiff for his interest in the Mayo Lumber Company but he refused to accept them, and brought action for a declaration that he is the owner of a one-twenty-third interest in the Mayo Lumber Company, alternatively that Sheam Singh has been a trustee for him for his interest, that the transfer to the Mayo Lumber Company Limited was fraudulent and void, for an accounting, and that the Mayo Lumber Company be wound up. The action was dismissed. *Held,* on appeal, affirming the decision of MORRISON, C.J.S.C., that the partnership agreement against transferring shares without the consent of the remaining partners was never abandoned and the transfer by Sheam Singh was a nullity as no consent was given by the other partners, and the plaintiff therefore had no interest in either of the companies. *Held,* further, that under section 34 of the Partnership Act the assignee of a partner's share is entitled, after dissolution, to an account, and there was here a dissolution. He may therefore have been entitled to an account for the partnership under said section but he did not plead for that relief or ask for it in his notice of appeal. He does not ask for an amendment and in the circumstances it should not be granted. HARNAM SINGH v. KAPOOR SINGH *et al.* - - - - - - - - **195**

PASSENGER — Automobile — Insurance against liability for injuries. **383**
See INSURANCE, AUTOMOBILE.

2.——*Street-car.* - - - - **443**
See NEGLIGENCE. 9.

PAYMENT OUT OF COURT—Application for — Costs—Taxation—Appendix "N," items 6 and 7. - - **79**
See PRACTICE. 1.

PEDESTRIAN—Crossing road contrary to city by-law—Run into by taxi-cab — Satisfactory explanation by driver wanting—Liability. **307**
See NEGLIGENCE. 8.

2.——*Crossing street to board street-car —Run down by motor-car — Negligence — Damages.* - - - - - - **285**
See MOTOR-VEHICLES. 3.

PHYSICIANS AND SURGEONS—Diagnosis —Failure to advise X-ray. **179**
See NEGLIGENCE. 5.

PLAINT—Amendment of. - - **224**
See MECHANIC'S LIEN.

PLEADINGS. - - - - - **443**
See NEGLIGENCE. 9.

2.——Amendment of. - - **195**
See PARTNERSHIP AGREEMENT.

POLICE OFFICERS—*Fugitive from justice Force to effect arrest—Firing revolver—Bullet ricochetting hits fugitive—Justification—Criminal Code, Secs. 30 and 41.*] Three men running from a police officer were ordered to stop. They continued to run and the officer fired two shots from a revolver in the air, followed by some shots on the ground behind the men who were running ahead of him. One of these shots ricochetting from the ground, struck one of the fugitives and killed him. In an action against the police officer for the death of the fugitive:—*Held,* that the officer believed on reasonable and probable grounds that the deceased had been abetting one whom he also believed had broken into a shop, and that the officer in shooting as he did was acting properly within his rights, and doing no more than his duty required him to do. MERIN v. ROSS. **471**

POLICY—Construction. - - **349**
See INSURANCE, FIRE. 1.

POST OFFICE—*Order refusing use of mails —Cross-word competition—Game of chance —Tort by Government officials—Sued individually—R.S.C. 1927, Cap. 161, Sec. 7—Postal regulation 219.*] The plaintiff carried on cross-word puzzle competitions necessitating considerable mail matter passing through the mails. The Postmaster General, concluding there was an element of chance in obtaining correct answers to the puzzles and that the contest might be considered as tending to deceive or defraud the public, declared it not to be "mailable matter" within the Post Office Act and

POST OFFICE—*Continued.*

regulations and issued a prohibitory order refusing the use of the mails to the plaintiff, and thereafter all mail matter sent to the plaintiff through the mails was returned to the senders. An action against the Postmaster General and the District Superintendent of Postal Service in their individual capacities for damages for wrongful interference with the plaintiff's business and for an injunction was dismissed. *Held*, on appeal, affirming the decision of MORRISON, C.J.S.C. that clause (*d*) of section 7 of the Post Office Act declares what shall not be "mailable matter" and regulation 219 gives the Postmaster General discretion, if the offence be established to his satisfaction, to declare what shall be "mailable matter." Acting on that discretion the Postmaster General declared the matter in question not to be "mailable matter." The Postmaster General having authority to prohibit the use of the mails to the plaintiff, being a matter in his entire discretion, it is not open to review by a Court. Even if it were open to review this discretion was properly exercised, as the "contest" as shewn by the evidence is open to many apparent solutions and therefore a game partly of chance. LITERARY RECREATIONS LIMITED V. SAUVE AND MURRAY. - - - - - - - - - - **116**

PRACTICE—*Application for payment out of Court—Costs—Taxation—Appendix "N," items 6 and 7.*] Items 6 and 7 of Appendix "N," Tariff of Costs in the Supreme Court are as follows: "6. Fee to cover each interlocutory application brought by any party in the action or proceeding to go to such party as may be ordered. 7. All process for payment into and out of Court." The plaintiff having recovered judgment applied for and obtained an order for payment out of certain moneys in Court and in taxing the costs of the application he sought to include both items 6 and 7 in the bill. On review of the taxation:—*Held*, that as soon as the application is launched and the order made item 7 can no longer apply, as the "process" was involved in the application. Item 6 should therefore be allowed and item 7 disallowed. TAYLOR V. MILLMAN. - **79**

2.——*Costs—Appeal to Supreme Court of Canada—Deposit of security for respondent's costs—Abandonment of appeal and respondent's costs thereof paid — Application by respondent for charging order or deposit for security—R.S.B.C. 1924, Cap. 136, Sec. 104.*] The defendants' appeal to the Court of Appeal, having been dismissed, an appeal was taken to the Supreme Court of Canada

PRACTICE—*Continued.*

and $500 was paid into Court as security for the respondent's costs of appeal. The appeal was subsequently dismissed for want of prosecution and the respondent's costs thereof were paid by the appellants. On an application by respondent's solicitor for a charging order on the $500 so deposited, basing his claim upon section 104 of the Legal Professions Act:—*Held*, that this sum was paid into Court for a special purpose, and that purpose having been satisfied in full, the appellants are entitled to a return of this sum. LOCKETT V. SOLLOWAY, MILLS & COMPANY LIMITED. - **211**

3.——*Costs—Taxation—Four defendants in action—Action dismissed against one defendant with costs—Taxing officer not to apportion the costs—Rule 977.*] On a trial in which there were four defendants, the action was dismissed as against one of the defendants with costs, the formal judgment reciting "that the plaintiff's claim against the defendant Genji Yada be and is hereby dismissed with costs to be taxed by the taxing officer and paid forthwith after taxation thereof." The taxing officer ruled that this defendant was entitled to "the whole costs" for any steps in the action which it was necessary for him to take. On the plaintiff's application for a review of the taxation:—*Held*, affirming the taxing officer, that in view of the terms of the formal judgment and the wording of rule 977, the successful defendant is entitled to "the whole costs" for the various steps he found it necessary for him to take. MORI V. LION LUMBER COMPANY LIMITED. - - - - **292**

4. —— *Costs — Taxation — Judgment against all defendants with costs—No apportionment by taxing officer—Item 13 of Appendix "N"—Distribution.*] In an action for tort against four defendants, who defended separately, the formal judgment, as to costs, restored by the Supreme Court of Canada, read, "That the defendants do pay to the plaintiff her costs of this action, such payment to be made forthwith after taxation." On the taxation it appeared that the costs of the action had been augmented by certain proceedings taken by individual defendants and not joined in by the others. The taxing officer allowed against all the defendants the costs occasioned by them all and segregated and apportioned the special costs occasioned by the acts of the individual defendants to the defendant who occasioned same. *Held*, affirming the decision of MORRISON, C.J.S.C. ((1930), 42 B.C. 358), that the taxing officer has no right to go behind the directions contained in the judgment.

PRACTICE—*Continued.*

If any apportionment or segregation is to be made it should be set out in the judgment. On the contention by defendants that four items in the planitiff's bill, namely (1), fee on motion for enlargement of trial; (2), fee on motion for trial by jury; (3), process for setting down for trial in June; and (4), process for setting down for trial in September, were all covered by item 13 of Appendix "N" and carried only the one fee:—*Held*, that item 13 should be read distributively and that the four items were allowable (MACDONALD, C.J.B.C. dissenting). *Bradshaw* v. *British Columbia Rapid Transit Co.* (1927), 38 B.C. 430, approved. OVERN v. STRAND *et al.* - - - **207**

5.——*Court of Appeal—Ex parte order for leave to proceed in forma pauperis—Application to set aside—11 Henry VII., Cap. 12—Whether in force—Court of Appeal Rule 21—R.S.B.C. 1924, Cap. 80.*] On an application to discharge an order made *ex parte* for leave to proceed *in forma pauperis*:—*Held*, that the order should be set aside as rule 21 of the Court of Appeal Rules excludes an application made *ex parte* to a judge. *Held*, further, that chapter 12 of 11 Henry VII., being an Act "To help and speed poor persons in their suits," is in force in British Columbia by virtue of the English Law Act. BLAND v. AGNEW. **230**

6.——*Criminal libel—Trial—Disagreement of jury—Discharge of accused—Later application to have indictment further proceeded with—Refused—Criminal Code, Secs. 962 and 1045.* - - - - - **281**

See CRIMINAL LAW. 3.

7.——*Foreign company—Security for costs—Carrying on business—Company—"Residence"—County Court Order XVIII., r. 1 (a).*] The plaintiff, a foreign corporation with head office in Chicago, U.S.A., but registered as an extra-provincial company in British Columbia with an office in the City of Vancouver, brought action in the County Court against the defendant on two promissory notes. On the defendant's application for security for costs it appeared that the only assets of the plaintiff company in British Columbia were $10,000 in outstanding book accounts of uncertain value, and the plaintiff was ordered to furnish security in the sum of $50 for the defendant's costs of the action. *Held*, on appeal, affirming the decision of ELLIS, Co. J., that the order below was properly made. *Per* MARTIN, J.A.: The question turns upon the consideration to be given Order XVIII., r. 1 (*a*) of the County Court Rules, and in

PRACTICE—*Continued.*

the case of a company where it has more residences than one, the rule applies and the Court may order security to be given. In order to exclude jurisdiction of the Court the residence within the Province must be the sole one. *Per* MACDONALD, J.A.: The *situs* of this company is clearly outside the Province even although also located within the Province. A company may have a residence or be located in more than one place. Whether or not, therefore, it "resides" within the Province it has a residence beyond it and is therefore within the rule and security for costs should be given. LASALLE EXTENSION UNIVERSITY v. LINLEY. - - - - - - - - - **369**

8.——*Garnishee order—Application to set aside—Necessity of entering appearance before application.*] If a defendant in an action has not entered an appearance, he is not entitled to move to have an attaching order obtained by the plaintiff set aside, and the objection to his right to so move cannot be cured by a subsequent entry of appearance. *Victoria (B.C.) Land Investment Trust, Ltd.* v. *White* (1920), 27 B.C. 559 applied. MCDONALD v. COCOS ISLAND TREASURES LIMITED. - - - - - **360**

9.——*Judgment—Writ of fi. fa.—Defendants' claim for exemption—Issue—Exemption disallowed—Appeal—Security for costs paid into Court—Appeal allowed without costs—Money in Court subject to charging order.*] On the plaintiff obtaining judgment in an action and issuing execution for the amount of his claim, the defendants claimed exemption under the Execution Act. On an issue the defendants' claim being disallowed, they appealed and paid $75 into Court as security for the costs of the appeal. The appeal was allowed without costs to either party. The plaintiff then obtained an order *nisi* charging the $75 in Court for the balance owing on the plaintiff's judgment. On the plaintiff's application for an order absolute:—*Held*, that the money paid into Court by the defendants is subject to a charging order in favour of the plaintiff. YICK CHONG v. HONG SING COMPANY *et al.* - - - - - - - - **290**

10.——*Order for issuance of concurrent writ of summons and service—Affidavit in support—Sufficiency of—Action for libel—Application to set aside order and service of writ—Order XI., rr. 1 and 4.*] On an application for leave to serve a writ out of the jurisdiction, the affidavit in support is not sufficient where it contains a mere statement of what the plaintiff claims or is bringing

PRACTICE—*Continued.*

his action for, and that someone believes the plaintiff has a good cause of action; the affidavit should shew a *prima facie* cause of action within the jurisdiction and disclose a substantial question which the plaintiff desires to try. Sufficient information should be given to make clear the ground on which the Court is asked to proceed. SMITH v. HARRIS INVESTMENTS LIMITED AND HARRIS. - - - - - - - - - **264**

PRINCIPAL AND SURETY—Bond of indemnity—Certain system of audit contained in policy—System of audit changed during currency of bond without notice—Effect on guarantee. - - - **515**
See INSURANCE.

PRIVILEGE—Appeal. - - - **241**
See STOCK EXCHANGE.

2.——*Qualified—Libel—Report by "Commissioners" on hospitals in Vancouver—Justification—Publication.* - - **67**
See DEFAMATION.

PROFITS—Loss of—Insured—Policy—Construction—Arbitration—Award. - - - - - - - - **349**
See INSURANCE, FIRE. 1.

PROHIBITION. - - - - **375**
See HUSBAND AND WIFE. 1.

PROPERTY—Voluntary transfer of by wife to husband—No independent advice—Undue influence—Onus. - **413**
See HUSBAND AND WIFE. 5.

2.——*Within and without the Province—Deceased not resident in Province—Method of calculation.* - - **547**
See SUCCESSION DUTY.

PUBLICATION — Libel—Report by "Commissioners" on hospitals in Vancouver — Justification — Qualified privilege. - - - **67**
See DEFAMATION.

RAILS AND TIES. - - - - **300**
See FIXTURES.

REAL PROPERTY — *Judgment—Registration—Cancellation under authorization of judgment creditor—Subsequent reregistration of judgment—Application to cancel reregistration—B.C. Stats. 1914, Cap. 43, Secs. 72 and 74—R.S.B.C. 1924, Cap. 117, Sec. 232.*] The plaintiff had registered a judgment against the defendant's lands. Under an arrangement that the defendant would pay a certain sum in cash and the balance of the debt in monthly instalments, the plaintiff authorized the district registrar of titles in writing to vacate the registration of his judgment against the defendant in so far as the same affected said lands. The district registrar of titles thereupon cancelled the registration in compliance therewith. Subsequently the plaintiff reregistered the judgment against said lands. The defendant's application to the registrar to cancel said reregistration was refused. The defendant then applied under section 232 of the Land Registry Act for cancellation of the reregistration. *Held*, that the reregistration of the plaintiff's judgment was illegal and void. The statutory effect of the registrar's action in cancelling the registration of the judgment was to settle the substantive rights of the parties in so far as registration of the judgment against said lands was concerned and caused the judgment to be released for all time in the sense that it could never again be registered as a charge under the provisions of the Execution Act and the Land Registry Act. HANSEN v. TAYLOR. - - - **556**

RECEIVER—Mortgage action—Order that tenants attorn and pay rent to receiver—Service of order on tenants—Whether creation of relationship of landlord and tenant. - - - - - - - - **451**
See LANDLORD AND TENANT. 1.

RECTIFICATION—Execution of conveyance—Effect of. - - - **441**
See VENDOR AND PURCHASER.

REGISTRATION—Cancellation under authorization of judgment creditor—Subsequent reregistration of judgment—Application to cancel reregistration. - - - **556**
See REAL PROPERTY.

RENT—Payment to receiver. - **451**
See LANDLORD AND TENANT. 1.

REPAIRS—Apartment flat—Porch at back used by tenants—Invitee—Railing on porch gives way when leaned against by tenant—Tenant falling is injured—Hidden defect—Liability of landlord. - **110, 362**
See LANDLORD AND TENANT. 2.

RES JUDICATA. - - - - - **81**
See CONTRACT. 2.

REVOLVER—Firing at fugitive. - **471**
See Police Officers.

ROYALTIES—Cutting of timber. - **453**
See Forest Act.

RULES AND ORDERS — County Court Order XVIII., r. 1 (*a*). - **369**
See Practice. 7.

2.——*Divorce Rule 65 et seq.* - **238**
See Divorce.

3.——*Order XI., rr. 1 and 4.* - **264**
See Practice. 10.

SHARES — Company—Sale of—Action for payment—Defence of lack of title to part of block and fraud in procuring them. - - **310**
See Contract. 4.

2.——*Purchase of on margin—Broker's duty—Action against customer for balance of account—Evidence—Onus of proof.* - **12**
See Stock-broker. 2.

STATUTE, CONSTRUCTION OF—*Chinese Immigration Act—Applicant for entry—Examination by controller—Order for deportation—Habeas corpus—Appeal—R.S.C. 1927, Cap. 95, Sec. 10, Subsec. 2.*] Subsection 2 of section 10 of the Chinese Immigration Act provides, *inter alia*, that if, on the preliminary hearing of an applicant for entry into Canada, the controller is not satisfied that such person is entitled to remain in Canada, the hearing shall be thereupon adjourned for forty-eight hours or for such longer period as the controller may see fit, and an opportunity shall be given such person to consult with duly accredited legal counsel. Upon the applicant arriving at Victoria, she was examined the following day by the immigration inspector, and three days later by the controller, who then ordered that she be deported. An application for discharge from custody on *habeas corpus* proceedings on the ground that the controller had not complied with the requirements of section 10 (2) of said Act, was dismissed. *Held*, on appeal, affirming the decision of Gregory, J., that although the controller did not follow the procedure strictly, the applicant was given an opportunity to retain counsel after the preliminary hearing by the inspector, and no injustice was done to her, the order of the controller should therefore be sustained. *Per* McPhillips, J.A.: The provisions of section 10, subsection 2 is not imperative but merely directory, and the appeal should be dismissed. *Re Yee Foo* (1925), 56 O.L.R. 669, followed. Rex v. Jung Suey Mee. - - - - - **533**

STATUTES—11 Hen. VII., Cap. 12. - **230**
See Practice. 5.

30 & 31 Vict., Cap. 3, Sec. 96. - **375**
See Husband and Wife. 1.

B.C. Stats. 1862, Cap. 116. - **375**
See Husband and Wife. 1.

B.C. Stats. 1914, Cap. 43, Secs. 72 and 74. - - - - - - - **556**
See Real Property.

B.C. Stats. 1921, Cap. 58, Sec. 2. - **547**
See Succession Duty.

B.C. Stats. 1921 (Second Session), Cap. 44, Sec. 3. - - - - - **547**
See Succession Duty.

B.C. Stats. 1925, Cap. 8. - - **462**
See Negligence. 3.

B.C. Stats. 1925, Cap. 20, Sec. 24. - **383**
See Insurance, Automobile.

B.C. Stats. 1925, Cap. 20, Secs. 28, 29 and 102. - - - - - **273**
See Insurance, Life.

B.C. Stats. 1928, Cap. 18, Secs. 3 and 4. - - - - - - - - **1**
See Infants Act. 3.

B.C. Stats. 1929, Cap. 11, Secs. 133 (8) and 138. - - - - - **447**
See Chose in Action.

B.C. Stats. 1932, Cap. 39, Sec. 19. - **430**
See Municipal Law. 2.

Can. Stats. 1929, Cap. 46, Sec. 9. - **235**
See Criminal Law. 5.

Can. Stats. 1929, Cap. 49. - - **321**
See Habeas Corpus. 3.

Can. Stats. 1929, Cap. 49, Sec. 2, Subsecs. (*i*) and (*k*). - - **341**
See Criminal Law. 1.

Can. Stats. 1929, Cap. 49, Sec. 26. - **232**
See Habeas Corpus. 2.

Can. Stats. 1930, Cap. 18, Sec. 9. - **152**
See Excise Act.

Criminal Code, Secs. 30 and 41. - **471**
See Police Officers.

Criminal Code, Secs. 81, 921, 1011 and 1013 (*c*). - - - **17**
See Criminal Law. 7.

Criminal Code, Sec. 235 (*i*). - **459**
See Criminal Law. 4.

Criminal Code, Secs. 962 and 1045. - **281**
See Criminal Law. 3.

STATUTES—*Continued.*

Criminal Code, Sec. 1120. - - **235**
See CRIMINAL LAW. 5.

R.S.B.C. 1911, Cap. 217, Sec. 7. - **547**
See SUCCESSION DUTY.

R.S.B.C. 1924, Cap. 6, Sec. 5 (2). - **491**
See INFANT. 2.

R.S.B.C. 1924, Cap. 16. - - **447**
See CHOSE IN ACTION.

R.S.B.C. 1924, Cap. 17, Sec. 3. - **278**
See ATTACHMENT OF DEBTS ACT.

R.S.B.C. 1924, Cap. 52, Sec. 6. - **321**
See HABEAS CORPUS. 3.

R.S.B.C. 1924, Cap. 53, Sec. 35. - **345**
See COUNTY COURTS ACT.

R.S.B.C. 1924, Cap. 53, Sec. 40 (1) and 86. - - - - - - - **59**
See INTERPLEADER. 1.

R.S.B.C. 1924, Cap. 59. - - **537**
See ATTACHMENT OF DEBTS.

R.S.B.C. 1924, Cap. 67, Sec. 4. - **375**
See HUSBAND AND WIFE. 1.

R.S.B.C. 1924, Cap. 70, Sec. 17. - **238**
See DIVORCE.

R.S.B.C. 1924, Cap. 80. - - **230**
See PRACTICE. 5.

R.S.B.C. 1924, Cap. 93, Sec. 127 (1). **453**
See FOREST ACT.

R.S.B.C. 1924, Cap. 97. - - **537**
See ATTACHMENT OF DEBTS.

R.S.B.C. 1924, Cap. 97, Sec. 3. - **59**
See INTERPLEADER. 1.

R.S.B.C. 1924, Cap. 98, Sec. 9. - **28**
See CRIMINAL LAW. 2.

R.S.B.C. 1924, Cap. 101, Secs. 3, 17 and 19. - - - - - - - **552**
See INFANT. 1.

R.S.B.C. 1924, Cap. 112, Secs. 56 (j) and 93. - - - - - **552**
See INFANT. 1.

R.S.B.C. 1924, Cap. 112, Secs. 57, 80 and 91. - - - - - - - **1**
See INFANTS ACT. 3.

R.S.B.C. 1924, Cap. 112, Sec. 79. - **267**
See CONSTITUTIONAL LAW. 2.

R.S.B.C. 1924, Cap. 112, Sec. 80, Subsecs. (1) and (8). - - **330**
See INFANTS ACT. 2.

STATUTES—*Continued.*

R.S.B.C. 1924, Cap. 112, Sec. 93. - **491**
See INFANT. 2.

R.S.B.C. 1924, Cap. 117, Sec. 232. - **556**
See REAL PROPERTY.

R.S.B.C. 1924, Cap. 123, Sec. 6 (*a*). - **17**
See CRIMINAL LAW. 7.

R.S.B.C. 1924, Cap. 136, Sec. 104. - **211**
See PRACTICE. 2.

R.S.B.C. 1924, Cap. 156, Sec. 6. - **161**
See MECHANICS' LIENS.

R.S.B.C. 1924, Cap. 156, Secs. 19 and 20. - - - - - - - **224**
See MECHANIC'S LIEN.

R.S.B.C. 1924, Cap. 177, Sec. 19A. - **23**
See MOTOR-VEHICLES. 1.

R.S.B.C. 1924, Cap. 179. - - **430**
See MUNICIPAL LAW. 2.

R.S.B.C. 1924, Cap. 179, Sec. 54, Subsec. (56). - - - - - **475**
See MUNICIPAL LAW. 1.

R.S.B.C. 1924, Cap. 179, Sec. 297. - **335**
See NEGLIGENCE. 2.

R.S.B.C. 1924, Cap. 183. - - **330**
See INFANTS ACT. 2.

R.S.B.C. 1924, Cap. 191, Secs. 34 and 41. - - - - - - - **195**
See PARTNERSHIP AGREEMENT.

R.S.B.C. 1924, Cap. 244, Secs. 7 and 10. - - - - - - - **547**
See SUCCESSION DUTY.

R.S.B.C. 1924, Cap. 256, Sec. 11. - **481**
See TESTATOR'S FAMILY MAINTENANCE ACT.

R.S.B.C. 1924, Cap. 278, Secs. 28, 32 and 33. - - - **110, 506**
See WORKMEN'S COMPENSATION ACT.

R.S.B.C. 1924, Cap. 278, Secs. 32 and 33. - - - - - **110, 506**
See WORKMEN'S COMPENSATION ACT.

R.S.C. 1927, Cap. 42, Sec. 111. - **152**
See EXCISE ACT.

R.S.C. 1927, Cap. 59, Sec. 4, Subsec. (5). - - - - - - - **136**
See CRIMINAL LAW. 6.

R.S.C. 1927, Cap. 93, Sec. 22 (2). - **321**
See HABEAS CORPUS. 3.

R.S.C. 1927, Cap. 93, Sec. 42. - **232**
See HABEAS CORPUS. 2.

STATUTES—*Continued.*

R.S.C. 1927, Cap. 95, Sec. 11, Subsec. (2). - - - - - - - **533**
See STATUTE, CONSTRUCTION OF.

R.S.C. 1927, Cap. 98, Secs. 2, 34, 35, 36, 117 and 156. - - - - - **28**
See CRIMINAL LAW. 2.

R.S.C. 1927, Cap. 161, Sec. 7. - **116**
See POST OFFICE.

STOCK-BROKER — *Bankruptcy—Right of action by trustee against other brokers based on "bucketing" — Fraud — Agency—Personal liability of directors.*] In an action for damages brought by the trustee in bankruptcy of a stock-broker firm against another stock-brokerage company and the individual directors thereof, based on the alleged "bucketing" of orders given by the bankrupt company to the defendant company, it was held on the evidence that the bankrupt company had been a customer of the defendant company and not merely an agent, that the securities advaced by the bankrupt to the defendant had lost their identity as the property of any individual client of the bankrupt, and the only course was an action by the trustee for the benefit of the estate. The evidence disclosed that the customer's orders were not carried out, the defendant reporting fictitious transactions, and the plaintiff was entitled to recover the money paid and the value of the securities deposited with the defendants, and the individual directors being parties to the fraudulent transactions were personally liable for the damage caused thereby. *Held*, on appeal, affirming the decision of FISHER, J. (MACDONALD, J.A. dissenting in part), that on the evidence disclosed the learned judge below reached the right conclusion and the appeal should be dismissed. JOHNSON v. SOLLOWAY, MILLS & COMPANY LIMITED. - - - - - - - - **260**

2.——*Purchase of shares on margin—Broker's duty—Action against customer for balance of account — Evidence — Onus of proof.*] In an action by a stock exchange firm against a customer to recover the balance due on margin transactions, the plaintiff recovered judgment. *Held*, on appeal, affirming the decision of LAMPMAN, Co. J., *per* MARTIN and MACDONALD, JJ.A., that the trial judge having found, *inter alia*, that the plaintiff as defendant's agent and on his behalf had incurred and discharged liabilities on stock purchases, and had all shares so purchased available for the defendant on payment of the balance due from him, the appeal should be dismissed. *Per*

STOCK-BROKER—*Continued.*

MACDONALD, C.J.B.C., and MCPHILLIPS, J.A., that as the plaintiff had failed to prove that it had at all times the shares so ordered available for delivery to the defendant if paid for, the appeal should be allowed; moreover no valid excuse had been given for not selling when the margin was almost exhausted, thereby saving the loss incurred. The Court being equally divided the appeal was dismissed. H. E. HUNNINGS & COMPANY LIMITED v. HALL. - **12**

STOCK EXCHANGE—*Broker and client—Stocks and bonds delivered broker as collateral—Conversion—Evidence of—Access to broker's books — Privilege — Appeal.* The plaintiff employed the defendants as stock-brokers and delivered to them certain stocks, shares and bonds as collateral security to cover indebtedness for the sale or purchase of stock by the defendants to his order on the market. The plaintiff later changed his stock-brokers, and on the defendants transferring the securities to the newly-employed firm the plaintiff took exception to the securities so transferred and brought action for damages for wrongful conversion of the securities so deposited with the defendants. Applications for discovery or admissions from the defendants by interrogatories as to the disposition of the securities were met by a claim of privilege on the ground that it would tend to incriminate them. Finally the senior counsel for the defendants was served with a *subpœna* as a witness. He admitted custody of the defendants' books, but claimed privilege by virtue of professional services, but an order was made that the books be produced. It was held on the trial that the entries in the books disclosed a *prima facie* case of conversion and the resulting damages were fixed at the market price of the securities when sold. *Held*, on appeal, affirming the decision of MACDONALD, J., that the defendants were not authorized to dispose of the securities until a debt to them by the plaintiff had been incurred, and this subject-matter lay "peculiarly within the knowledge of the defendants." In order to rebut the presumption that they had converted the securities, they were bound to prove their right to dispose of them, and this they have failed to do. BLUMBERGER v. SOLLOWAY, MILLS & COMPANY, LIMITED. - - - - - - - - - - **241**

STOCKS AND BONDS—Delivered broker as collateral — Conversion — Evidence of—Access to broker's books—Privilege—Appeal. - - **241**
See STOCK EXCHANGE.

STREET-CAR. - - - - - **462**
See NEGLIGENCE. 3.

2.——*Stopped with jerk — Passenger thrown down—Burden of proof.* - **443**
See NEGLIGENCE. 9.

SUCCESSION DUTY—*Property within and without the Province—Deceased not resident in Province—Method of calculation—R.S.B.C. 1911, Cap. 217, Sec. 7; B.C. Stats. 1921, Cap. 58, Sec. 2; B.C. Stats. 1921 (Second Session), Cap. 44, Sec. 3; R.S.B.C. 1924, Cap. 244, Secs. 7 and 10.*] Under sections 7 and 10 of the Succession Duty Act, R.S.B.C. 1924, Cap. 244, the proper course to find the tax on property within the Province is to take the net value of the whole estate; then follow section 7 by looking down the first column of Schedule "D" and placing the net value in its proper place; then look (in this case) in the second column for the percentage opposite the said net value; then multiply this percentage by the amount of the British Columbia estate (after first deducting therefrom its proportion of debts). *In re* SUCCESSION DUTY ACT and ESTATE OF ISAAC UNTERMYER, DECEASED. - **547**

TAXATION—*Company—Land in company's name—Transferred to individuals—Deed not registered—Sold by individuals at profit—Liability of company for tax.*] In June, 1926, M. Purchased a lot in Vancouver which was registered in her daughter's name. Shortly after, owing to differences arising between M., her husband and her daughter, they formed the appellant company, each of them holding one share in the company and a fourth share being in the name of their solicitor, only four shares being issued. The daughter then transferred the lot to the company. In December, 1927, M. purchased another lot adjoining the first one and had it registered in the daughter's name, and on May 5th, 1928, the daughter transferred this lot to the company. M., her husband and daughter having shortly after settled their differences, the company conveyed both lots in June, 1927, to the three of them. This conveyance was not registered and on February 2nd, 1929, the three then owners sold the two lots to others at a profit of $67,000. The assessor's assessment of the company for $5,600 on this profit was upheld by the Court of Revision. *Held*, on appeal (MACDONALD, C.J.B.C. and GALLIHER, J.A. dissenting), that the Court of Revision reached the right conclusion in viewing the private transaction of the individual members of this company as an unsuccessful attempt to evade the provisions of the statute. *In re* M. D. DONALD LIMITED. **406**

2.——*Costs—Four defendants in action—Action dismissed against one defendant with costs—Taxing officer not to apportion the costs—Rule 977.* - - - - **292**
See PRACTICE. 3.

3.——*Costs—Appendix "N," items 6 and 7.* - - - - - - - - - - **79**
See PRACTICE. 1.

4.——*Judgment against all defendants with costs—No apportionment by taxing officer—Item 13 of Appendix "N"—Distribution.* - - - - - - **207**
See PRACTICE. 4.

TENANT—Injury to. - **147, 362**
See LANDLORD AND TENANT. 2.

2.——*Right of to sue for damages.* **543**
See NUISANCE.

TESTATOR'S FAMILY MAINTENANCE ACT—*Will — Provision for widow inadequate—Consideration of others' claims on testator—"Others" not restricted to legal claims—R.S.B.C. 1924, Cap. 256, Sec. 11.*] Section 11 of the Testator's Family Maintenance Act provides that an application claiming the benefit of the Act shall be made within six months from "the date of the grant or resealing in the Province of probate of the will." *Held*, with respect to the grant, as meaning the date the grant or granting of probate of the will is actually completed by the grant being sealed. In the words "the situation of others having claims upon the testator must be taken into account" (see judgment of Duff, J. in *Walker* v. *McDermott* (1931), S.C.R. 94 at p. 96) the word "others" is not limited to only such others as would have had legal claims upon the estate either under the Administration Act or said Testator's Family Maintenance Act. *Held*, in the circumstances of the present case, that the sister of the testator and two children who had lived with the testator and his wife as their daughters, for which sister and children the testator had made provision by his will, come within the word "others" in said expression. Having regard to all the circumstances and the claims of said "others":—*Held*, that the whole estate should not be given to the widow but that she should be given a larger share than that given her by the will, and there should be a reduction by one-half of the amounts which said sister

TESTATOR'S FAMILY MAINTENANCE ACT—*Continued.*

and children claimed under the will, said amounts to be added to the widow's share. *In re* ESTATE OF W. S. PEDLAR, DECEASED. - - - - - - - - - - **481**

THEFT WITH VIOLENCE. - **136**
See CRIMINAL LAW. 6.

TIMBER LICENCE—Cutting of timber—Royalties—Liability of owner of licence. - - - - **453**
See FOREST ACT.

TRIAL. - - - - - - - **224**
See MECHANIC'S LIEN.

2.——*Disagreement of jury.* - **281**
See CRIMINAL LAW. 3.

3.——Trend of. - - - - **443**
See NEGLIGENCE. 9.

ULTIMATE NEGLIGENCE. - **462**
See NEGLIGENCE. 3.

UNDUE INFLUENCE — Voluntary transfer of property by wife to husband—No independent advice. - **413**
See HUSBAND AND WIFE. 5.

VENDOR AND PURCHASER—*Sale of land—Mutual mistake as to boundary adjoining a highway—House built by purchaser on wrong property — Rectification — Execution of conveyance—Effect of.*] The defendant, who owned two adjoining lots in the Lillooet District, sold the west lot to the plaintiff and conveyed the same to him by deed in fee simple. At the time of the sale the defendant, believing that a wagon road represented the eastern boundary of the lot sold, so advised the purchaser, and after the sale the plaintiff built a house adjoining the wagon road on its west side. Subsequently it was found that the line dividing the lots was west of the wagon road and that there was a strip of the eastern lot lying between the wagon road and the eastern boundary of the west lot, upon which the plaintiff had built his house. In an action that the defendant convey to the plaintiff that portion of the eastern lot that lies west of the wagon road:—*Held*, that in a case of mutual mistake such as this, there should be rectification and the defendant was ordered to convey to the plaintiff that portion of the eastern lot which lies west of the wagon road. EVANS V. NYLAND. - - - - - - - - - - - **441**

VESSEL—Advances made to repair—Part of price due—Insurable interest. - - - - - - - **233**
See INSURANCE, MARINE.

2.——*Foreign—Seizure of within territorial waters.* - - **152**
See EXCISE ACT.

WARRANT—Arrest. - - - - **232**
See HABEAS CORPUS. 2.

WIDOW—Provision for inadequate—Consideration of others' claims on testator—"Others" not restricted to legal claims. - - **481**
See TESTATOR'S FAMILY MAINTENANCE ACT.

WIFE — Deserted—Application for order against husband — Magistrate — Powers of—Prohibition. - **375**
See HUSBAND AND WIFE. 1.

2.——*Petition by for maintenance.* **238**
See DIVORCE.

WILL—Declaration subject to will in favour of preferred beneficiary — Subsequent codicil—Effect of. - **273**
See INSURANCE, LIFE.

2.——*Provision for widow inadequate—Consideration of others' claims on testator—"Others" not restricted to legal claims.* - - - - - - - - - - **481**
See TESTATOR'S FAMILY MAINTENANCE ACT.

WORDS AND PHRASES — "At once and continuously after the occurrence"—Meaning of. - - **213**
See INSURANCE, ACCIDENT.

2.——*"Employee"—Meaning of.* **278**
See ATTACHMENT OF DEBTS ACT.

3.——*"Neglected children"—Meaning of.* - - - - - - - - **552**
See INFANT. 1.

4.——*"Others"—Not restricted to legal claims.* - - - - - **481**
See TESTATOR'S FAMILY MAINTENANCE ACT.

5.——*"Residence"—Interpretation.* **369**
See PRACTICE. 7.

6.——*"Wages or salary"—Meaning.* **278**
See ATTACHMENT OF DEBTS ACT.

7.——*"Wilfully and knowingly"—Interpretation.* - - - - **459**
See CRIMINAL LAW. 4.

WORKMEN'S COMPENSATION ACT— *Assessments for medical aid—R.S.B.C. 1924, Cap. 278, Secs. 32 and 33.*] In levying assessments on employers for the purpose of medical aid, pursuant to section 33 of the Workmen's Compensation Act, the Workmen's Compensation Board are entitled to apportion the additional amounts required over the amount of payments by workmen to meet the cost of medical aid according to the amounts actually assessed against the several employers, and are not required to apportion the amount between the employers contributing thereto according to the amount of their respective payrolls. The general assessment referred to in section 33 of the Act is not required to be an assessment against all employers contributing thereto at an equal rate according to the amount of their pay-roll, but

WORKMEN'S COMPENSATION ACT— *Continued.*

may, and should be, so made that the several classes of employers contributing thereto will be assessed according to the hazard of the classes. *Held,* also *per* MACDONALD, C.J.B.C., that the provisions of the Act requiring the Board, on or before the 15th day of March in each year, to adjust the assessments against the several classes of employers so that each class shall be assessed according to the hazard of the class, are directory only and the Board has power, after the expiration of the appointed time, to afterwards make the adjustment required by section 43 of the Act. [Affirmed on appeal.] MERRILL RING WILSON LIMITED *et al.* v. WORKMEN'S COMPENSATION BOARD. - - - - - **110, 506**