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.

CHIEF JUSTICE OF BRITISH COLUMBIA:

THE HON. JAMES ALEXANDER MACDONALD.

JUSTICES OF THE COURT OF APPEAL.

CHIEF JUSTICE:

THE HON. JAMES ALEXANDER MACDONALD.

JUSTICES:

THE HON. ARCHER MARTIN.
THE HON. ALBERT EDWARD McPHILLIPS.
THE HON. MALCOLM ARCHIBALD MACDONALD.
THE HON. WILLIAM GARLAND ERNEST McQUARRIE.

SUPREME COURT JUDGES.

CHIEF JUSTICE:

THE HON. AULAY MORRISON.

PUISNE JUDGES:

THE HON. DENIS MURPHY.
THE HON. DAVID ALEXANDER McDONALD.
THE HON. ALEXANDER INGRAM FISHER.
THE HON. HAROLD BRUCE ROBERTSON.

LOCAL JUDGE IN ADMIRALTY:

THE HON. ARCHER MARTIN.

COUNTY COURT JUDGES:

HIS HON. PETER SECORD LAMPMAN,	Victoria
HIS HON. JOHN ROBERT BROWN,	Yale
HIS HON. FREDERICK CALDER,	Cariboo
HIS HON. FREDERIC WILLIAM HOWAY,	Westminster
HIS HON. CHARLES HOWARD BARKER,	Nanaimo
HIS HON. JOHN DONALD SWANSON,	Yale
HIS HON. GEORGE HERBERT THOMPSON,	East Kootenay
HIS HON. HERBERT EWEN ARDEN ROBERTSON,	Cariboo
HIS HON. JOHN CHARLES McINTOSH,	Nanaimo
HIS HON. WALTER ALEXANDER NISBET,	West Kootenay
HIS HON. JOSEPH NEALON ELLIS	Vancouver
HIS HON. WILLIAM EDWARD FISHER,	Atlin
HIS HON. ANDREW MILLER HARPER,	Vancouver
HIS HON. CHARLES JAMES LENNOX,	Vancouver

ATTORNEY-GENERAL:

THE HON. GORDON McGREGOR GLAHOLM SLOAN, K.C.

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DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

YORKSHIRE INSURANCE COMPANY LIMITED v. THE BANK OF TORONTO AND THE ROYAL TRUST COMPANY.

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Bankruptcy—Petition for receiving order against personal representative of deceased debtor — "Debtor" — "Person" — Receiving order made— Motion to set aside—R.S.C. 1927, Cap. 11, Secs. 2 (p) and (cc) and 163 (a).

One A. E. Austin had incurred, in the course of his business, a debt owing to the Bank of Toronto amounting to $16,330.80 and died on the 22nd of October, 1931, leaving this debt unpaid. By his will he appointed The Royal Trust Company his sole executor. On the petition of the Bank of Toronto of the 17th of January, 1933, an order was made adjudging The Royal Trust Company as executor bankrupt, and appointing a receiver. A motion by the Yorkshire Insurance Company Limited, a creditor of said estate, to rescind said order, was dismissed.

Held, on appeal, affirming the order of FISHER, J., on an equal division of the Court, that a petition in bankruptcy can be made against the legal representative of a deceased debtor. (MACDONALD, C.J.B.C. and MCPHILLIPS, J.A. would allow the appeal.)

APPEAL by the applicant, the Yorkshire Insurance Company, from the order of FISHER, J. of the 6th of March, 1933, dismissing said company's application for an order that the order

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made herein on the 26th of January, 1933, whereby The Royal Trust Company as executor of Albert Ernest Austin, deceased, was adjudged bankrupt and whereby a receiving order was made against said company as executor aforesaid, be annulled. Albert Ernest Austin died at Vancouver on the 22nd of October, 1931, and by his will appointed The Royal Trust Company his sole executor. At the time of his death he owed the Bank of Toronto $16,330.80. On the 22nd of April, 1929, Austin took a five-year lease on the easterly ground floor of the Metropolitan Building in Vancouver and owned by the Yorkshire Insurance Company Limited, for which he was to pay a monthly rent of $325 for the first two years and $350 for the three years following. He carried on business on said premises as a real-estate agent under the firm name of A. E. Austin & Company until his death, and the executor continued afterwards to occupy the premises, the rent being paid up to December 31st, 1932. On the petition of the Bank of Toronto an order was made on the 26th of January, 1933, whereby The Royal Trust Company as executor of A. E. Austin, deceased, was adjudged bankrupt and a receiving order was made against said company as executor of said estate, and The Royal Trust Company was constituted custodian of the estate. On the 17th of February, 1933, The Royal Trust Company gave the Yorkshire Insurance Company Limited, notice of cancellation of the lease. On the 21st of February following the Yorkshire Insurance Company Limited, a creditor of the estate of A. E. Austin, deceased, applied for an order as aforesaid which was dismissed on the 6th of March.

Statement

The appeal was argued at Victoria on the 14th, 15th and 16th of June, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Reid, K.C., for appellant: There was no act of bankruptcy. There is no jurisdiction to declare an estate bankrupt unless the petition be filed before death: see *In re Millar* (1925), 5 C.B.R. 732; *In re Gardner* (1926), 7 C.B.R. 513; *In re Dame Joseph Levesque et al.* (1931), 12 C.B.R. 290 at p. 301; *In re De Jos Levesque et al.* (1931), 13 C.B.R. 147. In this case there was no act of insolvency. Even if the estate is not suffi-

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cient to pay the debts in full the Bankruptcy Act does not apply and the estate should be administered under the Creditors' Trust Deeds Act. Section 126 of the Bankruptcy Act measures the landlord's rights. The Yorkshire Insurance Company is entitled to damages for breach of contract under the Creditors' Trust Deeds Act. Under section 2 of the Bankruptcy Act the word "debtor" is defined (subsection (*p*)). The word "person" as defined in subsection (*cc*) is not explicit enough to extend to the definition of "debtor." Section 3 only applies to a "person," and cannot be made to include the representatives of a deceased person; it identifies the insolvent and not his representative. If he is dead the reason for bankruptcy is gone. The petition in this case was presented a year after his death. That the Act should be so construed see *North Stafford Steel, &c. Co.* v. *Ward* (1868), L.R. 3 Ex. 172 at p. 177; *Cookney* v. *Anderson* (1863), 32 L.J., Ch. 427; *Blackburn* v. *Flavelle* (1881), 6 App. Cas. 628 at 634; *Ex parte County Council of Kent and Council of Dover* (1891), 1 Q.B. 725 at p. 728; *Hendryx* v. *Hennessey* (1893), 3 B.C. 53 at p. 55; *Boyer* v. *Moillet* (1921), 30 B.C. 216 at p. 220; *In re Cuno. Mansfield* v. *Mansfield* (1889), 43 Ch. D. 12 at p. 17; *Kydd* v. *Liverpool Watch Committee* (1908), A.C. 327. No order should have been made in this case as the statement submitted by the applicant disclosed that the assets were more than double the liabilities.

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Sloan, for respondent: Insolvency has nothing to do with bankruptcy as such. He ceased to meet his liabilities and was declared bankrupt under section 3 (*j*) of the Act: see *Brown* v. *Kelly Douglas & Co.* (1923), 32 B.C. 143 at p. 145. There was jurisdiction to make the order: see *In re Dame Joseph Levesque et al.* (1931), 12 C.B.R. 290; *In re De Jos Levesque et al.* (1931), 13 C.B.R. 147 at p. 149. The definition of "person" includes the legal representatives. This is a proceeding *in rem*: see *Longue Pointe Development Co. Ltd.* v. *Eastern Trust Co.* (1931), 13 C.B.R. 217 at p. 219; *In re Millar* (1925), 5 C.B.R. 732. On the interpretation of the statute see Maxwell on Statutes, 7th Ed., 268; *In re James* (1884), 53 L.J., Q.B. 575.

Reid, replied.

Cur. adv. vult.

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3rd October, 1933.

MACDONALD, C.J.B.C.: This is an appeal from the order of FISHER, J. refusing a motion by appellant to annul a receiving order in bankruptcy of the 26th of January, 1933. The appellant is a creditor and the respondent The Royal Trust Company is the executor of the late Albert Ernest Austin, deceased, late of Vancouver, B.C., who died in May, 1931. The said order of the 26th of January, adjudged the executor bankrupt apparently because of the bankruptcy of the estate of Austin and constituted it custodian of the estate of the debtor.

The question involved is a question of law, namely, whether such an order is authorized by the Bankruptcy Act. I think it is not for reasons which I shall briefly state.

A decision on that question depends largely upon three sections of the Act and upon the interpretation of the text of the whole Act.

Section 2 of the interpretation clause of the Bankruptcy Act defines a debtor who may be made subject to its provisions as follows: "'Debtor' includes any person" described in the four subsections of the definition but makes no reference to personal representatives of the deceased debtor. Section 163, subsection 9 reads:

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9. If a debtor by or against whom a bankruptcy petition has been presented dies, the proceedings in the matter shall, unless the Court otherwise orders, be continued as if he were alive.

Section 2 (*cc*) of the Act declares that the word "person" includes a firm or partnership, an unincorporated association of persons, a corporation as restrictively defined by this section, a body corporate and politic, the successors of such association, partnership, corporation, or body corporate and politic, and the heirs, executors, administrators or other legal representative of a person.

While the definition of debtor does not specifically include an executor it has been held in several cases of first instance in which the question had come up for decision that any "person" answering to the said four classes under section 2, subsection (*cc*) includes a personal representative of a deceased person which personal representative must be regarded as a "debtor" within the definition mentioned above. The answer to this is

that such a construction of the Act is inconsistent with the whole text of the Act; that section 163, subsection 9 contemplates the continuance of bankruptcy proceedings only which have been commenced by presentation of the petition during the debtor's lifetime and there is nothing in the Act authorizing proceedings after that event unless it be the interpretation put upon the word "person" as above mentioned.

Quebec decisions appear to attach no adverse implication to the omission in our Act of section 130 of the English Act which permits of a receiving order against a personal representative. In general our Act is copied from the English Act and the draftsman must therefore have been aware of the English section which he omitted. The inference therefore is that it was intentionally omitted. See *Reg.* v. *Cleworth* (1864), 4 B. & S. 927 at p. 934. Blackburn, J. pointed out that if it appear that the class or thing which it is sought to bring within the Act was known to the Legislature at the time at which the Act was passed and that class is omitted "it must be supposed to have been omitted intentionally."

Moreover it is only by a process of interpretation or construction that "person" is taken to mean the same as "debtor." The Bankruptcy Act interferes and was intended to interfere with civil rights and remedies and therefore if the Legislature intended to make a change in these rules and remedies, as it had the right to do, the rules of construction require that such change should be made by clear and express words or by necessary intendment. The place therefore to look for these is in the definition of "debtor" not in the definition of "person."

Had it been intended to bring a person not specifically described as a debtor within the Act surely after omitting the English section the Legislature would have taken pains to express the intention otherwise in plain and unambiguous language. To me it seems somewhat anomalous that the solvent executor should be declared a bankrupt because his testator's estate was bankrupt. I can understand bankruptcy proceedings being continued when validly commenced as the statute provides but to deduce from this that such proceedings can be commenced without an explicit provision in the Act authorizing

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such proceedings is difficult to imply from the statute which is so frankly personal in respect of a debtor when still alive.

Since there are no authorities on this question save those of Courts of first instance I must decide this case very largely upon the statute giving due attention to the decision of such an eminent judge as the late Chief Justice Sir Francois Lemieux in *In re Dame Joseph Levesque et al.* (1931), 12 C.B.R. 290, where he held that such an order might be made. In *Longue Pointe Development Co. Ltd.* v. *Eastern Trust Co.* (1931), 51 Que. K.B. 400, the question was raised but the case was decided upon another point, a point of practice.

In Ontario, Fisher, J. decided in *In re Gardner* (1926), 7 C.B.R. 513, that an order could not be made against the personal representative of one already deceased and in *In re Millar* (1925), 5 C.B.R. 732, an *interim* order was made by the late Mr. Holmested, K.C., Registrar of the High Court of Justice of Ontario against a personal representative of a deceased person with some hesitancy.

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I am, therefore, driven to the conclusion that the learned judge appealed from exceeded his jurisdiction in making the order.

There is another objection to the order founded on section 4, subsection 3 (*b*) of the Act. The debt on which the petition was founded has not been shewn to have occurred within six months of the presentation of the petition. It is true that the petition shews an indebtedness founded on a statement by the respondent made within six months of its presentation that the estate was unable to pay its debts. Section 3 of the Bankruptcy Act on which the petition is grounded reads as follows:

> 3. A creditor shall not be entitled to present a bankruptcy petition against a debtor unless . . .
>
> (*b*) the act of bankruptcy on which the petition is grounded has occurred within six months before the presentation of the petition.

But the statement of the obligations upon which this declaration was made contains no dates to shew when default occurred. The burden of proof of the act of bankruptcy within six months rests upon the petitioner. The failure to prove this fact alone may defeat the order appealed from. *Brown* v. *Kelly Douglas & Co.* (1923), 32 B.C. 143; 3 C.B.R. 812; 2 D.L.R. 738; 1 W.W.R. 1340.

It may, of course, be contended that the declaration of insolvency within six months makes the insolvency occur within that time, but I am doubtful as to whether that is sufficient. I am inclined to think that section 4, subsection 3 (*b*) precludes the granting of the petition unless the facts upon which the declaration was founded were set forth and fell within the six months. But, however this may be, I rest my decision upon the first question discussed above that a petition cannot be granted against a personal representative after the death of the debtor.

The appeal should, therefore, be allowed.

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

MARTIN, J.A.

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

MCPHILLIPS, J.A.

MACDONALD, J.A.: The Royal Trust Company is the executor of the estate of A. E. Austin, deceased. The deceased was indebted to the Bank of Toronto (unsecured creditor) in the sum of $16,330.80. An unsuccessful attempt was made, by demand on the executors, to secure payment. Thereupon it filed a petition in bankruptcy to have The Royal Trust Company *qua* executor of the Austin estate adjudged bankrupt and for a receiving order. It was alleged in the petition that the estate was insolvent—assets amounting to $91,836 and liabilities to $47,886 with contingent liabilities of $108,800. An order was made on January 26th, 1933, adjudging The Royal Trust Company as executor bankrupt and appointing it custodian of the estate.

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The appellant Yorkshire Insurance Company is also a creditor of the Austin estate. On April 23rd, 1929, it leased to A. E. Austin (he died October 22nd, 1931) certain premises for five years at a fixed rental varying in amount at different periods. After the bankruptcy order of January 26th, 1933, *viz.*, on February 17th, 1933, The Royal Trust Company, taking advantage of it, served notice of cancellation of the lease and gave up possession of the premises. Appellant, preferring that the estate should be wound up under the Administration Act containing more favourable provisions, refused to agree to cancellation on the ground that the order of January 26th, 1933,

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was made without jurisdiction and launched a motion to set it aside. The application was dismissed and from that order this appeal is brought. The grounds of appeal are (1) that the material filed with the petition did not disclose acts of bankruptcy and (2) that the application to adjudge the respondent The Royal Trust Company as executor bankrupt could not be entertained inasmuch as the petition was filed after the death of Austin. The petition, it is submitted, must be lodged before death.

On the first point I have no doubt that an act of bankruptcy was committed. There was inability to meet obligations as they matured having regard to the financial position of the estate.

The second point was considered by Mr. Justice Fisher of the Ontario Supreme Court in *In re Gardner* (1926), 7 C.B.R. 513. He held that a receiving order cannot be made against personal representatives of a deceased debtor unless the petition is presented prior to the debtor's death. By section 68 (9) of the Bankruptcy Act if the debtor dies after presentation of the petition the proceedings shall, unless the Court otherwise orders, be continued as if he were alive and by rule 84 if the debtor dies before service the Court may order it served on the personal representative, or on such other person as the Court may think fit. This section and rule do not indicate—quite the contrary—that it is repugnant to the Act to administer in bankruptcy the estate of a deceased debtor. While a petition is directed against a person it is the property or estate that is subject to the provisions of the Act. There is no sound reason for holding when, if a petition is launched before death, proceedings may be carried on afterwards that without this formality the debtor's estate after death is no longer subject to the Act.

MACDONALD, J.A.

Mr. Justice FISHER thought that because our Act is largely copied from the English Act and a section of the English Act (1914, Sec. 130, Cap. 59) contains an express provision enabling a creditor of a deceased debtor to present a petition in bankruptcy it follows that Parliament did not intend to sanction such a proceeding in this country. That does not necessarily follow. I agree with the views of Gibsone, J. as expressed in *In re De Jos Levesque et al.* (1931), 13 C.B.R. 147, where in

declining to follow Fisher, J. in *In re Gardner, supra,* he said (p. 153):

I respectfully think that to conclude a negative intention to exist merely because an omission has been made is a method not entirely convincing, but I need not deal with the question on that ground, because there is what I find to be a sufficient explanation quite at hand, namely: there is nothing in the English Bankruptcy Act, 1914, to authorize it to be said that the expression "debtor" or "person" includes heirs and legal representatives. The English Interpretation Act 52-53 Vict., ch. 63, sec. 19 defines "person" to include, unless the contrary intention appears, "any body of persons corporate or unincorporate" no mention of heirs or legal representatives. So for there to be under the English Act a recourse against the debtor's legal representatives it was (I suppose deemed) necessary to legislate expressly as by sec. 130. But in Canadian legislation the situation was quite otherwise. The Interpretation Act had already provided that "person or any word or expression descriptive of a person" includes the legal representatives, and 2 (*cc*) of the Act repeated much the same rule. This would indicate that the Canadian statute did not require that the equivalent of sec. 130 of the English Act be incorporated into it; the interpretative legislation produced the same result.

MACDONALD, J.A.

For the reasons stated I am of opinion that the receiving order may be made against the beneficiary heir. With deference and regret, I am unable to accept as the law, the declaration in *In re Gardner* (1926), 7 C.B.R. 513.

I have fully considered Mr. *Reid's* submission in respect to the possible bearing of Provincial legislation affecting insolvent estates: also the many sections of the Bankruptcy Act which he submitted supports his view but find that I cannot agree. No useful purpose would be served by a detailed examination.

I would dismiss the appeal.

The Court being equally divided the appeal was dismissed.

Solicitors for appellant: *Reid, Wallbridge, Gibson & Sutton.*
Solicitors for respondent: *Farris, Farris, Stultz & Sloan.*

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Consd R. v. Langlois 62 CCC (2d) 559 Que. S.C.

Followed R. v. A.B. 50 CR (3d) 247 Ont. C.A.

REX v. ROADHOUSE.

Criminal law—Assault with intent to steal—Evidence—Doctor in attendance on accused when under arrest—Whether person in authority—Admissibility of confession—Inducement.

The accused with a companion attempted to hold up a garage office with revolvers. One of the men in the office grappled with the accused and with the assistance of others who arrived quickly on the scene, beat him up so badly that the police, in answer to a call, after arresting him, took him to a hospital. The doctor, while treating him asked the accused "if he had been hungry that he had to do this: if he was so up against it that he had to do such a thing." Accused said "No, I wouldn't be here if my partner hadn't walked out on me" and he referred to his capture as "the biggest catch of the year." In saying "good-bye" to the doctor he said he would see him perhaps "in ten years' time." The doctor's evidence of the accused's statements was allowed in and accused was convicted on a charge of assault when armed with intent to steal.

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

Per MACDONALD, J.A.: That in the circumstances the doctor cannot be regarded as a person in authority and his words to the accused cannot be interpreted as an exhortation, admonition, promise or threat amounting to an inducement. The words fairly interpreted would not induce a confession. The doctor's evidence of the confession was therefore admissible.

APPEAL by accused from his conviction in Vancouver on the 29th of March, 1933, on a charge of assault with intent to rob, under section 446 of the Criminal Code. On the 2nd of January, 1933, at about 9.30 p.m., one Loretto, the owner of the Eagle Taxi at 515 Davie Street, Vancouver, with one Crosetti, were in the back room of the taxi office, Loretto lying down, when the accused and a companion walked into the room, both masked, and accused's companion pointed a revolver at Crosetti and told him to "Stick 'em up." Crosetti held up his hands and at the same time the accused pointed a revolver at Loretti, telling him to "Stick 'em up." Loretti made a sudden dive at accused and in the scuffle that ensued the revolver went off, wounding Loretti in the shoulder. Accused's companion then ran away and Crosetti helped Loretti. Three men who were on

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the premises and upstairs then came into the room, one of them knocking the revolver out of accused's hands and they then gave the accused a bad beating. In the meantime someone had called for the police, and when they arrived the affray had been carried into the street. The accused was then handcuffed and the police took him to the General Hospital. On the way to the hospital accused was warned by the police that anything he said would be used in evidence against him. On arrival at the hospital another revolver was found on the accused, and on going into the emergency ward the doctor attending asked him "if he had been hungry, that he had to do this" to which he replied that he was not, and proceeded to say "I wouldn't be here if my partner hadn't walked out on me" and later in discussion with the doctor he mentioned something about "this being the greatest catch of the year" and "he guessed he would get lashes for this." He was sentenced to seven years in the penitentiary.

Statement

The appeal was argued at Victoria on the 7th of June, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Nicholson, for appellant: The jury disagreed on the first trial. The evidence of the doctor who first attended the accused should not have been admitted. There should first have been an inquiry as to the admissibility of the evidence. He was a "person in authority": see Phipson on Evidence, 7th Ed., 256. Even in the case of someone in the presence and with the assent of those in authority an inquiry must be had: see Roscoe's Criminal Evidence, 15th Ed., 44; *Rex* v. *Kingston* (1830), 4 Car. & P. 387; *Reg.* v. *Garner* (1848), 3 Cox, C.C. 175; *Rex* v. *Royds* (1904), 10 B.C. 407. They should have proved that there was warning before the doctor's evidence was admitted. He was in custody when treated by the doctor: see *Rex* v. *Kay* (1904), 11 B.C. 157; *Rex* v. *Price* (1931), 55 Can. C.C. 206 at pp. 216-7 and 217-8; *Reg.* v. *Thompson* (1893), 17 Cox, C.C. 641 at p. 645. Assuming the doctor was one in authority it must be shewn the statements were given voluntarily. The warning should be disregarded in view of the condition of the accused. After accused's statements are admitted the police officer's evidence as to the circumstances under which it was

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given cannot validate the judgment: see *Rex* v. *Seabrooke* (1932), 58 Can. C.C. 323 at p. 327.

O'Brian, K.C., for the Crown: My submission is that the doctor was not "one in authority": see *Ibrahim* v. *Regem* (1914), A.C. 599; *Rex* v. *Voisin* (1918), 1 K.B. 531; *Rex* v. *Hoo Sam* (1912), 19 Can. C.C. 259. Any inducement in the nature of a favour or a threat vitiates the evidence. But here it was free and voluntary: see Archbold's Criminal Pleading, 28th Ed., pp. 400 and 404; Roscoe's Criminal Evidence, 15th Ed., 44. That the doctor was not in authority see *Sankey* v. *Regem* (1927), S.C.R. 436; *Rex* v. *Rodney* (1918), 30 Can. C.C. 259; *Rex* v. *Meloche* (1932), 58 Can. C.C. 362 at p. 365; *Prosko* v. *Regem* (1922), 37 Can. C.C. 199 at p. 201; *The State* v. *Treanor* (1924), 2 I.R. 193 at p. 208; *Regina* v. *Windsor* (1864), 4 F. & F. 360; *Rex* v. *Gibbons* (1823), 1 Car. & P. 97; *Moore's Case* (1852), 2 Den. C.C. 522; Phipson on Evidence, 7th Ed., 257.

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Nicholson, in reply, referred to *Rex* v. *Cook* (1914), 22 Can. C.C. 241; *Regina* v. *Bates* (1860), 2 F. & F. 317; *Rex* v. *Baschuk* (1931), 56 Can. C.C. 208 at pp. 209-10.

Cur. adv. vult.

3rd October, 1933.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: I would dismiss the appeal from conviction, and also the appeal from sentence.

MARTIN, J.A.

MCPHILLIPS, J.A.

MARTIN and MCPHILLIPS, JJ.A. agreed in dismissing the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: The accused was charged that, being armed, he assaulted complainant with intent to steal. The complainant grappled with accused and with the assistance of others beat him so severely that a police officer arriving in answer to a call, after arresting him, took him to the hospital for treatment. While still under arrest he was placed under the care of Dr. Shaw for emergency treatment, police officers in the meantime remaining in an adjoining room a few feet away. The doctor while treating him, acting on a sympathetic impulse (knowing from others that a hold-up occurred) asked accused " if he had

been hungry that he had to do this; if he was up against it, that he had to do such a thing." Accused said "No" and added, "I wouldn't be here if my partner hadn't walked out on me." Accused continued to talk, referring to his capture as "the biggest catch of the year" and upon saying "Good-bye" to the doctor said that he would see him perhaps in "ten years' time." These statements are suggestive of guilt and the point of law is raised that this evidence was inadmissible because the accused, being in custody and handed over temporarily for treatment while police officers remained in close attendance (without however so far as the evidence shews hearing the statements), the doctor must in law be regarded as a person in authority. The Crown might very well have established affirmatively that the police officers did not hear this conversation thus removing a doubt that might readily be entertained.

We are not concerned with the point as to whether or not the preliminary ingratiating words used by the doctor, leading the accused to speak, constituted an inducement if he intervened without authority. However, if it should be necessary to do so I would hold that the words used cannot be interpreted as an exhortation, admonition, promise or threat amounting to an inducement. The words fairly interpreted would not induce a confession. Inducement usually implies temporal benefit.

MACDONALD, J.A.

Ordinarily a person in authority is one engaged in the "arrest, detention, examination, or prosecution" of the accused. It may be too someone concerned in the arrest, detention, etc., *e.g.*, the captain of a ship or the master or mistress of an accused person. (Phipson on Evidence, 7th Ed., 257.) See also *Regina* v. *Windsor* (1864), 4 F. & F. 360. The wife of a constable is not a person in authority (*Rex* v. *Hardwick* (1811), 1 Car. & P. 98 *n.*). Dr. Shaw stood in the same position as the wife of an arresting officer if the accused has been taken to his home for first aid treatment at her hands administered under the circumstances disclosed in this case. The doctor was not deputized by the police to act on their behalf nor was he performing any function in connection with the administration of justice. Nor can any significance be attached to the place where the treatment

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was given nor to the professional character or otherwise of the ministrant.

In *Rex* v. *Kingston* (1830), 4 Car. & P. 387, a statement made by a prisoner to a surgeon was excluded but only, I take it, because he assumed the attitude of one in authority, self constituted so to speak, and something in the nature of an inducement was held out by the use of the words "You are under suspicion of this and you had better tell all you know." Again in *Reg.* v. *Garner* (1848), 3 Cox, C.C. 175 a confession to a surgeon preceded by the exhortation (also suggesting assumed authority) "It will be better for you to tell the truth" was excluded. See also *Rex* v. *Gibbons* (1823), 1 Car. & P. 97.

I would hold that the evidence was admissible. In any event after perusal of the evidence I am convinced that no substantial wrong occurred and that the appeal should be dismissed.

Appeal dismissed.

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Elections — Provincial — Nomination of candidates—Returning officer's receipt for nomination-paper—Effect of—Validity of nomination-paper signed by voters who had signed nomination-paper previously received —R.S.B.C. 1924, Cap. 76, Secs. 40, 51, 52, 53, 54 and 65.

The returning officer of Lillooet Electoral District issued a proclamation requiring the presence of voters of that district at 12 o'clock noon on October 12th, 1933, at the place fixed for nomination of candidates for nominating and electing one person to the Legislature. Previous to the time for nomination, one Murray and one Carson delivered their nomination-papers to the returning officer and the provisions of sections 53 (2) and 65 of the Provincial Elections Act were complied with. Shortly before the time fixed for nominations the applicant Hartley and one Smith came together to the place fixed for nominations and delivered their nomination-papers to the returning officer who first checked over Smith's papers, took the declaration under section 65 of the Act and gave Smith a receipt pursuant to section 53 (2) and an acknowledgment pursuant to section 65. The returning officer then proceeded to examine Hartley's papers, but had not finished at 12 o'clock, when pursuant to section 51 of the Act he read the proclamation, the writ of election and the three nomination-papers which he had received and for which he had given receipts, and then proceeded with the examination of Hartley's papers. After certain objections thereto were corrected he took Hartley's declaration pursuant to said section 65, accepted the nomination-paper and gave Hartley a receipt pursuant to section 53 (2) and an acknowledgment pursuant to section 65, and then read Hartley's nomination-paper pursuant to section 51. The returning officer then commenced to check over the four nomination-papers, and just before 1 o'clock one of the candidates, Murray, handed him written objections to Hartley's nomination-paper. The returning officer disallowed all the objections except one, namely, that four of the assentors on Hartley's nomination-paper were also on Smith's nomination-paper contrary to section 52 (2) of the Act. Smith's nomination-paper having been received first the returning officer declared Hartley's nomination-paper was invalid. On an application by Hartley for a writ of *mandamus* to restore his name as a candidate on the grounds (1) That after giving the receipt provided for by section 53 (2) the returning officer could no longer enquire into the validity of the nomination-papers, and (2) the returning officer should have taken evidence or enquired so as to ascertain when the four assenting voters actually signed Hartley's and Smith's nomination-papers.

Held, that notwithstanding the receipt, a candidate's nomination-paper may

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be reconsidered after nominations are closed. It is his duty to see that the nomination-paper is in order and if he fails in this it may be rejected.

Held, further, that the returning officer was right in holding that the four assenting voters, being already on Smith's nomination-paper, could not be considered as assentors on Hartley's nomination-paper, and as without these four assenting voters Hartley would only have nine assenting voters, while the Act requires ten, his nomination-paper was not valid.

Statement

APPLICATION for a writ of *mandamus* directed to the returning officer of Lillooet Electoral District for the Provincial Elections, compelling him to place on or restore the name of James Curtis Hartley as a candidate for election. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. at Vancouver on the 20th of October, 1933.

Gonzales, for Hartley.
Collins, for the Returning Officer.
O'Halloran, for G. M. Murray.

23rd October, 1933.

Judgment

ROBERTSON, J.: On the 16th of October, 1933, an order was made in this Court that *Alexander Ogston,* returning officer for Lillooet Electoral District for the Provincial Elections, to be held the 2nd of November, 1933, should shew cause why a writ of *mandamus* should not issue, directed to him, compelling him "to place on or restore" the name of James Curtis Hartley as a candidate running in the said district in the said election.

Pursuant to section 40 of the Provincial Elections Act, R.S.B.C. 1924, Cap. 76 (hereinafter referred to as the Act) *Ogston,* as returning officer of the said district issued his proclamation requiring the presence of the voters of that district at 12 o'clock noon on the 12th of October, 1933, at the place fixed for the nomination of candidates for the purpose of "nominating and electing a person to represent them in the Legislature" of the Province.

The mode of nomination is set forth in sections 52 and 53 of the Act.

Section 52 requires a nomination-paper "subscribed" by two registered voters as proposer and seconder and in the case of Lillooet Electoral District ten other registered voters as assent-

ing to the nomination and that the addresses and occupations of all such voters shall be stated therein as shewn by the list of voters for the district; and further provides that the nomination-paper may be delivered to the returning officer at any time between the date of the proclamation and 1 o'clock in the afternoon of nomination day. It further provides that each candidate shall be nominated by a separate nomination-paper "but the same voters or any of them may subscribe as many nomination-papers as there were members to be elected" and as there was only one member to be elected in Lillooet Electoral District the voters could only lawfully subscribe the nomination-paper of one candidate.

Subsections (1) and (2) of section 53 read as follow:

(1) No nomination-paper shall be valid nor shall it be acted on by the returning officer unless it is accompanied by the consent in writing of the person therein nominated, except when the person is absent from the district in which the election is to be held, in which case the fact of his absence shall be stated in the nomination-paper.

(2) The returning officer shall give his receipt for each valid nomination-paper, and the receipt shall be sufficient evidence of the production of the nomination-paper and of the consent of the person nominated.

Judgment

On the 10th and 11th days of October, 1933, respectively, one G. M. Murray and E. C. Carson delivered their nomination-papers to the returning officer, took the declaration required by section 65 of the said Act and received their receipts pursuant to said subsection (2) of section 53 and their acknowledgments pursuant to said section 65.

On the 12th of October, 1933, at 11.30 a.m. Hartley, the applicant herein, and J. M. Smith went together to the place fixed for the nomination of candidates and delivered their nomination-papers to the returning officer, who then, first, considered Smith's nomination-paper, checked over the names on it with the voters' list and the original affidavits made by the voters thereon to verify the signatures, took the declaration provided by said section 65 and gave Smith a receipt pursuant to subsection (2) of section 53 and an acknowledgment pursuant to said section 65. The returning officer then commenced to examine Hartley's nomination-paper and he had not finished by 12 o'clock whereupon, pursuant to section 51 of the Act, he read the proclamation therein mentioned, the writ of election and the

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three nomination-papers which he had then received and for which he had given receipts and then proceeded with the examination of Hartley's nomination-paper which at that time had on it the signature of a mover and seconder and twelve other voters as assentors. The returning officer objected that the addresses and occupations of four of the assenting voters were not "stated" in the nomination-paper as required by section 52 whereupon J. M. Smith then subscribed Hartley's nomination-paper and "stated" therein his address and occupation and two of the four voters objected to, came to the place of nomination and there wrote in their addresses and occupations. The other two voters were not available and the returning officer refused to allow Hartley to fill in their address and occupation. However, as the nomination-paper then had on it eleven assenting voters who appeared to be there properly, he took Hartley's declaration pursuant to said section 65, accepted the nomination-paper and gave Hartley a receipt pursuant to section 53 (2) and an acknowledgment pursuant to said section 65, and then read Hartley's nomination-paper to the voters as required by section 51. Assuming that the returning officer was wrong in refusing to allow Hartley to write in the names and occupations of the two voters above mentioned there would be thirteen assenting voters on his nomination-paper while the Act only required ten.

Thereafter the returning officer commenced to check over the four nomination-papers and at 12.59 p.m., on the 12th of October, 1933, while actually engaged in checking Smith's nomination papers, was handed written objections to Hartley's nomination-paper by one of the candidates, G. M. Murray. The nominations closed at 1 p.m. on that day and the returning officer then finished checking Smith's nomination-paper and then proceeded to check Hartley's and consider Murray's objections thereto. He disallowed all the objections except one, *viz.*, that four of the assentors on Hartley's nomination-paper were also on Smith's nomination-paper contrary to subsection (2) of section 52, which is as follows:

(2) Each candidate shall be nominated by a separate nomination-paper; but the same voters, or any of them, may subscribe as many nomination-papers as there are members to be elected.

The returning officer held that these four voters could not be

assentors to both Smith's and Hartley's nomination-paper and as Smith's nomination-paper had been received first and no objection taken thereto, the voters assenting to Smith's nomination must be taken to have exercised their rights, and could not thereafter be considered as assentors to Hartley's nomination and therefore he declared Hartley's nomination-paper invalid and the three remaining persons who filed nomination-papers to have been nominated.

The applicant submits:

(1) That after giving the receipt provided by subsection (2) of section 53 the returning officer could no longer enquire into the validity of the nomination-papers and should have acted upon the same.

(2) The returning officer should have taken evidence, or enquired, so as to ascertain when the four assenting voters actually signed Hartley's and Smith's nomination-papers and should have held that the assent of each of the four voters was good on the nomination-paper which he had signed first; and that he was wrong in holding the four assenting voters had finally exercised their rights and could not be assenting voters to Hartley's nomination.

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(3) That the *onus* rested on Murray to satisfy the returning officer as to which of the two nomination-papers each of the said assenting voters had signed first.

Counsel for the returning officer and Murray submit, amongst other points, that the receipts did not prevent the returning officer further considering all applications after nomination closed as provided by section 54, that his decision was right and that in any event, when deciding that Hartley's nomination-paper was invalid, he was exercising judicial functions and therefore his action is not open to question in *mandamus* proceedings.

As to the first point, the applicant's counsel relies strongly on subsections (1) and (2) of section 53 of the Act, *supra,* and says the returning officer is to only give a receipt for a "valid" nomination-paper and that once he has passed upon it he is *"functus officio"* or is "estopped" from afterwards reconsidering the same and that no matter how obvious to the returning officer it is that

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the nomination-paper was not valid, he must still act upon it, that he must accept as valid a nomination-paper which he afterwards knows to be invalid. Now subsection (2) of section 53, in my opinion, declares exactly the effect and value of the receipt, *viz.*, that it shall be sufficient evidence of the "production" of the nomination-paper and of the consent of the person nominated. It will be noticed that it is sufficient evidence of the "production" of the nomination-paper. If it had been intended that the receipt was to have the effect contended for, surely there would have been some section in the Act stating that the receipt should be conclusive evidence that a valid nomination-paper had been delivered to the returning officer or that it was binding on the returning officer.

Again section 51 requires the returning officer to read in an audible voice at the hustings where the returning officer by his proclamation, issued pursuant to section 42 of the Act, has required the presence of the voters to nominate a candidate, all "valid" nomination-papers which he has received and all further valid nomination-papers as he receives them. It would be evident that in case of the nomination-papers received just before 1 o'clock the returning officer's examination could not be a thorough one and yet the candidate would have the right to a receipt under subsection (2) of section 53. Counsel for the applicant says the returning officer could, if he liked, withhold the giving of receipts until after nominations had closed and he had satisfied himself that the nomination-papers were in order but subsection (2) above mentioned does not say so and as nomination-papers may be filed at any time between the date of the proclamation and 1 o'clock on nomination day it seems to me that the intention must have been that the receipt must be given at the time of the nomination-paper being handed to the returning officer. It could not have been intended that a candidate, who delivered his nomination-paper to the returning officer ten days before election, should have nothing to shew for it and should have to wait until nominations were closed.

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The returning officer must read the whole of the nomination-papers to the voters present who then know the names of each of the candidates, and the names and addresses and occupations of

the proposer, seconder and the ten assenting voters. What is the purpose of this? Surely it was to lay before the voters the facts disclosed by the nomination-papers and to give them an opportunity of objecting to any nomination-paper. It is true the Act does not contain any section giving the power to anyone to object; but if the voters are not to have this power why should the returning officer read out the nomination-papers to them? Why in such case should the Act not provide that the returning officer should announce only that a certain person had been nominated? Counsel for the returning officer and Murray submit that section 54 clearly shews that the returning officer has the right of reconsidering all nominations received by him and I agree with this. The section is as follows:

54. At the expiration of the time appointed for the nomination of candidates the returning officer shall declare the nomination closed, and, after satisfying himself of the validity of the nomination-paper or papers received by him, shall declare in an audible voice the names of the several candidates who have been nominated, and he shall deliver to every candidate or agent of a candidate applying for the same a duly certified list of the names of the several candidates.

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Now the returning officer has to declare the names of the candidates nominated "after satisfying himself of the validity of the nomination-papers received by him." This would include all nomination-papers for which receipts had been given and all other nomination-papers. If it had been intended that he should only consider nomination-papers for which he had not given a receipt, in my opinion, some words would have been inserted in the section to make this clear. Another point made by the applicant's counsel is that the construction suggested by counsel for the returning officer and Murray would work a great hardship on a candidate who had filed his nomination-paper, say a week before nomination, had received the receipt above mentioned after the returning officer had made a thorough examination of the nomination-paper and was not present on nomination day when, if objection were taken to his nomination-paper, he might have remedied the defect. The candidate is supposed to know the law and if I am right in my construction of the Act then he must know that notwithstanding the receipt, his nomination-paper may be reconsidered after nominations are closed, that it is his duty to see that his nomination-paper is

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in order and that if he fails in this, it may be rejected; and a further answer to this submission is that it is not in the public interest that anyone should be a candidate at the election who has not in fact filed his nomination-paper in accordance with the Act.

In my opinion then the returning officer was right in reconsidering the four nomination-papers and Murray's objection to Hartley.

I shall assume—without deciding—that the only thing wrong with Hartley's application was that four of his assentors were on Smith's nomination-paper. It is suggested that some *onus* lay upon Murray to shew when these assentors signed the two nomination-papers. There is nothing in the Act covering this point and in any event nothing that Murray did, or did not do, could affect the validity of the returning officer's decision. The applicant says that the returning officer should have held an inquiry to ascertain when these four assentors signed Hartley's and Smith's nomination-papers. There is nothing in the Act which requires him to hold an inquiry of this sort. The Act

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does not give him any power to summons witnesses or otherwise to take evidence. No one suggested at the time that he should follow this course nor that any of the four assentors on Smith's nomination-paper had signed Hartley's first. Cole, who made an affidavit stating he was present during the discussion of the objections to Hartley's nomination-paper says he signed Hartley's paper first of all; but he did not at the time make this known to the returning officer so the only thing the returning officer had to go upon then was the fact that the two nomination-papers were dated the same day and there were the same four assenting voters on each. I think the returning officer has to satisfy himself of the validity of the nomination-papers pursuant to section 54 of the Act by an examination of the nomination-papers themselves. There is not a great deal of time between nomination day and election day and the Act discloses that there are a great many things that have to be done, after nomination day, by way of preparation for the election, *e.g.*, ballots have to be printed and forwarded to the various returning officers in outlying parts of the Province and lists of the

candidates nominated have to be sent to the said returning officers so that the absentee voters may exercise their rights. If the returning officers in two or three constituencies were to spend some time in considering objections, which involved something other than consideration of the nomination-papers themselves, and the taking of evidence, it might be that owing to the absence of witnesses or other causes the hearing could not be brought until it would be too late to comply with the provisions of the Election Act and this might have the effect of invalidating the whole election. It seems to me that the intention was that the returning officer should consider the nomination-papers alone.

There was nothing on Hartley's and Smith's nomination-papers to shew when the four assentors signed. Now the returning officer had not only received Smith's nomination-paper but after 12 o'clock on nomination day had read Smith's nomination-paper to the voters present and it was not until after this that he finally accepted Hartley's application and read it to the voters. It seems to me that after Smith's application was thus publicly read to the voters the returning officer was right in the position which he took, *viz.*, that those four assenting voters, common to both nomination-papers, had exercised their right under section 52 by their subscription, etc., to Smith's nomination-paper and that their subscription as assenting voters would not be legal to any other nomination-paper. There was evidence before me to shew that the four voters in question signed Hartley's nomination paper prior to the 10th of October and no evidence as to when they signed Smith's. Of course none of this evidence was before the returning officer. I am of opinion therefore that the returning officer was right in holding that the four assenting voters, being already on Smith's nomination-paper, could not be considered as assentors on Hartley's nomination-paper and as without these four assenting voters Hartley would only have nine assenting voters, while the Act requires ten, his nomination-paper was not valid. The application must be dismissed.

Judgment

Application dismissed.

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REX v. J. G. WU *ALIAS* WU CHUCK.

Criminal law—Wounding with intent to commit murder—Trial—Evidence—Criminal intent—Provocation—Charge to jury—"Substantial wrong"—Appeal—Criminal Code, Sec. 264 (b).

On the trial for wounding with intent to commit murder, the complainant stated that at about a quarter to 6 o'clock on the evening of November 6th, 1932, after turning south on Jackson Avenue from Hastings Street, he turned and saw accused following him. He then walked faster but as accused was catching up to him he ran diagonally across the road in a south-easterly direction. When he reached the curb on the east side of the road the accused caught up to him and fired a shot at him with a revolver. Accused then took $90 from his pocket and after firing two more shots at him ran across a vacant lot in a north-easterly direction, and on emerging on Hastings Street he was recognized by two witnesses with a revolver in his hand. Two other Crown witnesses (both young men) were standing on the south-west corner of Hastings Street and Jackson Avenue, when they saw two Chinamen run from the north-west corner of Pender Street and Jackson Avenue (Pender Street being one street south and parallel with Hastings Street) across Jackson Avenue in a north-easterly direction, followed by a third Chinaman who was calling to them in Chinese and gesticulating with his arms, and when the two men reached the curb on the east side of Jackson Avenue the hindmost of the two men in front turned and fired a shot at the man following, who fell. He then "paused" and fired two more shots at him and he and his companion then ran north-easterly across the vacant lot. The accused attempted to prove an *alibi* by several Chinese witnesses who swore he was in Victoria from the 2nd until the 12th of November, 1932. The accused was convicted.

On appeal the conviction of MCDONALD, J. was affirmed by an equal division of the Court.

Per MACDONALD, C.J.B.C.: I think there was misdirection. The learned judge charged the jury as follows: "If you believe that the accused did what the witnesses say was done by the man who assailed the complainant, then he would be guilty of the charge as laid." The account given by the two witnesses (standing at the corner of Hastings Street and Jackson Avenue) is so diametrically opposed to that given by the complainant that the charge quoted above was an error in a vital point in the case and there should be a new trial.

Per MARTIN, J.A. (MCPHILLIPS, J.A. agreeing): I am abundantly satisfied that no miscarriage of justice, permitting an Appellate Court to interfere under section 1019 of the Criminal Code was caused by anything the judge said, and I will go further and say that, in my opinion, the charge as a whole gave the jury which condemned the prisoner all information necessary for the proper discharge of their duty, and the appeal should be dismissed.

Per MACDONALD, J.A.: The learned judge said: "If you believe that the accused did what the witnesses say was done by the man who assailed the complainant, then he would be guilty of the charge as laid." This meant that if the jury accepted the evidence that the complainant was really the aggressor the accused was guilty of the crime charged regardless of any question of intent. It was for the jury to say under proper instructions whether or not intent to murder existed and failure to instruct them on this point constituted misdirection. There should be a new trial.

APPEAL by accused from his conviction on a charge of unlawfully wounding one Wong Toy with intent to commit murder. Wong Toy's evidence was that at about a quarter to 6 o'clock on the evening of the 6th of November, 1932, he was walking east on Pender Street in Vancouver and on reaching Gore Avenue he turned north towards Hastings Street. As he was walking on Gore Avenue he saw the accused standing in front of the Reco Hotel. On reaching Hastings Street Wong Toy turned east and continued to Jackson Avenue where he turned south along the sidewalk on the west side of Jackson Avenue. After going a few yards on Jackson Avenue he turned and saw accused following him. He walked faster, but accused was gaining on him and he then ran in a south-easterly direction across the road, and on reaching the curb on the east side of Jackson Avenue the accused caught up to him and fired a shot at him. Accused then took $90 from Wong Toy's pocket, then fired two more shots at him and ran in a north-easterly direction across the vacant lot and behind Ferrera Court (a large building on the south-east corner of Hastings Street and Jackson Avenue). As accused emerged between two sign-boards on the south side of Hastings Street he was seen by two cousins of the injured man, and they saw him putting a revolver into his pocket, and two negroes who were standing near the said sign-boards saw the accused coming out on to the Hastings Street sidewalk. At the time of the shooting two young men were standing at the south-west corner of Hastings Street and Jackson Avenue and their story was that they saw two men running from the corner of Pender Street and Jackson Avenue in a north-easterly direction across Jackson Avenue, followed by a third man a few yards behind who was yelling in Chinese and waving his hands. This man was catching up on the men in front, one of whom on reaching the curb

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on the east side of Jackson Avenue turned and fired three shots at the man who was following, the two men in front then running away in a north-easterly direction across the vacant lot and behind Ferrera Court. The defence was an *alibi,* the defendant claiming that he went to Victoria on the 2nd of November, where he remained until the 12th of November when he sailed for China. A number of Chinese witnesses corroborated the story that he was continuously in Victoria from the 2nd until the 12th of November, 1932. Accused was arrested in the Orient and taken back to Vancouver for trial.

The appeal was argued at Victoria on the 22nd and 23rd of June, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

J. W. deB. Farris, K.C., for appellant: The Crown had four sets of witnesses. The wounded man, a Chinaman and two cousins swore that they identified the accused. Then there were two negroes who saw a Chinaman emerge on to Hastings Street close to the scene of the shooting, also, two young men, who were standing at the corner of Hastings Street and Jackson Avenue, tell a totally different story from the injured man as to what happened just prior to the shooting. The defence is an *alibi.* The accused says he went to Victoria on the 2nd of November where he sailed for China. In this he is corroborated by six Chinamen. We complain of the charge in that the jury was not properly instructed on self-defence and provocation. Provocation was not put to the jury at all: see *Rex* v. *Wong On and Wong Gow* (1904), 10 B.C. 555 at pp. 559-60; *Rex* v. *Scherf* (1908), 13 B.C. 407 at pp. 410 and 412; *Rex* v. *Jagat Singh* (1915), 21 B.C. 545; Russell on Crimes, 8th Ed., Vol. I., p. 808; *Reg.* v. *Cruse* (1838), 8 Car. & P. 541 at 542; *Rex* v. *Flannery* (1923), 3 W.W.R. 97.

O'Brian, K.C., for the Crown: Provocation does not apply to this case: see Archbold's Criminal Pleading, 28th Ed., 900; *Eberts* v. *Regem* (1912), 47 S.C.R. 1; *Picariello* v. *Regem* (1923), 39 Can. C.C. 229; *Director of Public Prosecutions* v. *Beard* (1920), A.C. 479.

Farris, replied.

Cur. adv. vult.

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MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: I think there was misdirection. The learned judge charged the jury as follows:

If you believe that the accused did what the witnesses say was done by the man who assailed the complainant, then he would be guilty of the charge as laid.

The Crown's case is that the complainant was shot down by the appellant on Jackson Avenue in the City of Vancouver with intent to murder. The Crown called two witnesses among others, Irwin and Bodner, who each gave evidence as being eye-witnesses to the occurrence. Each of these witnesses said that they saw two men fleeing from a third. One of the two is alleged to have been appellant. When the pursuer gained on and came up with them shouting and gesticulating one of the two who were fleeing turned and fired a shot which brought the pursuer to his knees whereupon the person who fired the shot stopped and stooping down towards the victim fired two other shots and then continued his flight. It was proved that the appellant did the shooting. The account given by these two witnesses is so diametrically opposed to that given by the complainant that the charge quoted above was in error in a vital point in the case.

The case was one requiring great care in its presentation to the jury and in several other important respects the charge is inadequate but as there must be a new trial I shall refrain from mentioning anything except the above which I think is all that is necessary for the disposal of the appeal.

There should be a new trial.

The learned trial judge's expression "the witnesses" was, I think, not meant in the way expressed but was just as misleading to a jury as if intended as expressed.

MARTIN, J.A.

MARTIN, J.A.: This is an appeal on questions of law, and also a motion for leave to appeal on fact, from the conviction of the appellant, at the Vancouver Fall Assizes, *coram* D. A. MCDONALD, J., for that he did "unlawfully wound Wong Toy with intent thereby then and there to murder" him, in violation of section 264 of the Criminal Code.

About 10 minutes to 6 o'clock p.m., on the 6th of November, 1932, the said Wong Toy was found by Police Constable Car-

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stairs on Jackson Avenue, near East Pender Street, "lying in a big pool of blood" and in a very serious condition caused by three bullet wounds in his body, and he was taken at once to a hospital and there attended to by the witness Dr. P. A. McLennan, who describes his three wounds, which included the breaking of his right leg and collar bone, and says "it was only through miraculous treatment that he did not bleed to death"; and at the time of the trial (to which he was brought on a stretcher from the hospital) his right arm was still paralyzed, though it was hoped that "an operation at a later date will repair the arm to a considerable degree of functioning: the amount of progress it is impossible to say at this time."

Wong's account of what happened to bring him to such a pass is, substantially, that about a quarter to 6 he was walking on the west side of Jackson Avenue, going south to East Pender Street, when at the alley, midway, he noticed the accused, Wu, following him and so "started to walk fast," and Wu did the same, whereupon Wong started to run diagonally and south-easterly across Jackson Avenue, and was overtaken by Wu who, getting in front of him at the sidewalk, said in English, "Hands up, no say nothing," and, as Wong was preparing to run away, fired a shot at him which took effect in his thigh and caused him to fall to the sidewalk in a sitting posture, and then Wu searched his pocket and took $90 therefrom, after which Wong shouted "Hold-up! Hold-up!" whereupon Wu, standing "near my feet," fired two more shots into him, which took effect in his collar-bone and hip, and then ran away across a vacant lot to the north-east, and Wong fell prostrate and stayed there in the same spot until aided by P.C. Carstairs, in a few minutes, as aforesaid: the pool of blood was 50 feet from the north-east corner of Jackson Avenue and Pender Street. He positively identified the accused as his assailant and had known him for more than two years, and said that no other man was with Wu, though he saw some white men "around" the corner of Jackson and East Hastings Street (about 250 feet to the north) but paid no attention to them: "I was awfully painful. I only saw several other people round that district"; and he denied positively that he had chased Wu or any other man that night, or that he had a row with any other man in that neighbourhood

that night, or that he had a "gun" (revolver) at that time, and his statement as to having no "gun" is beyond doubt correct, being corroborated by Carstairs and the hospital orderly, Revell.

Two other Crown witnesses, Irwin and Bodner, white, and described by the learned judge in his charge as "young lads," give an account of the shooting which contradicts in certain important respects the evidence of Wong, but in other important respects confirms it. They were standing at the time at the south-west corner of Jackson Avenue and Hastings Street, and, in substance, say that they first saw two men close together running quickly about half way across Jackson Avenue, diagonally in a north-easterly direction from the direction of the corner of Pender Street, and that they were followed by another man "at a few yards distance" who Irwin "thinks" "was waving his arms," but can't remember if he was shouting or not, and Bodner says "was waving his arms and shouting, Oriental," and both agree that the pursuer gained on the two pursued, and that, when he was almost up to them, and just at the curb, the hindmost pursued stopped, turned round, and fired a shot at the pursuer which brought him to the ground, and then "paused" and fired two more shots at him as he lay, and then ran away immediately after his companion, who had not stopped, in a north-easterly direction across the said vacant lot.

Irwin says that he could not tell, because "it was dark and from that distance [about 250 feet] you could not tell," what the nationality of the men was; and, again, "it was kind of dark, a little foggy, I guess; just getting dusk you know"; and that after the first shot fired by the man who turned, "there was a pause, and he kind of stooped a little bit and then fired the other two shots"; and that "I don't think they touched; I didn't see it anyway"; and that his attention was not attracted by shouting, but "we happened to be looking up that way."

Bodner says that "they have no lights along Jackson, just on the corner of Pender and Hastings" and that "it was dark"; and later that "it was foggy that day, a little foggy . . . well, just about half light"; and that he could not describe the men other than that "the three of them were short men." He also said that after the first shot was fired the pursuer "dropped on his knees . . . and then the man came up close and

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he fired two shots" more, and then immediately ran away, and that there was an interval between the first shot and the two last shots of "about a minute I should say." After the shooting Bodner and Irwin ran to the man on the ground and found that there were already three or four men, white, "around the place," and stayed with him till the police arrived in about five minutes.

It is to be observed that, apart from the strange discrepancy as to who were pursuer and pursued and the direction of their running, the account given by Wong is confirmed substantially by Bodner and Irwin even to the statement, by Irwin, that the shooter "stooped" over the body of Wong (doubtless to take his money), though at that distance and in that light Irwin did not undertake to say that he actually saw him touched, something it would, obviously, be impossible to determine clearly at that considerable distance and in that dim light, to which may, in part at least, be attributed some differences in the two accounts, but the fact remains that there were substantial differences which, as the learned judge told the jury at the opening of his charge, made the case one that "will give you some difficulty," but aptly went on to say:

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> Nevertheless, I think it is a difficulty you can overcome to your own satisfaction if you apply your minds to it in the same way as you do to any other case.

The only defence set up was an *alibi,* and several witnesses were called to support it, and also to refute it, but not the accused, significantly, and the evidence *pro* and *con.* was put to the jury in a manner unexceptional and specially calculated to impress the gravity of that issue upon the jury, the learned judge thus concluding his charge:

> There was a little suggestion in cross-examination early that the charge had been made by Wong Toy against this Wu Chuck for spite because this man spoke to his wife once in the restaurant. Now we have never heard another word about that. No witnesses have been called to tell of any such row, to shew that Wong Toy had a spite against this man. But yet the Crown does not seek a victim. Any one of a dozen Chinamen may have done this rather than the one in the box, and you cannot convict him unless there is sound conviction brought home to your mind that he is guilty.

Pursuant to that impressive direction and upon the evidence on that issue the jury returned a verdict adverse to the accused, as they were undoubtedly justified in doing, and therefore the situation now before us is that it has been established that the

man who did the shooting is the appellant, and he must take the legal consequences of his false *alibi,* because an *alibi* is at once the best, if true, of defences, and the worst, if false, as here. At the same time, as pointed out in *Rex* v. *Bottomley* (1922), 16 Cr. App. R. 184, at 191-2:

> Where the question of the identity of the defendant arises, and the defendant sets up an *alibi*, the *onus* of proving the *alibi* rests on the defendant. The *onus* on the prosecution of proving the identity still remains. It does not prevent the jury from finding that, notwithstanding the *alibi* is not proved, the evidence given on the defendant's behalf throws so much doubt on the evidence of the prosecution as to lead them to say we have a doubt about the guilt of the prisoner and acquit him. It is the same in a case of murder, it is for the defence to establish provocation, or in the case of wounding or assault it is for the prisoner to prove self-defence.

And it was not submitted herein that the appellant, despite the failure of his *alibi,* was not entitled to rely upon such alternative defences or grounds of appeal as might appear upon the record, whether arising from the Crown's witnesses or his own, or otherwise, and in that respect I am in accord with the views expressed by Mr. (now Chief Justice) Duff in *Eberts* v. *Regem* (1912), 47 S.C.R. 1, at 37-8, and *Picariello* v. *Regem* (1923), 2 D.L.R. 706, at 716; 1 W.W.R. 644; 39 Can. C.C. 229, to be considered later; and *cf.* also our own decision in *Rex* v. *Miller* (1923), 32 B.C. 298.

This appeal on law is based solely upon alleged misdirection in the charge, and a new trial is asked on the ground that the alleged different legal consequences flowing from the said two differing stories were not adequately put to the jury, and it was submitted that the jury should have been directed that if they believed, as they were entitled to do, the story of Wong then they could find the accused guilty, but that they should also have been directed not only that if they believed the story of the two whites then that story disclosed circumstances sufficient to afford a justification for the shooting based on the right of self-defence under section 53 of the Code, which would negative the presence of the necessary "intent to commit murder," and that intent could not be gathered merely from the fact that if death had ensued it would have been a case of murder; and in support of this submission reliance was placed on the direction of Patteson, J. in *Reg.* v. *Cruse* (1838), 8 Car. & P. 541 at 545,

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on an indictment for inflicting injury dangerous to life with intent to murder, *viz.*:

Before you can find the prisoner, Thomas Cruse, guilty of this felony, you must be satisfied that when he inflicted this violence on the child, he had in his mind a positive intention of murdering that child. Even if he did it under circumstances which would have amounted to murder if death had ensued, that will not be sufficient, unless he actually intended to commit murder.

But, as pointed out in Roscoe's Criminal Evidence, 15th Ed., p. 914, the same judge doubted the propriety of that direction two years later, in *Reg.* v. *Jones* (1840), 9 Car. & P. 258, and note 260 (*a*), wherein on an indictment for shooting with intent to murder he at least substantially modified its practical effect by thus directing the jury:

It is a very important question, whether, on a count charging an intent to murder, it is essential that the jury should be satisfied that that intent existed in the mind of the prisoner at the time of the offence, or whether it is sufficient that it would have been a case of murder if death had ensued; however, if it be necessary that the jury should be satisfied of the intent, I have no doubt that the circumstance, that it would have been a case of murder if death had ensued, would be of itself a good ground from which the jury might infer the intent, as every one must be taken to intend the necessary consequences of his own acts.

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And in *Rex* v. *Howlett* (1836), 7 Car. & P. 274 at 275, on an indictment for wounding with a tin can with intent to commit murder Alderson, B., told the jury:

When a deadly weapon, such as a knife, a sword, or gun is used, the intent of the party is manifest; but with an instrument like the present, you must consider, whether the mode in which it was used satisfactorily shews that the prisoner intended to inflict some serious or grievous bodily harm with it.

Furthermore, in the case of *Reg.* v. *Monkhouse* (*coram* Coleridge, J. and Baron Rolfe) (1849), 4 Cox, C.C. 55, on an indictment the same as this one, for wounding with intent to murder with a pistol, the decision of Patteson, J. in *Cruse's* case was considered and not "adopted" but differentiated as regards the present point, the Court, *per* Coleridge, J. thus instructing the jury:

There are two points for your consideration,—first, as to the act; second, as to the intent. With regard to the latter, the allegation respecting it in the indictment must, no doubt, be proved to your satisfaction, before you can find the prisoner guilty upon the full charge. The inquiry as to intent is far less simple than that as to whether an act has been committed, because you cannot look into a man's mind to see what was passing there at any given time. What he intends can only be judged of by what he

does or says, and if he says nothing, then his acts alone must guide you to your decision. It is a general rule in criminal law, and one founded on common sense, that juries are to presume a man to do what is the natural consequence of his act. The consequence is sometimes so apparent as to leave no doubt of the intention. A man could not put a pistol which he knew to be loaded to another's head, and fire it off, without intending to kill him; but even there the state of mind of the party is most material to be considered. For instance, if such an act were done by a born idiot, the intent to kill could not be inferred from the act. So, if the defendant is proved to have been intoxicated, the question becomes a more subtle one; but it is of the same kind, namely, was he rendered by intoxication entirely incapable of forming the intent charged? The case cited is one of great authority, from the eminence of the learned judge who decided it. The only difficulty is, in knowing whether we get the very words of the judge from the case quoted; and even if we do, whether all the facts are stated which induced him to lay down the particular rule. Although I agree with the substance of what my brother Patteson is reported to have said, I am not so clear as to the propriety of adopting the very words. If he said that the jury could not find the intent without being satisfied it existed, I shall so lay it down to you: the only difference between us is as to the amount and nature of the proof sufficient to justify you in coming to such a conclusion. Under such circumstances as these, where the act is unambiguous, if the defendant was sober, I should have no difficulty in directing you that he had the intent to take away life, where, if death had ensued, the crime would have been murder.

It is surprising that this important decision, and its determinative effect on *Cruse's* case, has, in this connexion, been overlooked in Russell on Crimes, 8th Ed., Vol. I., p. 806; in Roscoe's Criminal Evidence, *supra;* in Archbold's Criminal Pleading, 28th Ed., p. 930; Tremeear's Criminal Code, 4th Ed., and in the other authorities cited to us, and the more so because I find it considered, in relation to the defence of drunkenness primarily, by the House of Lords in *Director of Public Prosecutions* v. *Beard* (1920), A.C. 479, at p. 497.

The general rule that a person charged with a crime of violence resulting in death or serious injury must be presumed to have intended the natural consequences of his acts, as declared, *e.g.,* by the House of Lords in that case (wherein that tribunal specially composed of eight members for that important occasion, unanimously restored a conviction of murder which had been reduced by the Court of Appeal to manslaughter) does not extend, it should be kept in mind, to certain cases, *e.g.,* insanity (as in *Monkhouse's* case, *supra*), nor to one wherein the defence was the accidental discharge of a firearm, because,

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as was pointed out in *Rex* v. *Davies* (1913), 8 Cr. App. R. 211 at 213:

> The law presumes a man to intend the natural consequences of his acts, which can only mean of his conscious acts, not of his mistakes.

Appellant's counsel also referred to the decision of the Court of Appeal of Alberta in *Rex* v. *Flannery* (1923), 19 Alta. L.R. 613; 3 W.W.R. 97; but that is not of any real assistance to us because the facts are not stated, but merely the indictment recited, and it is, with every respect, unsatisfactory in law because it was decided without regard to all of the cases hereinbefore considered, not one of them being even mentioned in the reasons given, which, moreover, are involved and obscure and are also restricted to the declaration of a general abstract principle and not practically applied to the facts of the case (unknown to us) as they must be, even according to Patteson, J., in *Jones'* case, and its exposition in *Monkhouse's* case, *i.e.,* shewing that it must be considered "under such circumstances," etc., and "whether all the facts are stated" to found the ruling.

But what the Court decided, at the beginning of its judgment in *Flannery's* case, upon unstated facts was that "there was not sufficient evidence of an intent to cause death or kill" to support the conviction, but did not direct its attention to the way in which the fact of that intention should be submitted to the consideration of the jury and proved so as to satisfy them, and, further, the charge to the jury on this point is not given, therefore, without knowing the evidence or the charge thereupon we are left in the dark as to the application of the decision: if that Court had stated the facts and the relevant charge and had been made aware of the said cases on the point, *supra,* we should, doubtless, have the benefit of an appropriate decision, instead of one which is academic as regards the real question in the present case.

It is also to be noted that the same Court (composed of five judges instead of three as in *Flannery's* case, and including Beck, J.A. who sat therein) unanimously decided in *Rex* v. *Smart* (1927), 23 Alta. L.R. 349 at 350; 49 Can. C.C. 75, on a conviction (by a district judge) for unlawful wounding with intent to maim or disable (Criminal Code, Sec. 243), on the sole issue of self-defence that:

The fact having been clearly proven that the defendant did in fact shoot in the direction of several persons, and wounded Peter Chmilar, it would seem to me the Crown has established its case, and the *onus* would then shift to the accused to satisfy the Court that it was either an accident or that he did not intend to wound, which was one of the natural consequences of shooting in the direction of these persons.

I pause to say, with respect, that if the Court had borne in mind *Picariello's* case, *supra,* and in particular the observations of Mr. Justice Duff at pp. 713-4, the loose statement that "the *onus* would then shift to the accused" would have been more artistically expressed, because the *onus* to establish guilt never shifts from the Crown though the burden is upon the accused to prove the facts upon which his defence is based.

Now "under such circumstances" as exist in the case at Bar and taking them to be as deposed to by the said white witnesses alone, it is beyond question, to my mind, that the jury would have been properly instructed if, as in *Jones'* case, they had been told, *ipsis verbis,* that "to be satisfied of the intent . . . the circumstance that it would have been a case of murder if death had ensued, would be of itself a good ground from which [they] might infer the intent," and if that be the case the legal result flowing from the account given by them or that given by Wong would be the same. What, in fact, they were told was that, in effect, they must consider the question of intent to commit murder under section 264, which was read to them, and that what the accused intended to do in using a loaded firearm could be inferred from his actions, and under the circumstances that was a sufficient direction because if death had ensued it would have been a case of murder, in the absence of any explanation from the accused.

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But furthermore, it is, in my opinion, legally impossible to found the defence either of provocation or self-defence upon the evidence of said whites, because, when considered closely, it goes no further than to prove that one "short" unarmed man was running after two "short" men shouting and waving his empty hands (as they at least could see) and that upon coming up with them, one of them turned and shot him and brought him to the ground in a defenceless state, and having so disabled him, and after an appreciable pause and when no apprehension of danger from him could possibly exist, and having him at his feet and

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at his mercy, deliberately fired two more shots point blank into him, laying him prostrate and at death's door, and then fled. There is, to my mind, only one conclusion that in reason can be drawn from such actions in such circumstances, *viz.*, a deliberate intention to cause the death of a defenceless man. This final and wanton act, moreover, throws light upon the reason why the victim was thus noisily pursuing these two men, and obviously and primarily it was that for some reason he was raising the hue and cry (in an "Oriental" tongue, as Bodner says) against them and seeking to have them arrested in their flight after doing some wrong to him, either to his property or person, or both, and the fact that two men, being the superior physical force, and one at least armed, were fleeing from one man, and in silence, goes to shew that they were seeking to make their escape from the consequences of some crime they had committed, because if they were honest citizens and really in fear of their pursuer they would be shouting for assistance instead of him. The patent truth is that they were beyond a doubt fugitives from justice, and when they found they could not escape by running one of them did not hesitate to take the most desperate but most effective course of silencing their pursuer for ever by killing him to a certainty, as he thought, before resuming his flight.

It was submitted by counsel for the Crown that on said evidence alone no case of self-defence or provocation could be founded, and the decisions of the Supreme Court of Canada in *Eberts* v. *Regem* (1912), *supra,* and *Picariello* v. *Regem* (1923), *supra,* were chiefly relied upon, and in my opinion that submission is sound, and it flows therefrom that it really was not necessary nor desirable for the learned judge to have instructed the jury upon defences which had no legal existence: in said *Eberts'* case the action of the trial judge in refusing to direct the jury on the defence of manslaughter, which was unsupported by evidence, was upheld by the Supreme Court. Mr. Justice Davies (Anglin and Brodeur, JJ. agreeing) said, p. 22:

> I think, reading the charge of the trial judge as a whole and in the light of all the facts given in evidence, it cannot be said that his direction to the jury that they must either acquit the prisoner or find him guilty of murder, occasioned such a substantial wrong or miscarriage on the trial as would give us jurisdiction to set aside the conviction or direct a new trial.

And Mr. Justice Idington, in language very appropriate to the present case, said, pp. 24-25:

There is nothing but mere surmise or conjecture on which to rest such a finding as is claimed to have been legally possible. . . .

A verdict of that kind in such a case would have been a travesty of justice and made of the administration of the law a farce.

No jury could properly return such a verdict. It would, therefore, have been idle or worse for the learned trial judge to have entered upon an exposition of the law bearing on manslaughter and thus needlessly perplexed the jury.

This conforms to the prior decision of that Court in *Gilbert* v. *Regem* (1907), 38 S.C.R. 284, wherein the judge refused to put the defence of manslaughter to the jury (296), and it was said by Chief Justice Fitzpatrick (Davies, Idington, Maclennan and Duff, JJ. concurring) that (pp. 300-1):

The charge in view of the character of the defence and evidence in support of it cannot be complained of in so far as we can express an opinion in the absence of the text of the charge which is not before us.

There was no case of culpable homicide of less degree than murder presented on the evidence. And the accident testified to by the accused would have, if credited, entitled him to acquittal. The appeal should be dismissed.

This Court considered these decisions in the capital case of *Rex* v. *Burgess and McKenzie* (1928), 39 B.C. 492, and cited other authorities to the same effect at p. 495. MARTIN, J.A.

It follows that if I am right in these views then, however regarded, there can be no valid objection to the charge on said grounds, because even though the learned judge did unnecessarily charge the jury on said non-existent defences, doubtless *ex abundanti cautela*, yet that was not to the prejudice of the accused but in his favour.

Seeing, however, that there is an equal division of this Court upon this case, I think it best to consider the specific objections to the charge on the assumption that the issues of self-defence and provocation were properly before the jury as well as the *alibi*, and the first objection is to this statement:

If you believe that the accused did what the witnesses say was done by the man who assailed the complainant, then he would be guilty of the charge as laid.

It is submitted that this fails to distinguish between the legal effect of the conflicting evidence given by the whites and by Wong, and if it were taken by itself and detached from its context it would probably tend to mislead the jury. But nothing is

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better settled than that the charge must be read as a whole and in the light of the evidence, and so it was said by the House of Lords in *Beard's* case, *supra,* p. 496:

> It is extremely necessary to bear in mind that the judge when directing the jury with reference to the facts and circumstances of a particular case is not writing *in abstracto* a treatise upon the criminal law, and that his words must always be considered with regard to the special facts then before the jury.

And at p. 507:

> I am not prepared to lay it down—though I have felt some doubt upon the point—that the actual direction given to the jury by Bailhache, J. disabled them from reaching a true conclusion upon the matters which required decision. On the contrary, I think that upon the whole, the matter was so presented to them, though unscientifically, that they have in fact formulated the answer which is decisive even in a case where the defence is founded upon drunkenness.

This is in strict accord with decisions of the Supreme Court of Canada, and of this Court in, *e.g., Rex* v. *Bagley* (1926), 37 B.C. 353; *Rex* v. *Miller* (1923), 32 B.C. 298; *Rex* v. *Burgess and McKenzie, supra,* and it is to be borne in mind that as appeals to the Privy Council in criminal cases were abolished "notwithstanding any royal prerogative," etc., by the Parliament of Canada on and after the first of July of this year (Criminal Code Amendment Act, Cap. 53, Sec. 17) the said Supreme Court, which is the National Tribunal of what has become the Sovereign State of Canada, alone possesses the power of finally declaring the criminal law of this State. The leading decision of said National Court, on the present point, is the unanimous one of *Picariello* v. *Regem* (1923), 2 D.L.R. 706; 1 W.W.R. 1489; 39 Can. C.C. 229, wherein Mr. Justice Idington said, p. 708:

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> I am therefore disposed to look at the facts as they appear in evidence before I pass upon any charge, or part thereof, and apply thereto the relevant law. Until we realize the correct nature of the evidence adduced and the possibility of reasonable alternative results, flowing from due consideration of such facts, as it presents, it seems idle to demand an absolutely accurate definition of law having no necessary relation thereto.
>
> It is an accurate conception of the facts that are presented in evidence which, I submit, must be had before passing upon any charge and determining whether or not there has been thereby caused a miscarriage of justice. In the last analysis this is what we have to determine.

And Mr. Justice Anglin at p. 721 said:

> No doubt there may be found some sentences in the charge that might have been better expressed; some passages, if isolated, may be open to

criticism. But taken as a whole, as it should be, and having regard to the evidence with which the trial judge was dealing, I do not find any substantial misdirection. No case has been made of such "substantial wrong or miscarriage . . . on the trial" (Cr. Code, Sec. 1019, *Allen* v. *The King* (1911), 18 Can. C.C. 1, 44 S.C.R. 331) as would warrant setting aside the conviction of the appellants. On the contrary, they appear to have had a fair trial and the benefit of a charge in some respects more favourable to them than a strict interpretation of the law might require.

Section 1019 has since become, in substance, section 1014 in the amendments of 1923, Cap. 41.

Mr. Justice Brodeur at pp. 723-4, expressed himself to the same effect, and Mr. Justice Mignault said, p. 724:

Obviously it never was intended that the judge should deliver a lecture on the law to the jury; all that he can or should do is to give them such explanation of the law applicable to the evidence as will enable them to properly discharge their important duty. In so doing, it is not to be expected that the trial judge will use technical language, nor would it be reasonable to weigh each expression in his address as is done in the case of pronouncements of Courts or disquisitions of writers on the law. Measured by the proper test, I think the trial judge's charge, with what he added to it, sufficiently instructed the jury, . . .

I do not say that when isolated passages, detached from their context, are examined, the trial judge expressed with scientific accuracy the enactments of the law as formulated by the Code, but a scientific exposition, in necessarily technical language, would have been far less intelligible to the jury than what was told them in this case. And considering the charge as a whole, and that is the way to look at it, I am not of opinion that it can be successfully attacked.

Applying these guides to the paragraph quoted above it is to my mind no more than a preliminary general statement, following an exposition of the offence charged and the jury's undoubted right to act upon the whole or any part of the evidence, that the case would be established if the Crown's witnesses were believed, which general statement would, if it stood alone, leave the case at large, but the learned judge immediately proceeded to come to particulars by saying that there was another point of law [defence], which I will have to refer to later, and that is if you believe the two young lads, Bodner and Irwin—I will come to that in a moment, but if you do believe them you may say, "Well, maybe the man acted in self-defence when he turned to shoot this man that was following." Here is the law on that; this is the law of self-defence:

And he thereupon read to the jury the essential sections of the Code on that "point of law" (*i.e.*, defence) in an adequate manner and later discussed the evidence of the two whites as applicable thereto, and there can, to my mind, be no doubt whatever

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that the jury clearly understood that they had to pass upon the alternative defence of self-defence arising out of the Crown's evidence of "the two young lads" as well as the defence of an *alibi* arising out of the later evidence of the witnesses called by the accused, and, in my opinion, there is no ground for holding that they were misled or confused by the charge and I am satisfied that they must, in the proper discharge of their duty, have passed upon both issues and founded their verdict of "guilty" thereupon. The Crown had proved its case to the stage that the burden was upon the accused to prove the facts upon which his defence of self-defence was based, as hereinbefore stated, but he made no attempt to do so either by his own evidence or that of the other man who was with him, if the evidence of the two lads was to be accepted, as he wished it to be, otherwise that defence was not even arguable.

Upon this question of a direction on self-defence I adopt the following apt expressions of Idington, J. in *Picariello's* case, at p. 710, *viz.*:

> I most respectfully submit that a little common sense applied to the entire evidence bearing upon the occasion of the accused being there, and what transpired when they got there, would shew how little need there was for any laboured disquisition defining the legal defence of self-defence.

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There remains for consideration only the following passage near the end of the charge:

> There is not the slightest suggestion anywhere in this evidence that this man did not do the shooting.

To my mind this presents no real difficulty, when the whole charge and the context are considered, because the learned judge was doubtless referring to the fact that the man who wounded Wong did so, beyond the possibility of any other suggestion, by means of shooting him: in other words, that if they found the accused had not proved his *alibi,* then it was beyond doubt that he did the shooting: if this is not what is meant, then there is no sense at all in the language and it is consequently innocuous and at most a harmless slip, as in *De Bortoli* v. *Regem* (1927), S.C.R. 454. It has been suggested that it affected the *alibi,* but, clearly, it could have no relation thereto because the judge was most careful from first to last to refer repeatedly to the *onus* on the Crown to establish that primary fact of the accused's presence at the crime: thus, *e.g.,* he said towards the beginning of his charge, after discussing the "intent":

The Crown says this is the guilty man; this is the man who did that. He has put himself before you for trial, upon his country, which country you are, and it is for you to say whether the Crown has got the right man. The Crown must prove that before you can convict; the Crown must prove to your satisfaction, beyond any reasonable doubt, that they have got the right man.

If you have that reasonable doubt, that serious doubt which would actuate you in the serious affairs of your life from day to day, the accused is entitled to the benefit of it. And that applies not only to the accused; it applies to the *alibi*, which I will mention later. If you have a doubt on the *alibi*, the accused is entitled to that too. Give him the benefit of that doubt.

And so that the jury should be alert to keep the importance of that primary fact in mind he concludes his charge by the impressive language already quoted and which follows immediately upon the said passage, and ends it thus:

Any one of a dozen Chinamen may have done this rather than the one in the box, and you cannot convict him unless there is sound conviction brought home to your mind that he is guilty.

This objection, therefore, is not sustainable.

MARTIN, J.A.

Finally, on the charge as a whole I adopt this passage from the judgment of Mignault, J., in *Picariello's* case (p. 724):

I am abundantly satisfied that no miscarriage of justice, permitting an Appellate Court to interfere under Sec. 1019 of the Cr. Code, was caused by anything the judge said, and I will go further and say that, in my opinion, the charge as a whole gave the jury which condemned the prisoner all information necessary for the proper discharge of their duty.

In coming to the conclusion that this appeal should be dismissed, and that the motion for leave to appeal on fact be refused, it is a satisfaction to know, under its special circumstances, that the learned trial judge in his statutory report to this Court thereupon says, "I have no doubt that he [accused] is guilty"; and after giving the whole case most careful consideration there is also no doubt in my mind of the correctness of that conclusion, and of the essential fairness of the trial; and I may add that in my very long experience this is the only case which has come before me wherein the accused did not support his defence of an *alibi* by his own evidence.

MCPHILLIPS, J.A.

McPhillips, J.A. agreed with Martin, J.A.

MACDONALD, J.A.

Macdonald, J.A.: Appeal from a conviction on a charge (section 264) that accused "unlawfully did wound Wong Toy with intent thereby then and there to murder the said Wong

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Toy." He was sentenced to imprisonment for life. The Crown adduced in evidence two separate and contradictory narratives relating to what occurred immediately prior to the shooting and misdirection is alleged inasmuch as the jury were not properly directed on points arising out of this conflict of evidence. The complainant testified that he was followed by accused and on being overtaken was shot and robbed of $90. Three shots, he said, were fired by the accused, two after the robbery. Two English-speaking witnesses, however, called by the Crown told an entirely different story. They said the complainant, shouting and gesticulating (in a way that suggested possible violence), pursued the accused and another Chinaman and upon overtaking them one of the fleeing men (presumably the accused) turned and fired three shots. If the jury accepted this evidence of independent witnesses it is clear that the accused fired only after being chased and overtaken by the complainant. True, as it afterwards appeared, the complainant was not armed, but in the dusk this fact would not necessarily be known to the accused.

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On that state of facts it was necessary to tell the jury that if the evidence of the English-speaking witnesses was accepted they must find that the accused intended to commit the crime of murder. If complainant had died one can conceive of circumstances under which accused might be guilty of murder without proof of intent. Death not ensuing, "intent to commit murder" was an element in the crime under section 264 and it was necessary that the jury on proper instructions should pass upon it. The trial judge referred fully to the evidence of these witnesses but did not state the implications in law arising therefrom. After quoting section 264 of the Code where the words "intent to commit murder" are used and thus to that extent directing their attention to the question he nullified it by saying:

> If you believe that the accused did what the witnesses say was done by the man who assailed the complainant, then he would be guilty of the charge as laid.

He is in this statement, without segregation, referring to the evidence of all the Crown witnesses. This meant that if the jury accepted the evidence that the complainant was really the aggressor the accused was guilty of the crime charged regardless of any question of intent. Had the word "complainant" been

substituted for the word "witnesses" in this statement no objection could be raised.

Intent is a question of fact for the jury to pass upon. The circumstances were not such that only one inference could be drawn, *viz.*, that accused, who, according to this evidence, was in full flight, fearing possibly, rightly or wrongly, that his life was in danger at the hands of a man who might have been armed with gun or knife, intended to murder. Flight from a hostile assailant would suggest, not intent to murder, but a desire to escape the shots being fired to prevent attack and facilitate escape when it was useless to run further. True, the jury might find that shooting more than once indicated more than an intention to escape and on all the facts find intent, but it was necessary that they should consider it. On the other hand, not knowing what may have occurred before the flight and pursuit (possibly a quarrel and threats of violence) the jury might think that the accused felt it necessary to completely disable the complainant to save his own life or to escape in safety. At all events it was for the jury to say, under proper instructions, whether or not intent to murder existed and failure to instruct them on this point constituted misdirection. That question, *viz.*, were the jury convinced that accused had in his mind a positive intention to murder complainant, was not tried (*Regina* v. *Cruse* (1838), 8 Car. & P. 541; *Rex* v. *Flannery* (1928), 3 W.W.R. 97).

MACDONALD, J.A.

The question of self-defence and provocation was raised in argument. I prefer to confine my view to the question of intent although doubtless self-defence, and to a lesser degree provocation, is involved in the consideration of that question.

On the question of substantial wrong, bearing in mind the fact that, if the white witnesses are to be believed, the complainant in inventing a story of a robbery and a pursuit told a glaring falsehood on a vitally important point, coupled with the unsatisfactory nature of the evidence in some particulars as to identity, section 1014 (2) of the Code should not be applied.

There is a further point on which the jury may have been misled by a statement in the charge. I only think it of some importance in view of the features already discussed. The defence of the accused was an *alibi*. It may have been false and yet the fact that he resorted unsuccessfully to this method

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of defence, while dangerous and likely to expose him to peril, does not necessarily point conclusively to guilt. The learned judge said:

> There is not the slightest suggestion anywhere in the evidence that this man did not do the shooting.

There was, of course, abundant evidence that accused did not do the shooting and the jury might have regarded this statement as an intimation that the evidence, as to the accused being elsewhere should be wholly disregarded. No doubt it was not meant to be taken literally in this sense. It might, however, improperly influence the jury.

I would allow the appeal and direct a new trial.

The Court being equally divided the appeal was dismissed.

IN RE BLAND AND CHILDREN'S AID SOCIETY.

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IN RE BLAND AND CHILDREN'S AID SOCIETY

Infants Act—Order for custody of children—Religious persuasion—Habeas corpus—Certiorari—R.S.B.C. 1924, Cap. 112, Secs. 57 and 93.

On the 16th of February, 1932, five children of the applicant were brought before *George Jay*, Esquire, a judge within the meaning of the Infants Act, by the Children's Aid Society, of Victoria, to determine if said children were neglected within the meaning of said Act, and the order made recited: "I do find that the said children are neglected children within the meaning of the said Act and that the said children are of the (not known) religion, and having determined that the said children are neglected within the meaning of the Act," etc. He then ordered that they be delivered into the care and custody of the Children's Aid Society, of Victoria.

On the application of Jean Bland by way of *habeas corpus* proceedings with *certiorari* in aid, to test the legality of her children being detained in the custody of the Children's Aid Society:—

Held, that an endeavour to ascertain by taking evidence the religious persuasion of the child is made by statute a condition precedent to the exercise of the jurisdiction to commit, and the supervising power of this Court upon *habeas corpus* proceedings extends to seeing that the law is observed by the magistrate in the course of the exercise of his jurisdiction, and that all conditions precedent are fulfilled. No endeavour having been made on the said application to ascertain pursuant to section 93 of the Infants Act, the religious persuasion to which the children belonged, and to select accordingly the society to which the children should be committed, and such condition precedent not having been fulfilled the order for delivery of the 16th of February, 1932, was made without jurisdiction and should be quashed.

APPLICATION by Jean Bland for a writ of *habeas corpus* with *certiorari* in aid to test the legality of her five children being detained in the custody of the Children's Aid Society and the refusal of the magistrate who made the order for the custody of the children to recognize that the children belong to the Roman Catholic religion. The facts are set out in the reasons for judgment. Heard by FISHER, J. at Victoria on the 4th and 8th of May, 1933.

Statement

O'Halloran, for the application.
Beckwith, contra.

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26th May, 1933.

FISHER, J.: This is an application on behalf of one Jean Bland by way of *habeas corpus* proceedings with *certiorari* in aid to test the legality of her children Muriel Bland, Charles Ashton Bland, Faith Bland, John Bland and James Bland being detained in the custody of the Children's Aid Society, Victoria, B.C., and also, as she says in her affidavit "to test the learned magistrate's refusal under section 93 of the Infants Act, to recognize that the said children belong to the Roman Catholic religion."

Pursuant to an order of the Court a writ of *habeas corpus* was issued directed to H. L. Butteris, Esquire, the President of the Children's Aid Society, Victoria, B.C., or to the proper officer having in custody or charge the said children, and a writ of *certiorari* was also issued directed to *George Jay,* Esquire, at the City of Victoria aforesaid, a judge under the Infants Act, Cap. 112, R.S.B.C. 1924, and amending Acts, to remove into this Court all and singular the orders or authorities for the detention of the said children with all "transcripts, exhibits, records, orders, reasons for judgments, and things touching the same as fully and perfectly as they had been made" by him under the provisions of the Infants Act.

Judgment

The return by the learned judge to the writ of *certiorari* included, in addition to the order for delivery dated February 16th, 1932, and hereinafter referred to, the transcript of the evidence taken before him at the City of Victoria aforesaid on the 27th, 28th, 29th and 30th days of June, 1932, on an application by the said Jean Bland under section 93 of the Infants Act aforesaid, together with all the exhibits filed at the said hearing, and also his order dismissing the application dated the 30th day of January, 1933, with his reasons in support thereof.

Certain sections of the Infants Act have to be considered, especially sections 57 and 93, reading as follows:

57. Any child apprehended under the last preceding section shall be brought before the judge for examination within seven days after his apprehension; and it shall thereupon be the duty of the judge to investigate the facts of the case, and ascertain whether the child is neglected, and the judge shall have power to compel the attendance of witnesses. The parents or person having the actual custody of the child, if known, shall be notified of such examination, and . . . If on such occasion the judge

finds that the child is neglected within the meaning of the last preceding section, or is neglected so as to be in a state of habitual vagrancy or mendicancy, or ill-treated so as to be in peril of life, health, or morality by continued personal injury, or by grave misconduct or habitual intemperance of the parents or guardians, he shall set out such findings by a proper order in that behalf, and may order delivery of the child to a children's aid society, and such society may send the child to their temporary home or shelter, to be kept until placed in an approved foster home, pursuant to the provisions of this Part. The judge shall deliver to the society and to the superintendent respectively a certified copy of the order made in the case, which shall contain, beside the said findings, a statement of the facts, so far as ascertained, as to the age of the child, name, nationality, and residence, the occupation of parent, or either of them, or whether either of them is dead or has abandoned the child; and in the case of examination of two or more children at the same time, only one order may be made. Instead of ordering delivery of the child to a children's aid society, the judge may by his order direct delivery of the child to the superintendent to be placed in a foster home approved by the superintendent, and in that case the judge shall deliver to the superintendent a certified copy of the order. The superintendent may place the child in an approved foster home, or may at any time deliver the child to a children's aid society, to be kept and dealt with in like manner as if delivered under the order of a judge pursuant to this section. In case of the delivery of the child by the superintendent to a children's aid society, he shall deliver to the society the certified copy of the order of the judge, endorsed with a memorandum, signed by the superintendent, setting out the delivery of the child by him to the society pursuant to this section.

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 pursuant 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.

Judgment

In his return to the writ of *habeas corpus* Mr. Butteris says that the said Children's Aid Society did take into its custody and has ever since had and still has in its custody the said children under and by virtue of an order made on the 16th day of February, 1932, by *George Jay*, Esquire, a judge within the meaning of the Infants Act and therein recited in full. The said order reads in part as follows:

Whereas . . . have been brought before me by the Children's Aid Society, of Victoria, B.C., to determine if the said children are neglected within the meaning of the said statute in such case made and provided

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[*i.e.*, the Infants Act] I do find that the said . . . are neglected children within the meaning of the Act . . . and that the said children are of the (not known) religion and having determined that the said children are neglected within the meaning of the Act I do order that the said children be delivered into the care and custody of the Children's Aid Society, of Victoria, B.C., and that they be forthwith taken to their temporary home there to be kept until placed in an approved foster home pursuant to the provisions of the said Act.

Counsel on behalf of the said Children's Aid Society contends that the Court on this application cannot go outside of said order and that the statement apparently therein contained and made by the judge under the Infants Act that the children "are of the (not known) religion" is conclusive even on the assumption that he may have come to a wrong decision on both the facts and the law as his decision cannot be questioned by this procedure.

Counsel on behalf of the applicant on the other hand contends that there was no evidence on which the learned judge could find as he did and that the order should therefore be quashed, citing *In re Howard* (1909), 14 B.C. 307. In that case, at p. 312, CLEMENT, J. said in part as follows:

Judgment

It seems to me the two questions of fact before the magistrate in the first instance were: First, what is the child's religious persuasion? Secondly, what is the Society's religious persuasion?

On the first there was evidence from which Mr. Alexander could find as he did, and this Court has no jurisdiction to review that conclusion of fact. If, indeed, there was no evidence on which he could find as he did, an order based on such finding would be quashed; . . .

In reply to this citation from the judgment of CLEMENT, J. counsel on behalf of the said Children's Aid Society relies upon *Rex* v. *Nat Bell Liquors, Ld.* (1922), 2 A.C. 128 as being a later decision and holding that even without evidence at all a conviction could not be interfered with upon *certiorari* proceedings. In the *Nat Bell* case the Court said in part as follows, at p. 151:

It has been said that the matter may be regarded as a question of jurisdiction, and that a justice who convicts without evidence is acting without jurisdiction to do so. Accordingly, want of essential evidence, if ascertained somehow, is on the same footing as want of qualification in the magistrate, and goes to the question of his right to enter on the case at all. Want of evidence on which to convict is the same as want of jurisdiction to take evidence at all. This, clearly, is erroneous. A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not

open to impeachment, his subsequent error, however grave, is wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not.

And at p. 141:

The charge was one which was triable in the Court which dealt with it, and the magistrate who heard it was qualified to do so . . . nothing occurred to oust his initial jurisdiction after the commencement of the inquiry. No conditions precedent to the exercise of his jurisdiction were unfulfilled, and the conviction, as it stood, was on its face correct, sufficient and complete.

I think it is apparent, however, from the above cited passages and other parts of the judgment that the principle laid down is based upon the assumption that the magistrate's "jurisdiction to entertain the charge is not open to impeachment" and also that "nothing occurred to oust his initial jurisdiction after the commencement of the inquiry" and that "no conditions precedent to the exercise of his jurisdiction were unfulfilled." I think, also, that the Court, in the *Nat Bell* case, in laying down the principle, that the jurisdiction of the magistrate having been once established, the superior Court cannot enter on an examination of the evidence, though part of the proceedings below, for the purpose of quashing the conviction, felt itself bound by the consequences of the enactment of a general form of conviction which did not include any statement of the evidence for the conviction. It may be noted that the Court says, at p. 156:

Judgment

That the superior Court should be bound by the record is inherent in the nature of the case.

But at p. 150, it also says:

More generally speaking, it becomes necessary to ask, what is the "record" . . . ?

And at p. 159:

When the Summary Jurisdiction Act provided, as the sufficient record of all summary convictions, a common form, which did not include any statement of the evidence for the conviction, it did not stint the jurisdiction of the Queen's Bench, or alter the actual law of *certiorari*. What it did was to disarm its exercise. The effect was not to make that which had been error, error no longer, but to remove nearly all opportunity for its detection.

In the present case there is no conviction but an order made by the magistrate acting as a judge under the Infants Act and *certiorari* has not been taken away by any provision of such Act. Under the circumstances I think that the applicant is entitled to resort to *habeas corpus* with *certiorari* in aid thereof

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and that the Court may go outside the order and look at the return made by the learned magistrate to the writ of *certiorari*, not for the purpose of ascertaining if the magistrate came to a wrong conclusion but for the purpose of seeing whether his order has been made within his jurisdiction. In the *Nat Bell* case, *supra*, the Court referring to the jurisdiction of the superior Court says at p. 156:

> Its jurisdiction is to see that the inferior Court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would itself, in turn, transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise.

In *Rex* v. *Montemurro* (1924), 2 W.W.R. 250, the *Nat Bell* case, *supra*, was considered and the Court said at pp. 250-51:

> Notwithstanding any statute taking away the right to *certiorari* or any law or authority deciding that I cannot look at the evidence to quash a conviction, I hold that I am entitled on a *habeas corpus* application to receive affidavit evidence to shew that the magistrate had no jurisdiction or has exceeded his jurisdiction in convicting the applicant. If the magistrate has exceeded or had no jurisdiction and *certiorari* is taken away so that I may not look at the evidence and the unlawful act does not appear on the face of the record, how otherwise could lack of jurisdiction be made evident than by affidavit? The Supreme Court always had inherent power to enquire into the jurisdiction of an inferior tribunal. The affidavit is received, not to shew that the magistrate came to a wrong conclusion, but to shew his lack of jurisdiction.

Judgment

In the present case the applicant seeks on a *habeas corpus* application to shew lack of jurisdiction not merely by affidavit evidence but by the return made by the magistrate, and, as already intimated, I think the applicant is entitled to do so. Counsel for the Children's Aid Society, however, contends that in any case such material *dehors* the order can only be directed to what appeared at the beginning of the inquiry and not to what occurred during the progress of the inquiry. It is submitted that in the present case the only conditions precedent to the exercise of the magistrate's jurisdiction were that the children should be apprehended within the territorial limits of his jurisdiction and brought before him for examination upon a charge over which he had jurisdiction. The contention, therefore, is that the applicant must fail unless it can be shewn that the magistrate had no jurisdiction to enter upon the inquiry. In

this connection reference might be made to *Reg.* v. *Bolton* (1841), 1 Q.B. 66, which is referred to in the *Nat Bell* case at p. 159 as "a landmark in the history of *certiorari*" and which, if I may be permitted to say so, would appear to me to go as far as the Court went in the *Nat Bell* case to establish the general rule, that absence of evidence does not affect the jurisdiction of the magistrate to try the charge. In *Reg.* v. *Bolton,* the Court said at p. 74:

> The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature: it is determinable on the commencement, not at the conclusion, of the inquiry: and affidavits, to be receivable, must be directed to what appears at the former stage, and not to the facts disclosed in the progress of the inquiry.

This is the general rule which counsel for the Children's Aid Society supporting the validity of the order as aforesaid seeks to invoke and apply here. I am convinced, however, that before such general rule is applied here the special nature of the matter over which jurisdiction is given to the magistrate under the Infants Act and the conditions of or precedent to its exercise must be carefully considered. The Infants Act must not be treated solely as an Act giving jurisdiction to the magistrate to try a charge well and truly laid before him against a child nor must the order made be treated in the same manner as a conviction under an Act with respect to which the Court said in the *Nat Bell* case at p. 164:

Judgment

> . . . the object of the section is to stop every chance of the accused's escaping after conviction, so far as it is possible to do so . . .

Speaking generally one may say that the offence, if any, has been committed not by but against the child and the magistrate exercising jurisdiction under the Infants Act is not really trying a charge against a child but is being entrusted with the exercise of certain powers with respect to the child by an Act which both in its spirit and in its letter indicates that the religious persuasion of the child is a factor that must be considered before any committal order is made.

It is conceded by counsel on behalf of the said Children's Aid Society that the learned judge before determining on the person or society to whom the child is to be committed should endeavour to ascertain the religious persuasion to which the child belongs in accordance with the provisions of said section 93 but it is

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argued that such provisions are only directory and that such an endeavour by the hearing of some evidence on the matter is not a condition precedent the absence of which would prevent the jurisdiction of the judge from coming into effect or continuing and thus destroy the validity of the committal order. I think, however, a careful perusal of the two sections of the statute as aforesaid shews that jurisdiction is really being given to the magistrate to exercise two distinct powers or duties, first that of finding whether or not the child is neglected or ill-treated, and second that of determining on the person or society to whom the child is to be committed, if found to be neglected or ill-treated. Said section 93 specifically states that

> 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.

On the other hand it may be noted that said section 57 in providing for what the order shall contain, beside the findings, does not include the religious persuasion of the child as one of the things to be contained in "the statement of the facts so far as ascertained." I think a comparison of the two sections leads to the irresistible conclusion that notwithstanding anything contained in said section 57 the judge before committing the child to any particular person or society must endeavour to ascertain the religious persuasion to which the child belongs. I think this principle was intended to be one of the fundamental or essential principles of the Act to be observed without fail in all cases where the jurisdiction is exercised and after carefully considering the said sections along with the other relevant sections of the Act, I am firmly of the opinion that the Infants Act does not give the judge jurisdiction to determine the question as to the person or society to whom the child is to be committed without endeavouring to ascertain by evidence brought before him the religious persuasion to which the child belongs. This does not mean that the judge having heard the evidence has jurisdiction to decide the question one way only. I agree with what was said by the Court in a case cited by counsel on behalf of the said society—*Rex (Limerick Corp.)* v. *L.G.B.* (1922), 2 I.R. 76 at p. 93:

Judgment

A power to decide a question one way only is nonsense. It certainly is not judicial.

It does mean, however, that, in my opinion, the judge has no jurisdiction to determine the question without having heard any evidence at all from which to come to any decision as to whether or not the child is of any religious persuasion, and if so, what it is. In other words, my opinion is that an endeavour to ascertain by taking evidence the religious persuasion of the child and to select accordingly the person or society to whom the child should be committed is made by the statute a condition precedent to the exercise of the jurisdiction to commit.

I think it is quite apparent from the passages above set out from the *Nat Bell* and *Montemurro* cases that the supervising power of this Court upon *habeas corpus* proceedings extends to seeing that the law is observed by the magistrate in the course of the exercise of his jurisdiction and all conditions precedent fulfilled. As already intimated I think also that the very nature of the proceedings under the Infants Act and the express statutory requirements of such Act make the general rule laid down in *Reg.* v. *Bolton, supra,* and approved of in the *Nat Bell* case, as aforesaid, inapplicable here and therefore material outside the order can be directed to what occurred after the magistrate entered upon his inquiry and absence of any evidence during the progress of the inquiry as to the religious persuasion of the child would affect the jurisdiction of the magistrate to make the committal order as it would shew that the aforesaid condition precedent to the exercise of such jurisdiction was unfulfilled.

Judgment

I come therefore now to deal with the material returned by the magistrate and have to say that such material, including his own reasons for judgment upon the later application of the applicant before him in which he says in one place, referring to the application of the said Children's Aid Society of the 16th of February, 1932, that "upon the hearing of this application . . . no mention was made of the religious persuasion of either parents or children," and the evidence of Mr. Butteris satisfies me, and I find, if I may say so, with great respect to the learned magistrate that there was no endeavour made at the time of the said application of the 16th of February, 1932, to ascertain, pursuant to said section 93 of the Infants Act, the religious persuasion to which the said children belonged and to

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select accordingly the person or society to whom the children should be committed. As I have already indicated such an endeavour, in my opinion, was a condition precedent to the exercise of the jurisdiction to commit the said children to the society as aforesaid and such condition precedent not having been fulfilled and its non-fulfilment having been properly established according to my views as outlined above, the order of delivery made on the said 16th day of February, 1932, by the learned magistrate, acting as a judge under the Infants Act, delivering the said children to the custody of the said Children's Aid Society, was made without jurisdiction, and should be quashed.

I pause here to state that counsel on behalf of the Children's Aid Society, of Victoria, while relying on the order made on February 16th, 1932, contends that in any event the applicant herein by reason of her later application to the magistrate under the latter part of said section 93 that the children should be placed with the Catholic Children's Aid Society is estopped from now challenging the validity of the order made in February. I do not think this contention can be sustained as upon such an application as this I think the Children's Aid Society having custody of the children must establish the validity of the order under which it claims they are detained, and I would also say that if such order was made without jurisdiction the subsequent proceedings did not confirm or validate it although I do not think it is contended that they did.

Judgment

My conclusion on the whole matter therefore is that at present the said children are illegally detained in the custody of the said Children's Aid Society, but I have to add that I understood counsel for the applicant to state on the hearing of the application that he was not asking for the delivery of the children to the custody of the mother, but would make another application in the event of the said order being quashed and no further committal order being made, and as I am of the opinion that I have no power on the present application to give the custody of the children to anyone else, I would like to express the hope that the children may be allowed to remain where they are at present pending such further application being made. If counsel cannot agree on the terms of the order the matter may be spoken to.

Order quashed.

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Criminal law—Libel — Private prosecution — Jury disagree — Subsequent entry of nolle prosequi by Attorney-General—Discharge on nolle prosequi a "judgment for defendant"—Liability of private prosecution for costs—Criminal Code, Secs. 956 and 1045.

An accused was tried on a charge of criminal libel upon an indictment at the instance of a private prosecutor. The jury having disagreed a *nolle prosequi* was subsequently entered by the Attorney-General and thereupon by order of the Court the accused was discharged.

Held, that the discharge of the accused ordered by the Court following a stay constituted a "judgment" within the meaning of section 1045 of the Criminal Code and he is entitled to recover costs from the private prosecutor, including the costs of the trial in which the jury disagreed.

APPEAL by defendant from the decision of FISHER, J. of the 15th of March, 1933, in an action to recover the sum of $2,417.95, being the costs incurred by one Kanetaro Takagishi in defending himself upon an indictment for libel, the information upon which the indictment was found having been laid by the defendant, and which costs by order of MORRISON, C.J.S.C., of the 20th of May, 1932, were ordered to be paid by said defendant to the said Kanetaro Takagishi, the costs being taxed at the said sum of $2,417.95, on the 16th of August, 1932. By assignment in writing of the 18th of November, 1932, the said costs and interest thereon were assigned by Kanetaro Takagishi to the plaintiff, due notice of which was given in writing by the plaintiff to the defendant on the 18th of November, 1932. On the 22nd of January, 1931, the defendant preferred an information against Takagishi whereby he charged him with having published a defamatory libel on the defendant, said charge being laid under section 333 and other relevant sections of the Criminal Code. Takagishi was committed for trial, and indictment being preferred against him, he was tried on the 16th, 17th and 18th of November, 1931, when the jury disagreed. On the 20th of May, 1932, the Attorney-General of British Columbia directed a stay of proceedings to be entered on said indictment and thereupon by order of the Supreme Court, Takagishi was

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discharged from custody and the defendant was ordered to pay the costs of the said Takagishi incurred by reason of the indictment, including the costs of the abortive trial, and the costs incurred before the police magistrate. The plaintiff then brought his action in the Supreme Court of British Columbia to recover the amount of costs as taxed, claiming under section 1045 of the Criminal Code.

The appeal was argued at Victoria on the 14th of June, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Sloan, for appellant: The question is whether a discharge under a stay is a judgment within section 1045 of the Criminal Code. There was an application to have the case reinstated but this was refused (see 46 B.C. 281). We could have preferred another charge but this was not done: see *Burgess* v. *Boetefeur and Brown* (1844), 13 L.J., M.C. 122. We submit that a stay is not equivalent to an acquittal. *Rex* v. *Blackley* (1904), 8 Can. C.C. 405 is the judgment of a trial judge and should not be followed. The discontinuance of an action is not within the section: see 89 J.P. 678; *Goddard* v. *Smith* (1704), 6 Mod. 261; 87 E.R. 1008; *Regina* v. *Murry* (1893), 57 J.P. 136; Blackstone's Commentaries, Lewis's Ed., Book 3, p. 1353; *idem,* Book 4, p. 1755. On the distinction between "discharge" and "judgment" see Archbold's Criminal Pleading, 28th Ed., p. 241. A "discharge" is an administration order only. On the distinction between order and judgment in civil actions see *Onslow* v. *Commissioners of Inland Revenue* (1890), 25 Q.B.D. 465 at p. 466; *The King* v. *Kenworthy* (1823), 1 B. & C. 711; *Buczko* v. *Chobotar* (1926), 1 D.L.R. 1024. In the case of *Rex* v. *Nichol* (1901), 8 B.C. 276, it was held by DRAKE, J. that accused was not entitled to the costs of two abortive trials, and assuming there was a judgment in this case the costs of the abortive trial should not be allowed: see *Nichol* v. *Pooley* (1902), 9 B.C. 363; see also *Rex* v. *Fielding* (1759), 2 Burr. 719. In *Rex* v. *Fournier* (1916), 25 Can. C.C. 430, they followed *Rex* v. *Blackley* (1904), 8 Can. C.C. 405.

Tysoe, for respondent: Section 1045 of the Criminal Code provides for costs if judgment has been given for the defendant.

The defendant has been discharged from this particular indictment for ever and proceedings thereon have been terminated: see *Gilchrist* v. *Gardner* (1891), 12 N.S.W.L.R. 184. Judgment is distinct from verdict and may be contrary thereto: see Criminal Code, Sec. 956, Subsec. 2; Archbold's Criminal Pleading, 28th Ed., pp. 234 and 240. Judgment is the destination—roads of travel are many. For form of entry of *nolle prosequi* see Short & Mellor's Crown Office Practice, 2nd Ed., p. 553. Judgment on acquittal, Archbold, p. 241. "Judgment for the defendant" is a term used to indicate the determination of any proceedings in favour of the defendant: Words and Phrases Judicially Defined, Vol. 4, p. 3835; Widdifield's Words and Terms Judicially Defined, 206; Abbott's Law Dictionary, Vol. 1, p. 663; Bouvier's Law Dictionary, Vol. 2, pp. 25 and 30; Black on Judgments, 2nd Ed., Vol. 1, pp. 20, 21 and 29; Archbold, pp. 99 and 159; *Reg.* v. *Smith* (1838), 2 M. & Rob. 109; *Brook* v. *Carpenter* (1825), 3 Bing. 297; 130 E.R. 527 at 529-30; *Shaw* v. *Hertfordshire County Council* (1899), 2 Q.B. 282; *Gilbert* v. *Gosport and Alverstoke Urban Council* (1916), 2 Ch. 587. I particularly rely on *Rex* v. *Blackley* (1904), 8 Can. C.C. 405; also *Rex* v. *Fournier* (1916), 25 Can. C.C. 430; *Rex* v. *Spence* (1919), 31 Can. C.C. 365. As to the costs of the abortive trial, he is bound by the order of the Chief Justice: see *Rex* v. *Blackley; Rex* v. *Fournier; Mackay* v. *Hughes* (1901), 19 Que. S.C. 367; *Richardson* v. *Willis* (1873), 12 Cox, C.C. 351. In any event, costs of abortive trial were incurred by reason of the indictment and order of Chief Justice was right. *Rex* v. *Nichol* was wrongly decided: see *Green* v. *Wright* (1877), 2 C.P.D. 354; *Field* v. *Great Northern Railway Co.* (1878), 3 Ex. D. 261; *Copeland* v. *Corporation of Township of Blenheim* (1885), 11 Pr. 54, also Criminal Code, Sec. 1047.

Argument

Cur. adv. vult.

3rd October, 1933.

MACDONALD, C.J.B.C.: It appears from the pleadings in this case that the defendant laid a charge against Kanetaro Takagishi for having published a defamatory libel against him, under the provisions of the Criminal Code; that the defendant prose-

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cuted the charge before the deputy police magistrate who committed the said Kanetaro Takagishi for trial; that the defendant caused an indictment to be preferred against the said Kanetaro Takagishi on the said charge upon which he was tried in November, 1931; that upon the said trial the jury disagreed; that on the 20th of May, 1932, the Attorney-General of British Columbia directed a stay of proceedings to be entered upon the said indictment, which said stay of proceedings was duly entered and thereupon by order of the Court the said Kanetaro Takagishi was discharged by the Chief Justice of the Supreme Court of British Columbia from custody under the said indictment; that on the same day the said Chief Justice made an order pursuant to section 1045 of the Criminal Code, whereby he ordered the defendant to pay to the said Kanetaro Takagishi his costs incurred by him by reason of the said indictment including the costs of the trial at which the jury disagreed and the costs incurred before the police magistrate, the said judge also directed the said costs to be taxed by the district registrar of the Supreme Court and the same were taxed at $2,417.95; that in November, 1932, the said Kanetaro Takagishi by legal assignment and due notice assigned the said costs to the plaintiff. The defendant having made default in payment of the said costs this action was commenced in the Supreme Court of British Columbia for the said sum of $2,417.95. At the trial the statement of claim was amended by setting up the said section 1045 and claiming to succeed thereunder. Counsel for the parties agreed during the said trial, as stated by plaintiff's counsel, as follows:

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> My friend and I have agreed, subject to your Lordship's approval, as follows: If it shall be held that the plaintiff is not entitled to recover under the order of Chief Justice Morrison, but is entitled to recover without regard to that order, the bill shall be referred to the registrar to be taxed, at which taxation both sides shall be there to give evidence.

The Court expressed its approval of this and defendant's counsel said:

> It is satisfactory to me, with this observation, that I am not receding from any position I have previously taken.

To this Mr. *Craig* answered:

> That is all right.

It seems to me that thereupon the claim of the plaintiff was an alternative one, first under the order of the Chief Justice and

the certificate of the taxing officer and in the alternative a debt created by section 1045.

The learned judge held that the plaintiff was entitled to succeed upon the order of the Chief Justice and of the certificate of the taxing officer and ordered judgment for the said sum of $2,417.95, the amount not being in dispute.

Much confusion was created by the argument of counsel during the trial and up to the time of the said agreement. As I understand Mr. *Sloan's* argument for the defendant, he claimed that there was no judgment by the Criminal Court and that the alternative claim was not maintainable because there had been no assignment of the debt created by section 1045. I do not understand that the judgment of the Chief Justice who was the trial judge and who made the order for costs on the same day was not made in the Criminal Court. If it were made in the Criminal Court then there seems to be no point to the objection raised by defendant's counsel. I assume therefore in the absence of evidence to the contrary that the Chief Justice made the order of the 20th of May in the Criminal Court which would be in the Supreme Court of British Columbia exercising criminal jurisdiction.

MACDONALD, C.J.B.C.

It was argued by defendant's counsel that the entry of a *nolle prosequi* was not a termination of the proceedings and that therefore section 1045 did not apply. I cannot agree with that submission. I think it is against the authorities and I refer particularly to the judgments of the Court of New South Wales consisting of the Chief Justice, Mr. Justice Windeyer and Mr. Justice Innes, in *Gilchrist* v. *Gardner* (1891), 12 N.S.W.L.R. 184, of which we have been supplied with a typewritten copy, the said report not being in our library. The question of the effect on the criminal proceedings of the entry of a *nolle prosequi* was fully considered and the authorities reviewed in that case and I agree with the conclusion at which the Court unanimously arrived.

I would therefore dismiss the appeal.

MARTIN, J.A.: Under the circumstances before us, the order appealed from was, in my opinion, rightly made pursuant to the joint effect of sections 1045 and 1047 and all the costs allowed

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by the presiding judge of Assize, MORRISON, C.J., were those "incurred . . . by reason of such indictment" under said section 1045, as interpreted by the cases relied on by my learned brothers, to which I add the recent decision of the King's Bench Division in *Rex* v. *Essex Justices* (1933), 49 T.L.R. 283; 148 L.T. 498; in support of the reasoning that the entry of the *nolle prosequi* under section 962 is, in this case, the substantial equivalent of a "judgment given for the defendant," within the true meaning of that expression as employed in said section 1045, which, to cite Avory, J., is not to be taken in its "strict technical sense" but interpreted in a way which is "obviously necessary to give . . . some meaning which will not render it nugatory" to cover such an ordinary situation as the present. This case, indeed, has even stronger grounds for such a view because the situation which has arisen here (far from an extraordinary one) must be taken to have been in the contemplation of Parliament in view of the wide power it conferred upon the Attorney-General by said section 962.

It follows that the appeal should be dismissed, but not without giving to the appellant's counsel, Mr. *Sloan,* that "commendation and gracing" which Bacon says (in his famous essay "Of Judicature") are due to counsel where the "Cause [is] well handled and fair-pleaded."

MCPHILLIPS, J.A.

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

MACDONALD, J.A.

MACDONALD, J.A.: After perusal of the cases and statutes to which we were referred I think the judgment of Hall, J. in *Rex* v. *Blackley* (1904), 13 Que. K.B. 472, on similar facts, is sound. It disposes of this appeal. The discharge of the accused ordered by the Court following a stay constituted a "judgment" within the meaning of section 1045 of the Code. Although this discharge pronounced upon the formal declaration by the Crown of a *nolle prosequi* was not equivalent to an acquittal and a new indictment might be preferred still *quod* that indictment, as Hall, J. points out at p. 474 it is a judgment in defendant's favour. The case too covers the point that the costs of the trial in which the jury disagreed should be included. This appears clear from the phrase in section 1045 "costs incurred by him by

reason of such indictment or information." The costs might be taxed by the presiding judge as in *Rex* v. *Fournier* (1916), 25 Can. C.C. 430 at 439. They may also be taxed pursuant to section 1047, subsection 1 of the Code, as in this case. The Chief Justice of the Supreme Court, who discharged the accused, directed that the costs incurred by reason of the indictment should be paid by the defendant after taxation by the registrar. He had jurisdiction in respect to costs.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Farris, Farris, Stultz & Sloan.*

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

KNIGHT, KNIGHT AND CHILLIWACK BOTTLING WORKS LIMITED v. FAIRALL.

Contract—Sale of business—Covenant by defendant—Not to carry on or engage or be interested directly or indirectly in other business competing or interfering—Action for breach—Injunction.

By contract in writing of the 14th of August, 1930, the plaintiffs K. and K. purchased from the defendant 25 shares in the Chilliwack Bottling Works Limited, thereby making the plaintiffs K. and K. the only shareholders in said works. The contract contained, *inter alia*, a covenant whereby the defendant agreed not to carry on or engage, or be interested directly or indirectly in any other business competing or interfering with the business of said Chilliwack Bottling Works Limited for five years, and within an area known as the Fraser Valley District. About the 1st of June, 1933, the defendant was first employed by one McCulloch and later by his own wife in a business competing or interfering with the business of said Chilliwack Bottling Works within the area mentioned, and in the course of his employment he solicited orders from customers of said Chilliwack Bottling Works. In an action for an injunction to restrain the defendant from so acting, and for damages:—

Held, that the word "engaged" does not mean and include "employed or hired." If the plaintiffs desired to prevent the defendant from acting as a servant in like establishments they should have so stated in unmistakable terms, and the action was dismissed.

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ACTION for breach of contract and for an injunction restraining the defendant from repeating and continuing the breach, and for damages. The facts are set out in the reasons for judgment. Tried by FISHER, J. at New Westminster on the 20th of October, 1933.

J. A. MacInnes, for plaintiffs.
McQuarrie, and *Milledge,* for defendant.

15th November, 1933.

FISHER, J.: In this matter I have to say that my first impression was that even if the contract before me had not contained the express covenant hereinafter referred to nevertheless the defendant would be acting in breach of the contract if he solicited orders from customers of the plaintiff, Chilliwack Bottling Works Limited, as that appeared to me to be contrary to the principle laid down in *Trego* v. *Hunt* (1896), A.C. 7, where it was held that where the goodwill of a business is sold (without further provision) the vendor may set up a rival business but he is not entitled to canvass the customers of the old firm. Upon further consideration however I do not think so. In the first place it does not appear to me that the *Trego* case went so far as to hold that the vendor of the goodwill of a business could not canvass simply as an employee for a third party setting up a rival business. In the *Trego* case Lord Herschell, at p. 21, seems to base his judgment on the principle that the vendor of the goodwill of a business should not be allowed "to take that which constitutes the goodwill away from the persons to whom it has been sold and to restore it to himself." Thus the case would seem to go no further than to hold that the vendor of the goodwill of a business (without further provision) may set up a rival business but is not entitled to canvass customers of the old firm for such business. Even on the assumption however that the *Trego* case must be interpreted as going so far as to hold that the vendor of the goodwill of a business could not even in the capacity of servant for another party canvass the customers of the old firm it still seems to me that the present case is distinguishable on the ground that the defendant as vendor in the contract sued upon herein (Exhibit 4), dated August 14th,

Judgment

1930, does not purport thereby to transfer any goodwill. The nature of the contract sued upon may be made apparent by setting out here paragraph 3 and a portion of paragraph 4 of the statement of claim, reading as follows:

3. By a contract in writing dated August 14th, 1930, the plaintiffs, Gordon O. Knight and Lyle F. Knight, agreed to purchase from the defendant and the defendant agreed to sell to the said plaintiffs for the sum of $3,750, 25 shares of stock in the Chilliwack Bottling Works Limited, thereby making the plaintiffs, Gordon O. Knight and Lyle F. Knight, the only shareholders in the said Chilliwack Bottling Works Limited.

4. The said written contract of August 14th, 1930, was executed under seal and contained, *inter alia*, a covenant in clause "10" whereby the defendant did covenant and agree with the plaintiffs not to carry on or engage, or be interested directly or indirectly in any other business competing or interfering with the business of the said Chilliwack Bottling Works Limited for the term of five years from the said date and covered the area known as the Fraser Valley District. . . .

In the said statement of claim the plaintiffs allege that the defendant wrongfully and in breach of the said contract

(a) Carried on, engaged in or been interested in, directly or indirectly, the business of a manufacturer and distributor of soft drinks, continuously since about the First day of June, 1933.

(b) Solicited orders for soft drinks from divers customers of the plaintiff, Chilliwack Bottling Works Limited, and other vendors of soft drinks in the said Fraser Valley District.

Judgment

In the course of the evidence a bill of sale (Exhibit 1), dated 9th of April, 1929, was put in according to which the defendant for the consideration named therein transferred to Chilliwack Bottling Works Limited, one of the plaintiffs herein, certain goods and chattels appertaining to the business of the grantor and, *inter alia*, "all the goodwill of the grantor in his manufacturing business." It must be noted however that the statement of claim herein does not complain that the defendant solicited orders from previous customers of his wrongfully and in derogation of the rights granted by him to the plaintiffs in the bill of sale given by him in April, 1929, but that the defendant solicited orders from customers of the said plaintiff, Chilliwack Bottling Works Limited, wrongfully and in derogation of the rights granted by him to the plaintiffs in the said contract of August 14th, 1930. Even assuming that by the said contract of August 14th, 1930, the plaintiffs, Gordon O. Knight and Lyle F. Knight, became the only shareholders in the said Chilliwack

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Bottling Works Limited, I do not think such a contract, in which the defendant does not expressly transfer the goodwill, could be interpreted as having the same effect as a contract expressly transferring the goodwill unless the further provisions thereof made it capable of being so interpreted. The said contract however did contain the further provision or covenant in clause "10" as above set out and the effect of such covenant must now be considered in the light of the principles established by the cases cited by counsel.

As to the facts of this particular case, I find that the defendant was employed since about the 1st day of June, 1933, first by one M. L. McCulloch and later by the wife of the defendant in a business competing or interfering with the business of the said Chilliwack Bottling Works Limited in the said area and in the course of his employment did solicit orders from customers of the plaintiff Chilliwack Bottling Works Limited. In this connection reference might be made to what was said by Lindley, L.J. in *Smith* v. *Hancock* (1894), 63 L.J., Ch. 477 at p. 480:

> Now, it cannot be denied that this proceeding is calculated to injure the plaintiff, and no one can be surprised at his being greatly annoyed by it. If the evidence admitted of the conclusion that what was being done was a mere cloak or sham, and that in truth the business was being carried on by the wife and Kerr for the defendant, or by the defendant through his wife for Kerr, I certainly should not hesitate to draw that conclusion, and to grant the plaintiff relief accordingly. But I find it impossible to avoid the conclusion that the business is being carried on by the wife primarily for Kerr, and perhaps, to some extent, for herself. But, there being at present little or no profit, she has not yet got any money out of the business for herself. This being the state of the case, I am unable to hold that the defendant has done, or is doing, or is threatening or intending to do, what he agreed not to do. The utmost that can be said is that he has assisted his wife and Kerr to do what he agreed not to do himself. No honourable man would have done that, and no honourable man would, if he could help it, allow his wife to do what she has done and is doing. But, as a matter of law, I cannot say that the defendant is breaking his agreement.

Judgment

In the present case I must say that an air of suspicion surrounds the circumstances under which the said competing business was begun and carried on but I cannot say that what was being done was a "mere cloak or sham" and that in truth the business was being carried on for or by the defendant. On the evidence before me I must find, as I do, that the defendant was simply an employee.

Counsel for the plaintiffs however submits that the covenant must be interpreted in the light of the circumstances of the case and a meaning given which is proper under the circumstances. It would appear that the defendant was an employee of the plaintiff company at the time and it is also pointed out that the defendant sent to the said plaintiffs G. O. and L. F. Knight a written offer (Exhibit 2) which was apparently accepted by letter (Exhibit 3) and contained the following paragraph:

I further agree to enter into a formal contract not to engage in the manufacture or selling of the same products or products similar to those manufactured and sold by the said company for the term of five years in the Fraser Valley District in consideration of your acceptance of this offer on the understanding that both you and the company covenant with me in similar manner not to engage in the coal business.

I think it must be admitted that upon the contract being reduced to writing the previous negotiation is presumptively merged in the writing but in the present case I think it is immaterial whether it is merged or not as in any event it must be noted that the words in the offer are "not to engage in the manufacture or selling" and the same question arises as to how the words "engage in" should be interpreted.

Judgment

Jones v. *Heavens* (1877), 4 Ch. D. 636 is relied on by counsel for the plaintiffs and in the report of that case, at pp. 638-9, the following statement appears:

Bacon, V.C., held that by acting as manager for another carrying on the particular trade the defendant had brought himself within the terms of his covenant not to carry on, or be concerned in carrying on, either directly or indirectly, that particular business, or sell any goods in any way connected with that trade. There had been a very clear breach of the agreement by the defendant, who was proved to have sold goods connected with the prohibited trade within the prescribed limits, and the plaintiff was accordingly entitled to an injunction.

As was indicated by Lindley, L.J., at p. 479, in *Smith* v. *Hancock, supra,* the contract must be construed with reference to the subject-matter to which it relates and so as to give effect to and not to defeat the object to attain which the contract was entered into. It must be noted, however, that Lindley, L.J. also goes on to say:

This object is plain enough; it was to secure the plaintiff from the competition of the defendant. But, although this is the object, it is not in accordance with sound legal principle to give to the language of the agreement a wider interpretation than that language properly bears. The duty

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of the Court is confined to enforcing the agreement entered into, and it is not permissible to extend it so as to make the defendant responsible either for the conduct of other people besides himself or for conduct which does not amount to carrying on or being in any way interested in one of the prohibited businesses.

Counsel for the plaintiffs also refers to *Geo. Hill and Co.* v. *Hill* (1886), 55 L.T. 769 and *Cade* v. *Calfe* (1906), 22 T.L.R. 243 but in both those cases the language of the covenant is different from what I have in the case before me. In *Gophir Diamond Company* v. *Wood* (1902), 1 Ch. 950, Swinfen Eady, J. says in part as follows at p. 952:

It is quite conceivable that the defendant's action may be prejudicial to the plaintiffs, as it is open to him to injure their business by disparaging their goods when selling those of his present employers. The rival shops are close together, and in any case the defendant's special knowledge of the plaintiffs' goods may well enable him to draw unfavourable comparisons. This, however, is not a sufficient ground for the interference of the Court, unless it comes within the terms of the covenant. I must not strain the language of the covenant merely because I think the defendant is acting improperly. The question is whether the covenant, fairly construed, covers the case. I am struck by this fact. The covenant departs materially from the common form. It does not provide that the covenantor shall not be "engaged or concerned or interested" in a similar business, but merely that he shall not be "interested" therein. Nor does it contain the usual provision against accepting employment as a servant in a similar business. If it was intended to prevent the defendant accepting employment of that nature it would have been quite easy to say so.

Judgment

In *Smith* v. *Hancock* (1894), 2 Ch. 377, 386, 390, Lindley and A. L. Smith, L.JJ. treated the word "interested" as referring to proprietary or pecuniary interest, and held that notwithstanding the acts of the husband in assisting his wife to start a rival business he had not committed a breach of his covenant not to "carry on or be in anywise interested in" any similar business.

Reference might also be made to *Morrison* v. *McTurk* (1931), 45 B.C. 28 where, at pp. 29-30, MACDONALD, J. says as follows:

The finding as lack of a breach, avoids the necessity of my considering the cases and rendering a decision upon the covenant in the agreement, according to the interpretation sought to be placed thereon by the plaintiff in his pleadings. If it had been the intention of the parties to prevent defendant from working within the limit mentioned, then plaintiff should have so instructed his solicitor and used apt words in the instrument for that purpose. I might however add in this connection that in *Lee Hing* v. *Green* (1927), 2 W.W.R. 729 the Court of Appeal in Saskatchewan, fully considered many cases relating to restrictive covenants of this nature. It was there decided that even where the wording of the covenant was, that the defendant would not for five years "engage" in Estevan, either directly

or indirectly, in the business of restaurant keepers or confectioners that becoming a paid employee in another restaurant did not constitute a breach of the covenant. If it were requisite I would follow this judgment, supported as it is, by many authorities therein referred to.

In *Lee Hing* v. *Green, supra,* Martin, J.A. at p. 735 says, in part, as follows:

> This seems to me to be a more reasonable and more natural construction of the language than to hold that the word "engaged" means and includes being employed or hired and I think that if the plaintiffs desire to prevent the defendants from acting as servants in other restaurants they should have so stated in unmistakable terms.

There may be some apparent conflict in the cases cited but it seems to me that the principle to be applied here is along the lines indicated by Martin, J.A. in the passage above cited and that if the plaintiffs desired to prevent the defendant from being employed in a competing business or soliciting orders from customers of the said plaintiff or from other parties in the course of his employment they should have so stated in unmistakable terms, and, in my opinion they have not done so. The action is therefore dismissed with costs.

Judgment

As to the counterclaim, I have to say that I accept the evidence of the said plaintiff Gordon O. Knight and of the witness, *E. S. Davidson,* on the issues involved therein. I do not think that the defendant has any real ground of complaint with regard to either the coal transaction he complains of or the sublease referred to. I also think that when the difficulty arose over the transfer of the property, through no fault of the plaintiffs, the defendant was more to blame than the plaintiffs for not getting the matter satisfactorily adjusted. The defendant, however, is entitled to a transfer and there will be an order that the plaintiffs should transfer to the defendant forthwith the property in accordance with the offer referred to in their reply and upon such transfer being made the counterclaim will stand dismissed with costs.

Action dismissed.

ROBERTSON, J.

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THOMPSON v. THOMPSON.

Divorce—Order for maintenance — Default in payment — Enforcement—Application for garnishee order—R.S.B.C. 1924, Cap. 17, Sec. 3; Cap. 70, Sec. 36—Divorce Rules 69 (c) and 79 (a).

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The petitioner obtained a divorce from her husband and later presented a petition for and obtained an order for weekly payments for maintenance. Certain payments on coming due under said order were not paid. An application by the petitioner for a garnishee order under section 3 of the Attachment of Debts Act was refused.

Statement

APPEAL from the registrar's refusal of a garnishee order under section 3 of the Attachment of Debts Act. Heard by ROBERTSON, J. at Victoria on the 14th of November, 1933.

C. H. Tait, for the petitioner.

No one, *contra.*

16th November, 1933.

Judgment

ROBERTSON, J.: The petitioner herein obtained a divorce from her husband on the 19th of May, 1933, and later on presented a petition for, and obtained, an order under rule 69 (*c*) of the Divorce Rules, 1925, for weekly payments for maintenance and there is now due and unpaid in respect of the said order the sum of $80. The petitioner applied, unsuccessfully, to the registrar for a garnishee order under section 3, Cap. 17, R.S.B.C. 1924, and now applies to me for this order. The applicant's counsel submits that as her order is still unsatisfied she comes within the language of said section 3 (1) which reads in part:

> A judge or a registrar may, . . . in case a judgment has been recovered or an order made, . . . order that all debts, . . . be attached.

In *Bailey* v. *Bailey* (1884), 13 Q.B.D. 855, Brett, M.R. said at p. 859:

> It is an old and well-known rule of construing statutes, that when a special remedy is given for the failure to comply with the directions of a statute, that remedy must be followed, and no other can be supposed to exist.

And Bowen, L.J. in the same case at p. 860 said:

> Where new rights are given with specific remedies, the remedy is confined to those specifically given.

In *The Queen* v. *The County Court Judge of Essex* (1887), 18 Q.B.D. 704 at p. 707 Lord Esher, M.R. said:

The ordinary rule of construction therefore applies in this case, that where the Legislature has passed a new statute giving a new remedy, that remedy is the only one which can be pursued.

See also *Ivimey* v. *Ivimey* (1908), 2 K.B. 260.

I think that the decision in *MacPherson* v. *MacPherson* (1933), 1 W.W.R. 464, is based upon the same principle, *viz.*, that a judgment or order in divorce proceedings can only be enforced under a section in the Divorce Act or under a divorce rule.

The Divorce Act, Cap. 70, R.S.B.C. 1924, contains a section providing for the enforcement of Orders and Decrees of the Court, as follows:

36. All decrees and orders to be made by the Court in any suit, proceeding, or petition to be instituted under authority of this Act shall be enforced and put in execution in the same or the like manner as the judgments, orders, and decrees of the High Court of Chancery may be now enforced and put in execution.

Rule 79 (*a*) of the Divorce Rules, 1925, is 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 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.

Judgment

This rule is made pursuant to section 37 of the Divorce Act and these Divorce Rules have statutory force—see subsection (3) of section 2, Cap. 45, B.C. Stats. 1925.

There is no doubt that the Divorce Act is "a new statute giving a new remedy" and section 36 and rule 79 (*a*), *supra,* contain special remedies for failure to comply with an order of the Court. It is therefore necessary to determine whether the said section or rule would empower the Court to make an order under the provisions of the Attachment of Debts Act.

There can be no such power under section 36 of the Divorce Act as the attachment of debts was purely a common law remedy which, for the first time, was given to the superior Common Law Courts by section 61 of the Common Law Procedure Act, 1854 (17 & 18 Vict.), c. 125. Rule 79 (*a*) does not give power to make a garnishee order.

I therefore think the application fails.

Application dismissed.

ROBERTSON, J.

1933

Nov. 22.

GRAY v. PATERSON

GRAY v. PATERSON *ET AL.*

Practice—Statement of claim—Defendants public officials—Sued in official capacity—Motion to strike out—Leave to amend—Rules 14 and 284.

The defendant Paterson employed by the public works department of British Columbia, while driving a motor-car in the course of his employment, knocked down one J. A. Gray, who died from injuries thereby received. The plaintiff as administratrix of deceased's estate brought action for damages against Paterson, and Bruhn and Philip in their official capacity as minister and deputy minister of public works respectively. On motion, on behalf of Bruhn and Philip, for an order striking out the statement of claim as against them, on the ground that, as they were sued in said capacity it disclosed no reasonable cause of action against them as such:—

Held, that the plaintiff should be allowed to amend her statement of claim so as to make it clear she was suing them in their private capacity.

MOTION by defendants Bruhn and Philip for an order that the statement of claim be struck out as against them on the ground that it discloses no reasonable cause of action. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. at Victoria on the 21st of November, 1933.

Statement

R. A. Wootton, for the motion.
O'Halloran, contra.

22nd November, 1933.

ROBERTSON, J.: This is a motion under Order XXV., r. 4, on behalf of the defendants Bruhn and Philip for an order that the plaintiff's statement of claim [so far as the same contains allegations against them] be struck out on the ground that, as against them, it discloses no reasonable cause of action and is frivolous and vexatious.

Judgment

For the purposes of this application, I must accept the facts as I find them in the statement of claim, from which it would appear that at all material times Bruhn was minister of public works, Philip, deputy minister of public works in this Province, and the defendant Paterson, road foreman, employed by the Province in the department of public works.

On January 31st, 1933, the late James Anderson Gray was knocked down by a motor-car, belonging to the Province, and

driven by the defendant Paterson, and died from the injuries thereby received on February 8th, 1933. The action is brought by the plaintiff, as administratrix with the will annexed, of her late husband for the benefit of herself and her children under the provisions of the Families' Compensation Act, R.S.B.C. 1924, Cap. 85.

The negligence alleged against the defendant Paterson is; that by reason of his defective eyesight, he was negligent in driving a motor-car at all, or in the alternative, in driving a motor-car at night, whereby he failed to see and ran into the said James Anderson Gray, deceased.

Paragraph 5 of the statement of claim is as follows:

5. The negligence of the defendants Bruhn and Philip lies in that,—

(*a*) As minister of public works and deputy minister of public works of the Province of British Columbia respectively, they employed or caused to be employed the defendant Paterson as a road foreman, and entrusted him with the possession of and authorized him to drive and operate the said motor-car No. 5627.

(*b*) The said defendants knew, or in the alternative negligently failed to satisfy themselves that the said defendant Paterson had defective eyesight, which condition rendered it dangerous to the public for him to drive a motor-car, or in the alternative, rendered it dangerous to the public for him to drive a motor-car at night.

(*c*) The said defendants were further negligent in that they failed to institute a system of insurance or mode of indemnity whereby persons injured or damaged by motor-vehicles in the possession of or under the control of officers of the public works department should be able to recover compensation or damages.

Judgment

Counsel for the defendants Bruhn and Philip submits that his clients are sued in this action in their representative capacity, and that upon the facts alleged in the statement of claim, there is no reasonable cause of action against them as such, while the plaintiff's counsel, admitting that these defendants could not be sued in their official capacity, submits that this action is brought against them in their private capacity, and asks, should I decide against him on this point, that he be allowed to amend so as to make it clear that the plaintiff is suing these defendants in their private capacity.

Rule 14 reads as follows:

If the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, the endorsement shall shew, in manner appearing by such of the forms in Appendix A, Part III., Sec. VII., as shall be applicable to the case, or by any other statement to the like effect, in what capacity the plaintiff or defendant sues or is sued.

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The endorsement then determines whether or not the defendants are sued in their official or private capacity. The forms set out in the Appendix referred to in the rule shews that where an action is against a person in his representative capacity the proper endorsement is that the claim is against the defendant "as public officer of the bank," or "as heir-at-law of *A. B.*, deceased," etc.

The endorsement on the writ in part is as follows:

> The plaintiff's claim is as administratrix with the will annexed of the estate of James Anderson Gray, deceased, for damages for the death of the said James Anderson Gray on the 8th day of February, 1933, from injuries received on the 31st day of January, 1933, through the negligence of the defendant R. W. Bruhn, the then minister of public works for the Province of British Columbia and his servants or agents, the defendant P. Philip as deputy minister of public works and chief engineer of the said Province, and the defendant J. McNair Paterson as a road foreman of the said public works of the Province of British Columbia.

It is alleged that the words "minister of public works of the Province" and the words "deputy minister of public works," etc., are merely descriptive of these two defendants, but the claim, at least against Philip, is for "injuries received . . . through the negligence of . . . defendant P. Philip as deputy minister of public works." To my mind, this is clearly, so far as the writ is concerned a claim made against Philip in his representative capacity. So far as the writ is concerned, it is not clear in which capacity Bruhn is sued. However, the matter is put beyond doubt as to the intention of the plaintiff when paragraph 5, particularly subparagraph (*c*) thereof, *supra*, of the statement of claim is examined, because there, the negligence alleged against them is in their official capacity and said subparagraph (*c*) could only be a claim against them in their official capacity because in their private capacity they could not, of course, institute a system of insurance.

Judgment

The language of Romer, J. in *Raleigh* v. *Goschen* (1898), 1 Ch. 73, at p. 80; 67 L.J., Ch. 59, expresses my views in this matter. He says:

> Now on the facts before me, and dealing fairly with the writ and statement of claim, the conclusion I come to is that the present action was intended to be, and is, a claim against the defendants in their official capacity and not as individuals.

I think this is a case where the plaintiff should be allowed to

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amend. If I were to dismiss the action, I would do so without prejudice to the right of the plaintiff to bring a fresh action against these defendants which no doubt she would do and the present action would proceed against the remaining defendants Paterson and the Municipality of Saanich and quite likely the two actions would be tried together. The defendants therefore would gain no real advantage by the striking out of the statement of claim as against them.

Judgment

The plaintiff will have leave to amend but the two defendants Bruhn and Philip are entitled to the costs of this application in any event and to all costs thrown away by reason of the amendment.

Order accordingly.

HINDLEY v. BURNS.

MCDONALD, J.

1933

Nov. 29.

HINDLEY v. BURNS

Negligence—Damages—Farm labour—Knee injured when carrying bale of hay — Hay-hooks not provided — Effect of—"Industry"—Definition—Workmen's Compensation Act, Part II.—R.S.B.C. 1924, Cap. 278.

The plaintiff, a farm hand, while engaged in carrying bales of hay into the defendant's barn and piling them in tiers, slipped while climbing from tier to tier and falling injured his knee. In an action for damages for negligence he claimed his vision was obscured by being compelled to carry the bale in front of him and that the defendant should have provided hay-hooks, as by carrying the bales at one side with a hay-hook he could have seen where he was stepping.

Held, that the defendant was negligent in not supplying hay-hooks, but as it appears from the evidence that he could see where he was going quite as well without a hay-hook as with one, his action fails.

Held, further, that farming is an "industry" within the meaning of section 2 (1) of the Workmen's Compensation Act. The defendant company might, therefore, have brought itself within the provisions of Part I. thereof, but not having done so the plaintiff, if he had made out a case, would have been able to succeed under Part II. of the Act and would not have had to meet the defences of "*Volenti non fit injuria*" and "common employment."

Statement

ACTION for damages for negligence. The plaintiff while engaged as a farm servant of the defendant, slipped and injured

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his knee while carrying bales of hay and piling them in tiers in the defendant's barn. The facts are set out in the reasons for judgment. Tried by McDONALD, J. at Vancouver on the 21st of November, 1933.

McGeer, K.C., for plaintiff.
Bull, K.C., and *Ray*, for defendant.

29th November, 1933.

McDONALD, J.: The plaintiff sues for damages for injuries sustained on the 4th of July, 1931, while engaged as a farm servant of defendant in carrying bales of hay from the baler being operated on defendant's farm, and piling them in a barn. His complaint is that the defendant or its manager, one Hellier, failed to supply him with a hay-hook for use in carrying the bales. I find that no hooks were supplied. His whole case, as developed at the trial, was that if provided with a hook he could have carried the bales slung somewhat to his side, whereas, without a hook, he was obliged to carry them in his arms in front of him, whereby his vision was obscured. The bales of hay were piled in rows and tiers, and he and another man were required turn and turn about to carry a bale up the eighteen-inch steps formed by the bales already laid down, up to the 7th tier. While so carrying up a bale his foot rested upon a loose portion of another bale, with the result that he fell and injured his knee. In order to succeed he must prove that the defendant was negligent in not supplying hooks and that such negligence caused the accident.

Judgment

As to the first point, although there is some difference of opinion, as to whether hooks ought to be used, I think I must accept Hellier's own evidence given on his examination for discovery:

> Well do you agree with this proposition: that a man should have the privilege of using hooks or not, as he wants? He should have the privilege of using hooks, certainly.

Evidence of reputable and experienced witnesses was led to prove that it is a matter of choice with the workman as to whether he uses a hook or not; that some workmen gain time by turning the bales end over end or by resting them, on the way up, on the next higher bale. I think, however, on the whole of

the evidence, and having in mind the fact that the plaintiff is of small stature, and that the bales were about 4 feet long, 2 feet wide and 18 inches deep, and weighed about 105 pounds, I must find, sitting as a jury, that the defendant was negligent in not supplying a hook. The real rub however is to find whether this negligence caused the accident. In paragraph 7 of the statement of claim it is alleged that the plaintiff at the time of the accident was carrying a bale upon his back. In his examination for discovery he gave the following evidence:

How would you be able to see better if you had a hay-hook? I don't suppose that would make any difference.

But if you carried one of them with a hook it would not have been easier to see where you were going? No.

Upon this pleading and these admissions it seems to me impossible to hold that the plaintiff has made out a case.

This disposes of the case but it is probably not inappropriate that I should mention the discussion which took place at the trial as to whether or not, if the plaintiff had a cause of action, such cause of action lay at common law or under Part II. of the Workmen's Compensation Act. Mr. *Bull* suggested that farming is not an industry within the meaning of section 2 (1) of the Act but I find that the Oxford Dictionary (among other definitions) defines an industry as "a particular form or branch of productive labour," which would of course include farming. I therefore would hold that the defendant company might have brought itself within the provisions of Part I., if it had seen fit, and that not having done so the plaintiff, if he had made out a case, would have been able to succeed under Part II. of the Act and would not have had to meet the defences "*Volenti non fit injuria*" and "common employment."

Judgment

The action is dismissed.

Action dismissed.

COURT OF APPEAL

1934

Jan. 9.

REX v. THOMAS

REX v. THOMAS.

Criminal law — Club—Automatic slot-machine — Common gaming-house— Criminal Code, Secs. 226 and 229.

The Club of the Loyal Order of Moose, duly incorporated with a membership of 1,100 and provided with all the facilities of a social club, was entered by three detectives under a search warrant and one of them played two slot-machines which they found on the premises. He played the machines five times, paying one nickel for each play and received back in all seven nickels. They then took the machines away. The accused was acting for the secretary in his absence and was in charge of the club. The secretary had the keys to the slot-machines and took the proceeds therefrom from time to time on behalf of the club. Accused was convicted of keeping a common gaming-house.

Held, on appeal, that playing the slot-machines is a game of chance, the proceeds therefrom being taken for the benefit of the club, and the accused being in charge was properly found guilty.

APPEAL by accused from his conviction by *J. A. Findlay*, Esquire, deputy police magistrate in Vancouver on the 21st of July, 1933, on a charge of keeping a common gaming-house. The premises in question were owned and operated by the Loyal Order of Moose, a legally incorporated club. Two gambling-machines were found on the premises. The accused was in charge of the premises in the absence of the secretary, who was on a holiday. In acting as secretary the accused served customers and was acting as steward or manager. The two slot-machines were under the control of the secretary who kept the keys for the machines. The proceeds from the playing of the slot-machines were taken out by the secretary for the use of the club. The accused was found guilty and fined $50.

Statement

The appeal was argued at Vancouver on the 4th of October, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Soskin, for appellant: Three detectives with a search warrant walked into the club's premises and one of them played the slot-machines five times. They were not members of the club. The charge is under section 226 (*b*) of the Criminal Code. We

Argument

submit this is not a room, house or place kept or used for operating an unlawful machine within said section. This is not a gambling-device: see *Rex* v. *Hing Hoy* (1917), 2 W.W.R. 958. The case of *Bampton* v. *Regem* (1932), S.C.R. 626 should be followed. The English Gaming Act is broader than ours: see *Powell* v. *Kempton Park Racecourse Company* (1899), A.C. 143. They made their own evidence by playing the machines: see *Downes* v. *Johnson* (1895), 2 Q.B. 203; *Rex* v. *Riley* (1916), 23 B.C. 192; *Jenks* v. *Turpin* (1884), 13 Q.B.D. 505. The magistrate found this was a genuine club properly organized. Having so found he should not convict: see *Rex* v. *Gow Bill* (1920), 2 W.W.R. 199; *Martin* v. *Benjamin* (1907), 1 K.B. 64. If the evidence of the detective is inadmissible there is no evidence of gambling at all.

Argument

Des Brisay, for the Crown: The facts of this case bring it within sections 985-6 of the Criminal Code. *Bampton* v. *Regem* (1932), S.C.R. 626 does not apply to this case. The case of *Rex* v. *Richards* (1931), 44 B.C. 430 applies to this case. See also *Roberts* v. *Regem* (1931), S.C.R. 417; *Jackson* v. *Roth* (1919), 1 K.B. 102.

Soskin, replied. *Cur. adv. vult.*

9th January, 1934.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The appellant was employed by the Loyal Order of Moose in their club-house in the City of Vancouver, and at the time of the offence charged was acting in lieu of the secretary-treasurer of the club, who was absent, and had charge of the premises occupied by the club. This club had in these premises two slot-machines and the police obtained a search warrant, entered the premises, and took the machines away and a charge was laid against the appellant for keeping a common gaming-house. It was necessary, therefore, to prove that the said club-house was a common gaming-house under section 226 of the Criminal Code and that the appellant falls within section 229 of the Code, subsection 2. I think it is clear that the case does not fall under said section 226, subsection (*a*) since only members were entitled to enter and did enter there and such are not persons who resort there but are there as of right. *Bampton* v. *Regem* (1932), S.C.R. 626.

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Was it then a disorderly house under subsection (*b*) of said section 226? In the case above referred to it was held that the gain to the house must have been taken from the stakes or bets made in the game itself, and in that case it was held that since the moneys played against the machine were not taken from the stakes or bets and had necessarily nothing to do with the game, that case did not fall within the subsection. Detective Cruickshank, who played the machines, describes the result. He put a nickel in the slot and received in return four nickels for the first operation. He again put a nickel in the slot and received in return two nickels. He then played the other machine. For his first nickel he received one nickel and one worthless token and on playing it a second time he received nothing. The evidence does not shew that it was in reality a vending-machine but if it were, and the evidence is not very satisfactory on this point, I think it would make no difference to this case. The Supreme Court of Canada in the case above cited held agreeing with the decision of the Ontario Court of Appeal in *Rex* v. *Wilkes* (1930), 66 O.L.R. 319, in which Masten, J.A., delivering the judgment of the Court, said (p. 324):

MACDONALD, C.J.B.C.

> I think the statute must be interpreted in the sense I have indicated; that the operation of the automatic vending-machine in the manner here shewn is not playing at a game of chance within the meaning of the statute; that the accused, therefore, are not keepers of common gaming-houses, because those who operate the machine have no chance to lose; that it is here established that no chance to lose exists; and that the convictions should be quashed.

In this case the only evidence we have on the question of the character of the machine is that given by Detective Cruickshank, who played the machine in the club-room, from which it appears that there was a chance to lose and a chance to gain and that therefore in that respect the case is not governed by *Bampton* v. *Regem, supra.*

Does it then fall within section 226 (*b*) (i), which reads:

> (*b*) a house, room or place kept or used for playing therein at any game of chance, or any mixed game of chance and skill, in which
>
> (i) a bank is kept by one or more of the players exclusively of the others.

The club in this case is the banker. The club was the user of the slot-machine and deposited money in it and took the money out of it and "the bank [that is to say the machine] is kept

exclusively" of the other players. Detective Cruickshank says that the game was one of chance or of mixed chance and skill and that players may win or lose.

The money was taken out of the bank by the secretary-treasurer of the house in the course of his duty as such for the benefit of the club; therefore the club was a gaming-house and the accused was guilty of conducting it as enacted under subsection 2 of section 229.

The appeal should be dismissed.

MACDONALD, C.J.B.C.

MARTIN, J.A.: I agree in dismissing this appeal, and the case is clearly brought within the statute—section 226—by the uncontradicted evidence and the admission of the appellant's witnesses that, *inter alia,* the machines were under the control of the club's secretary who kept the keys thereof, and the money put into the machines by the players as "stakes or bets" was taken out of them by him, and all the "proceeds" from that operation of the machines were collected by him and appropriated by the club: that the game played was one of "mixed chance and skill," if not, indeed, of pure chance, is beyond serious question.

MARTIN, J.A.

The principles involved in *Bampton* v. *Regem* (1932), S.C.R. 626, invoked by appellant, when properly applied to the facts of this case, support the conviction, which, therefore, should be affirmed.

MCPHILLIPS, J.A.: I would dismiss the appeal. It would appear upon the facts and controlling decisions as I read them that there was an infraction of the Criminal Code. No doubt the Loyal Order of Moose were of the opinion that there was nothing illegal in having the mechanical contrivance in the club only utilizable by its members, but in that they were in error as I look at it and it cannot be allowed that the plain reading of the provision of the Criminal Code should be flouted.

MCPHILLIPS, J.A.

MACDONALD, J.A.: The points in issue were fully discussed in *Bampton* v. *Regem* (1932), S.C.R. 626 (and the cases therein referred to) and it is only useful to mention a fact that makes the decision inapplicable to this case, *viz.*, that "the

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whole of the stakes or bets or other proceeds" from the game was directly paid to the person keeping the house, room or place in question. The evidence shews that at least on one occasion the whole "of the proceeds" went into the coffers of that club. It was conceded by counsel for the accused that this was the practice. The late Chief Justice Anglin intimated, at p. 628, that:

> We might have been disposed to hold that this case fell within clause (*b*) (ii) of s. 226 of the Criminal Code, but for the fact that the evidence does not shew

the fact I just alluded to and Duff, J., now Chief Justice, at p. 633, said:

> The section is aimed, I think, at the participation by the owner of the place where the game is carried on, in the profits or other proceeds accruing to members from the game itself.

There is no doubt, therefore, that it is a "game of chance" in which the proceeds go to the keeper but it was submitted the evidence does not shew that the room or place was "kept" for that purpose. It is an organization engaged in many activities of a fraternal nature and, as the magistrate found, a "*bona fide* club." It is also true that only members of the club are entitled to play the machine. But, as Hawkins, J. stated in *Jenks* v. *Turpin* (1884), 13 Q.B.D. 505 at 512 (approved in *Jackson* v. *Roth* (1919), 1 K.B. 102 at 114)

> if the house had been kept open for a double purpose, *viz.*, as an honest social club for those who did not desire to play, as well as for the purpose of gaming for those who did, it would none the less be a house opened and kept "for the purpose of gaming."

MACDONALD, J.A.

Obviously if a club is "kept" for legitimate social and benevolent purposes and in addition introduces as part of its activities a gaming contrivance from which it derives profits it is "kept" for two purposes, one legal, the other illegal.

I would dismiss the appeal and affirm the conviction.

MCQUARRIE, J.A.

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

Appeal dismissed.

ILLINGWORTH v. COYLE.

MCDONALD, J. (In Chambers)

1933

Dec. 6.

ILLINGWORTH v. COYLE

Negligence—Automobile collision—Action for damages—Criminal prosecution arising out of same accident—Right of stay in civil action—Criminal Code, Sec. 13.

The plaintiff brought action against the defendant for damages owing to injuries sustained by himself and for the loss of his wife who was killed in a collision between the plaintiff's car and that of the defendant. Arising out of such accident a charge was laid against the defendant for that he did unlawfully kill the plaintiff's wife, and the defendant was committed for trial. The defendant moved to stay proceedings in the action until the determination of the criminal proceedings on the ground that he would be otherwise prejudiced in his defence.

Held, that a stay should be granted in a case such as this where the identical facts and the identical persons are involved in both proceedings and where the defendant has done nothing to delay or frustrate the criminal proceedings.

APPLICATION by defendant to stay proceedings in an action for damages resulting from an automobile collision, until the disposition of criminal proceedings on a charge arising out of the same accident. Heard by MCDONALD, J. in Chambers at Vancouver on the 5th of December, 1933. Statement

W. B. Farris, K.C., and *L. St. M. Du Moulin*, for the application.

Maitland, K.C., and *Hunter, contra.*

6th December, 1933.

MCDONALD, J.: On July 9th, 1933, the defendant while driving an automobile came into collision with an automobile being driven by plaintiff; as a result plaintiff's wife met her death and plaintiff was injured. Arising out of such accident a charge was laid against the defendant for that he did unlawfully kill and slay plaintiff's wife, and defendant has been committed for trial on that charge. In the ordinary course he will be tried at the Spring Assizes which may be expected to open about the middle of March next. Judgment

On November 14th, 1933, a writ was issued in this action

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wherein the plaintiff claims damages for the injuries sustained by himself and for the loss of his wife, Lettice Illingworth. In the statement of claim it is alleged that the death was caused by the negligence of the defendant, and particulars of such negligence are fully set out.

The defendant moves to stay proceedings in the action until the determination of the aforementioned criminal proceedings, for the reason that he is advised by counsel that he would otherwise be prejudiced in his defence.

The application is met by the answer that the defendant cannot be hurt since on his examination for discovery or on the trial he may claim the protection afforded by section 5 of the Canada Evidence Act, R.S.C. 1927, Cap. 59. The matter is not, however, quite so simple as that, for no such protection is afforded as to interrogatories which may be submitted to him, and one can see many other ways in which he may be embarrassed in his defence if the civil action proceeds first.

The question, however, is whether the action ought for such reasons to be stayed. Mr. *Maitland* points to section 13 of the Criminal Code, R.S.C. 1927, Cap. 36, which provides that no civil remedy for any act shall be suspended by reason that such act amounts to a criminal offence. It appears never to have been decided whether this section is *intra vires* though the question has often been discussed. Even assuming that it be *intra vires,* it can surely mean only what it says; and it does not purport to take away the right of any civil Court to control its own proceedings. It is a mere statement that the fact of the act constituting a criminal offence does not of itself operate as a stay.

Judgment

It does seem fairly clear that the present trend of the decisions is to the effect that a stay should be granted in a case such as this where the identical facts and the identical persons are involved in both proceedings and where the defendant has done nothing to delay or frustrate the criminal proceedings. See *Re Bryant* v. *City Dairy Co.* (1921), 50 O.L.R. 40; 37 Can. C.C. 405; *Moorehouse* v. *Connell* (1920), 17 O.W.N. 351; *Attorney-General* v. *Kelly* (1915), 25 Man. L.R. 696; 9 W.W.R. 243, 492.

In my opinion the distinction pointed out by Mr. *Maitland* between "civil" and "criminal" negligence is not such as to deprive the Court of the discretion which I think ought to be exercised in a case such as this.

The order will therefore go. Costs to be in the cause.

Application granted.

LOWE v. CAWSTON IRRIGATION DISTRICT.

Taxes—Assessment—Water Act—Notice to mortgagee—Two years' delinquent taxes in notice—Insufficient delinquent period before sale as to second year's taxes—Validity of notice—R.S.B.C. 1924, Cap. 271, Secs. 250 and 257—B.C. Stats. 1925, Cap. 61, Sec. 42.

The defendant is an improvement district by letters patent under the Water Act, formed for the acquisition of licences for the storage and delivery of water for irrigation purposes and for the improvement of the lands by drainage. The plaintiff is mortgagee of certain lands within the district. The defendant sent the plaintiff a notice headed "Tax Demand Notice 1932" notifying the plaintiff under the heading of delinquent taxes that unless the taxes are paid the property will be sold for taxes on April 28th, 1933, and it set forth the amount of taxes owing for 1931 and 1932 including costs and interest. Section 257 (1) of the Water Act provides that the district has power to sell at public auction all the lands in respect of which any taxes are owing which at the date of the tax sale have been owing for 24 months or longer. The plaintiff obtained an injunction restraining the defendant from selling the lands without conforming with the provisions of the Water Act.

Held, on appeal, affirming the decision of FISHER, J., that under the construction of section 257 of the Water Act the 1932 taxes were not delinquent. The statute requires that notice of sale shall be served at least 60 days before the sale, and the notice served was not dated nor was there evidence of when it was served, and there was not accurate information as to the amount claimed with respect to the 1931 taxes. They did not comply with the statute either as to the substance of their claim or as to the time in which the plaintiff should have the option to redeem and the notice is wholly invalid.

Held, further, that the proper course was taken when the plaintiff applied for an injunction and the judgment below should be sustained.

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LOWE v. CAWSTON IRRIGATION DISTRICT

Statement

APPEAL by defendant from the decision of FISHER, J. of the 29th of June, 1933, in an action for a declaration that the tax demand notice 1932, No. 703, issued by the defendant in respect of certain lands in the Similkameen Division of Yale District of British Columbia is invalid, a declaration that no taxes are due and for an injunction restraining the defendant from selling said lands. The plaintiff is the holder and owner of and is mortgagee named in a certain mortgage dated the 23rd of December, 1915, being registered in the Land Registry office at Kamloops, B.C., and said mortgage covers and includes the said lands, the subject-matter of this action. The defendant is an improvement district constituted by letters patent in 1926 under and subject to the provisions of the Water Act. After the granting of said mortgage, the mortgaged premises were subdivided by the mortgagors and as certain parcels were sold they were released from the mortgage. On the 23rd of February, 1933, the plaintiff received the said tax demand notice, said notice alleging delinquent taxes of $893.11 for 1931 and $893.11 for 1932, with interest and costs of sale. It was held that the tax notice was invalid under section 257 of the Water Act and an injunction was granted restraining the defendant from selling the land.

The appeal was argued at Vancouver on the 5th and 6th of October, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Argument

O'Halloran, for appellant: Four hundred and sixty-five acres of irrigable land is covered by this mortgage. Including the 1932 taxes in the notice is not fatal. The 1931 taxes were delinquent and the property was subject to sale: see *Clive School District* v. *Northern Crown Bank* (1917), 2 W.W.R. 549; *Calgary & Edmonton Land Co.* v. *Attorney-General of Alberta* (1911), 45 S.C.R. 170; *Riches* v. *Richmond Township* (1933), 3 D.L.R. 437 at 439. An injunction will not be continued where there is another adequate remedy: see *Smart Hardware* v. *Town of Melfort* (1915), 24 D.L.R. 540; *La Ville St-Michel* v. *Shannon Realties Limited* (1922), 64 S.C.R. 420 at 437; *Dechene* v. *City of Montreal* (1894), A.C. 640. The case of

Saunby v. *London (Ont.) Water Commissioners* (1906), A.C. 110 does not apply to the facts here.

J. W. deB. Farris, K.C., for respondent: The question is whether the appellant had the right to include the 1932 taxes as well as those of 1931 in the notice. There are three groups of taxes: (1) Current year's taxes; (2) taxes in arrear; and (3) delinquent taxes. The Act should be construed strictly and in cases of ambiguity must be construed in favour of the subject: see *O'Brien* v. *Cogswell* (1890), 17 S.C.R. 420 at p. 424; Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., 377; *Anderson* v. *Municipality of South Vancouver* (1911), 45 S.C.R. 425 at p. 427; *Standard Trusts Co.* v. *Municipality of Hiram* (1927), S.C.R. 50; 1 D.L.R. 1063; *Tate* v. *Biggs* (1911), 130 N.W. 1053 at p. 1055.

Argument

Cur. adv. vult.

9th January, 1934.

MACDONALD, C.J.B.C.: This is an appeal by the defendant from a judgment of the Supreme Court granting an injunction restraining the defendant from selling lands (of which the respondent is a chargee) without conforming to the provisions of the Water Act, Cap. 271, R.S.B.C. 1924, and amending Acts. The notice of appeal sets out four grounds of appeal, *viz.*:

1. That the learned judge erred in holding that the tax demand notice 1932 No. 703 was invalid as a tax-sale notice.

2. The learned judge erred in granting an injunction restraining the defendant (appellant) from selling at tax sale the lands described in the endorsement on the writ of summons herein.

3. The learned judge erred in not holding that section 257 of the Water Act, Cap. 271, R.S.B.C. 1924 as amended by section 42 of Cap. 61 of the statutes of 1925 requires the 1932 taxes to be included in the tax-sale notice.

4. In the alternative, if it is found that the learned judge was right in holding that the defendant wrongly included the 1932 taxes in the tax-sale notice he erred in that he did not (a) declare the said tax-sale notice valid in respect to the 1931 taxes. (b) Dismiss the plaintiff's (respondent's) motion to restrain the defendant from selling the lands in respect to the 1931 taxes.

MACDONALD, C.J.B.C.

An *interim* injunction was granted in the first place and on motion to continue it until the trial it was by consent turned into a motion for judgment. The learned judge held in favour of the plaintiff's contention and granted an injunction perpetually restraining the appellant "from selling or attempting to

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sell the said lands and hereditaments mentioned and described in the endorsement on the writ of summons in this action pursuant to the said tax-demand notice 1932, No. 703."

Section 250 of the said Act was alleged by the plaintiff to have been disregarded in that no tax-demand notice was sent to the plaintiff. The said Act provides that such notice shall be sent to the owner of the land and that if persons having any other interest, such as the plaintiff had, notices should be sent to them on request. No request appears to have been made in this case so that section 250 may be eliminated from further consideration. It is true that the notice to the plaintiff was designated tax-demand notice, but the appellant admits that this was a mistake and they had used the form ordinarily used under section 250 to give tax-sale notices. Section 257 provides:

(1.) In addition to all other remedies for the recovery of taxes (which expression where used in this section includes percentage amounts and interest), the improvement district shall have power to and shall once in each year hold a tax sale, and at the tax sale sell at public auction all the lands in respect of which there are any taxes owing to the improvement district which at the date of the tax sale have been owing for twenty-four months or longer.

MACDONALD, C.J.B.C.

(2.) The trustees shall fix the date, time and place of holding the tax sale.

The notice sent to the plaintiff is headed "Tax Demand Notice, 1932, No. 703." It notified the plaintiff, under the heading of Delinquent Taxes that,—

unless the taxes are sooner paid, this property will be sold for taxes at the annual tax sale of the District, to be held in the Community Hall, Cawston, B.C., at 10 a.m. on April 28th, 1933.

It sets forth that the taxes for 1931 are $893.11 and for 1932 $893.11; tax-sale costs $318 and interest $108.39—total $2,212.61.

I may add that the statute requires that notice of sale shall be served at least 60 days before the time fixed for the sale. This notice No. 703 is not dated and we have been referred so far as I recollect to no evidence shewing when it was served. The statute also states that the sale shall be absolute and there shall be no right of redemption. Now it is plain to me on the construction of said section 257 that the 1932 taxes were not delinquent and that there was no right to claim for the 1932 taxes in the said notice. If the notice had been in proper form and had

been given for the 1931 taxes only, together with costs of sale and interest, the plaintiff could have paid them and therefore prevented the sale, but in the notice the two years' taxes are included together and unless the plaintiff is required to segregate them and to tender the amount actually delinquent she had no means of saving the property except by an injunction. There has been a clear breach of the terms of the statute, namely, of said section 257. Had the defendant given a notice of sale in respect of the arrears of 1931 and if that notice had been given in time, which is doubtful, no doubt they could have sold on the 28th of April, 1933, the lands in question for those taxes, but they have not complied with the statute either as to the substance of their claim or as to the time in which she should have the option to redeem and it seems to me that her proper course was taken when she applied for an injunction and that the finding of the learned trial judge must be sustained. This finding does not prevent the sale of the property in the future in compliance with the provisions of the Act. It simply enjoins the sale "pursuant" to the notice No. 703.

MACDONALD, C.J.B.C.

There is a cross-appeal on the question of the constitution of the board. It seems that two or three of the members of the board had not the proper qualifications to take part therein. The learned judge dismissed the plaintiff's claim in this behalf and she appeals by way of cross-appeal. I think the learned judge was right for the reason given in his judgment.

It appears to me that the only real question involved apart from the costs has become academic. The injunction prevented the sale and the lands have not been sold though liable to be sold when proper proceedings are taken in the future. The removal of the injunction now would not assist the plaintiff in any way. The Court, however, is entitled to deal with the matter of costs as it should think fit, and I think the judgment below with regard to the costs of the action ought not to be disturbed. Costs should be given in this Court in favour of the respondent except the costs of the cross-appeal to which the appellant is entitled

The appeal and cross-appeal are therefore dismissed.

MARTIN, J.A.: No sound ground has been shewn, in my opinion, for disturbing the conclusions reached by the learned

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judge below, and therefore the appeal and cross-appeal should be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal. It is clear that the learned trial judge gave careful attention to all that was argued before him, and I am satisfied with the conclusion at which he arrived. In matters of this kind—the sale of lands under the provisions of the Water Act analogous to sales of land for Provincial or Municipal taxes, it is well known that there must be strictness in all that is done. I do not think it necessary to specifically call attention to the controlling decisions. Upon a careful reading and consideration of the learned trial judge's judgment, which is a full and complete treatment of the points in issue and the relevant law bearing thereon, I am of the opinion that the judgment should be affirmed.

I would, therefore, dismiss the appeal and I would also dismiss the cross-appeal.

MACDONALD, J.A.

MACDONALD, J.A.: The appellant is a body corporate by letters patent under the Water Act (R.S.B.C. 1924, Cap. 271, Part VI.). A tract of land in the Similkameen Division of Yale District was constituted an improvement district and the owners a body corporate subject to the Act and the provisions in the patent from the Crown. The improvement district was formed for the acquisition and operation of works and licences for the storage and delivery of water for irrigation purposes and the acquisition and operation of works for the improvement and development of the lands by drainage. It is administered by trustees with the aid of a secretary, assessor, collector and engineer. The area contained 1,083 acres of which 822 are irrigable at present and of the latter 469 irrigable acres were covered by a mortgage to the respondent. This dispute arose because of an attempt by appellant to sell the lands covered by respondent's mortgage at a tax sale pursuant to a tax-demand notice. By consent the application for an injunction was treated as the trial of the action and appellant was perpetually restrained from selling or attempting to sell the mortgaged lands on the ground that the tax-demand notice did not definitely state the total amount of taxes, interests, costs, etc., owing for the

year 1931—the only taxes it is alleged in respect to which a notice for sale could be given—but also wrongly included a demand for taxes due and owing in 1932. The material part of the notice reads as follows:

TAXES ARE DUE AND PAYABLE AS FOLLOWS:

Legal Description Lot	Block	Reg. Plan	Grade	Acreage	Rate of Taxes	Total Taxes 1932 Summary
				893.11	1931.....	893.11
					1932.....	893.11

DELINQUENT TAXES. Unless the taxes are sooner paid, this property will be sold for taxes at the annual tax sale of the District, to be held in the Community Hall, Cawston, B.C., at 10 a.m. on April 28th, 1933.

	19....	
	19....	
Tax Sale Costs		318.00
Penalty		
Interest		108.39
		$2,212.61
Total amount of current year's taxes if paid on or before 1st of February, 1933		893.11

SALE ABSOLUTE. NO REDEMPTION.

The point as submitted is that it was only taxes that were due "for 24 months or longer" (see B.C. Stats. 1925, Cap. 61, Sec. 42) in respect to which a tax sale might be held. I examined the various sections of the Act throwing light on the inquiry and without setting out details involving a reference to many sections will only say that the 1932 taxes should not have been included in the notice. It is clear too that a specific demand was made for payment of the 1932 taxes with the intimation that if not paid the property would be sold. It was suggested that even the 1931 taxes could not be included as the by-law for imposing it was only passed on September 24th of that year. That contention however is answered by section 245.

MACDONALD, J.A.

There is misinformation in the demand notice too in respect to interest. An amendment of 1931—Cap. 68, Sec. 17, substituting the word "March" for "February" was overlooked. The object of the notice is to advise the owner or holder of a charge of the amount that can be legally demanded to enable him to make provision, if so inclined, to make payment and prevent a sale. If there is an absolute right to receive the formal notice—

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and that is not disputed—it follows that, at least in respect to its most important provision (the amount demanded) it should be accurate. The owner or mortgagee has 60 days to act under section 257, subsection (3). It is important that he should have the time given by the Act to decide upon the course he ought to pursue. The other essential is accurate information as to the amount claimed. Later a notice by letter was given that the 1931 taxes would be accepted, *viz.*, on April the 18th, 1933. This however was not 60 days but ten days only before the date of the sale.

It was submitted that if the 1932 taxes should be excluded from the notice the provision of the Act in respect to the amount of the taxes owing as set out in section 257 are directory and not mandatory. *Clive School District* v. *Northern Crown Bank* (1917), 2 W.W.R. 549 was referred to. This is not borne out by the views of Beck, J. (based upon the words of Strong, J. in *O'Brien* v. *Cogswell* (1890), 17 S.C.R. 420 at 424) at p. 552 where he says:

MACDONALD, J.A.

> It seems to be proper to say that those provisions of the statute relating to the imposition of taxes which are intended for the security of the citizen, or to ensure equality of taxation, or for certainty as to the nature and amount of each person's taxes are mandatory; but those designed merely for the information or direction of officers or to secure methodical and systematic modes of proceeding are merely directory, or, in other words, where there is substantial compliance with the statute, irregularities in the assessment which are of such a nature that their effect cannot be injurious to taxpayers will not be regarded.

In *O'Brien* v. *Cogswell, supra,* Strong, J., at pp. 424-5, said:

> The general principles applicable to the construction of statutes imposing and regulating the enforcement of taxes for general and municipal purposes are well settled. Enactments of this class are to be construed strictly, and in all cases of ambiguity which may arise that construction is to be adopted which is most favourable to the subject. Further, all steps prescribed by the statute to be taken in the process either of imposing or levying the tax are to be considered essential and indispensable unless the statute expressly provides that their omission shall not be fatal to the legal validity of the proceedings; in other words, the provisions requiring notices to be given and other formalities to be observed are to be construed as imperative, and not as merely directory, unless the contrary is explicitly declared.

Certainty is required as to the amount claimed preparatory to a sale. If the proper amount is demanded redemption may follow: if an excessive amount the property may be lost through

supposed inability to redeem. This requirement is obligatory—"shall cause to be mailed" a notice shewing "the amount of the taxes owing in respect of the land" (section 257, subsection (3)). All steps taken to impose taxes and to sell lands for default in payment must be in conformity with statutory powers.

It was further submitted that in any event an injunction should not be granted if other remedies are available. As stated the application to continue the injunction was by consent treated as the trial of the action and all that was asked by the writ was a declaration and an injunction to prevent a sale. The aid of the Court was not sought as in applications for *interim* injunctions to protect property until a legal right was ascertained. If a sale without legal sanction is attempted the obvious remedy is by way of an injunction.

MACDONALD, J.A.

It has been frequently pointed out that to refuse an injunction in such a case would be to enable the defendant to expropriate the plaintiff without statutory authority, or without following the procedure pointed out by the statutory authority:

Saunby v. *London (Ont.) Water Commissioners* (1906), A.C. 110 at 115-16.

In *Victoria City* v. *Bishop of Vancouver Island* (1921), 2 A.C. 384 an injunction restraining the defendant from offering the property for sale for taxes was granted.

I would dismiss the appeal.

McQUARRIE, J.A.: Section 257 of the Water Act provides the formalities to be complied with where recovery of taxes by sale of land is contemplated. One of the requirements is a tax-sale notice as specified in subsection (3) of said section.

It is contended by counsel for the appellant that the notice (Exhibit A) is a proper tax-sale notice. If it were intended as a tax-sale notice the heading is misleading and the particulars constitute what more resembles a tax-demand notice than a tax-sale notice.

MCQUARRIE, J.A.

I agree with the reasons for judgment of FISHER, J. as to all matters dealt with by him and would therefore dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *T. G. Norris.*

Solicitor for respondent: *R. C. Lowe.*

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REX v. STINSON.

Criminal law—Carnally knowing girl between 14 and 16 years of age—Previous illicit connection—Conviction—Appeal—Criminal Code, Sec. 301 (2).

The appellant was convicted for having carnal knowledge of a girl of previous chaste character under the age of 16 and above the age of 14 years. The girl at the trial, admitted that she had had illicit connection with the appellant on one previous occasion saying that she was afraid of him and that he said "I would not have a home or anything if I did not give it to him." The complainant's mother was a widow and for many years lived with the accused, not being married to him. The girl lived with them. The accused stood *in loco parentis* to the girl. The home was at a remote point 24 miles north of Fort St. John in the Cariboo.

Held, on appeal, affirming the decision of ROBERTSON, Co. J. (MACDONALD, C.J.B.C. and MCPHILLIPS, J.A. dissenting), that in view of the relationship and the facts referred to it was open to the trial judge to find the girl to be "of previous chaste character" within the meaning of section 301 (2) of the Criminal Code.

APPEAL by accused from his conviction by ROBERTSON, Co. J. at Pouce Coupe on the 29th of May, 1933, on a charge of unlawfully having carnal knowledge of one Dorothy May Sowden, a girl of previous chaste character under the age of 16 and above the age of 14. Dorothy Sowden went on horseback from her home to a Girl Guide camp about 30 miles away. Accused went with her. Towards evening it started to rain so accused made camp and they stayed there all night. Dorothy stated accused had connection with her during the night and she stated he had had connection with her once previously. She stayed at the Girl Guide camp two days and then went home. On the day she arrived home her mother asked her if the accused had had connection with her and she replied that he had. The mother laid an information against the accused for having carnal knowledge of her daughter on the 29th of March, 1933. The accused was sentenced to eighteen months in Oakalla with hard labour.

Statement

The appeal was argued at Vancouver on the 25th of October,

1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

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Burritt, for appellant: This charge was under section 301 (2) of the Criminal Code. The girl admits she had had connection with accused previously and she is not a girl of previous chaste character. There is no suggestion that she was forced. There must be "duress" or the conviction cannot stand. The girl told her mother of this on the day she arrived from the camp, and the information was not laid until March 29th following. Complaint must be made on the first reasonable opportunity. Over eight months had elapsed: see *Rex* v. *McGivney* (1914), 19 B.C. 23 at p. 31; *Rex* v. *Elliott* (1928), 49 Can. C.C. 302. There was no corroboration of the girl's story: see *Theffault* v. *Regem* (1933), S.C.R. 509 at p. 516.

Argument

Des Brisay, for the Crown: Having connection with the accused before does not necessarily prove that she was not of previous chaste character: see *Magdall* v. *Regem* (1920), 61 S.C.R. 88; *Rex* v. *Lougheed* (1903), 8 Can. C.C. 184. There was ample corroboration including the evidence of the girl's mother: see *Rex* v. *Wakelyn* (1913), 21 Can. C.C. 111.

Burritt, replied.

Cur. adv. vult.

9th January, 1934.

MACDONALD, C.J.B.C.: I think on the evidence of the girl concerned the Crown failed to make out a case. Her own confession of previous misconduct with the accused is, I think, sufficient to support this finding. See *Rex* v. *Fiola* (1918), 29 Can. C.C. 125 and *Rex* v. *Farrell* (1916), 26 Can. C.C. 273. In the former is contained an exhaustive consideration of the American and Canadian cases, there being no English cases on the subject.

MACDONALD, C.J.B.C.

Apart from this question of law I am satisfied that the conduct of the mother and daughter was such as to render it exceedingly difficult to say that the accused was guilty. It looks as if his statement that the prosecution was a "frame-up" has a good deal to support it. The admission of the girl of the offence was obtained by her mother on a cross-examination by leading ques-

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tions and it is significant that the information was not laid until a year after the alleged offence.

I think the accused was not given the benefit of a reasonable doubt and on both these grounds I would allow the appeal and direct his discharge from custody.

MARTIN, J.A.: This is an appeal from the conviction of the appellant by the County Judge's Criminal Court for the County of Cariboo, *coram* ROBERTSON, Co. J., for having carnal knowledge of a "girl of previous chaste character under the age of 16 and above the age of 14, not being his wife," contrary to section 301 (2) of the Criminal Code.

Two grounds of appeal were argued, but the first, lack of corroboration, was disposed of during the hearing adversely to the appellant, and so there remains only the second, *viz.*, the "previous chaste character" of the girl; and it was submitted that she was not of that description because the appellant had carnal knowledge of her on one previous occasion a very short time, apparently, but not definitely fixed, before the particular offence charged, which occurred on the 16th of July, 1932. At that time the girl was 14 years and about 7 weeks old, having been born, her mother testified, on the 25th of May, 1918.

MARTIN, J.A.

It was submitted by counsel for the Crown that the evidence shewed, clearly, that on both occasions the young girl had been compelled to submit to the carnal actions of the appellant through fear of him, and that her submission to him alone by that duress could not form a ground for depriving her of the *status* of a girl of chaste character which she had admittedly enjoyed before the appellant defiled her, and there is to my mind sound reason, apart from direct authority, to support that submission because otherwise, *e.g.*, even a woman who has been raped is no longer a chaste character, though such a crime against her is of so grave a nature that it is declared by Parliament (section 299) that he who commits it is "liable to suffer death or to imprisonment for life, and to be whipped," and that offence is complete (section 298) even where she has consented if her

> consent has been extorted by threats or fear of bodily harm, or obtained by personating the woman's husband, or by false and fraudulent representations as to the nature and quality of the act.

In *Reg.* v. *Day* (1841), 9 Car. & P. 722, Coleridge, J., on an indictment for attempt to carnally know and abuse a girl under 10 years old, with a second count for common assault, directed the jury thus:

There is a difference between consent and submission; every consent involves a submission; but it by no means follows, that a mere submission involves consent. It would be too much to say, that an adult submitting quietly to an outrage of this description, was not consenting; on the other hand, the mere submission of a child when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law. You will therefore say whether the submission of the prosecutrix was voluntary on her part, or the result of fear under the circumstances in which she was placed.

And Stephen, J. said in *Reg.* v. *Clarence* (1888), 22 Q.B.D. 23, at 43:

A young child who submits to an indecent act no more consents to it than a sleeping or unconscious woman. The child merely submits without consenting.

In the Divorce Court it was held in the leading case on the subject of *Coleman* v. *Coleman* (1866), 35 L.J., P. 37 (recently approved by the Court of Appeal in *Cullen* v. *Cullen and Methuen* (1933), 102 L.J., P. 81) that even though a woman had been forced by her husband to resort to prostitution that conduct did not, under the circumstances, disentitle her to relief because, p. 38:

It has been proved to my satisfaction that the adultery was committed under circumstances which shew that the wife was not a willing agent. She was terrified by the threats and ill treatment of her husband into leading a life of immorality, contrary to her own will and desire. I think, therefore, I ought not to refuse a divorce against a wife who has been so grossly ill treated by her husband. I make a decree *nisi*, with costs.

The Supreme Court of the North West Territories, *in banco,* in *Rex* v. *Lougheed* (1903), 8 Can. C.C. 184, considered the meaning of "previous chaste character" on a charge of seduction under promise of marriage and came to this conclusion, p. 186:

The Court is of opinion on the foregoing, considering particularly the part or division of the Code in which section 821 is incorporated, that the words "previous chaste character" do not mean "previously chaste reputation," but point to those acts and that disposition of mind which constitute an unmarried woman's virtue or morals.

And it proceeded to say, *per* Prendergast, J., 187:

I do not mean to infer that there cannot, under particular circumstances, be a second seduction of the same woman by the same, and possibly even, another man. I would rather incline towards the affirmative, and it has,

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in fact, been held by the American Courts (5 A. & E. Encycl. of L., 2nd Ed., 871, last foot-note) that a woman may have been guilty of unchaste conduct, and subsequently become chaste in legal contemplation, and be the subject of seduction. And it does seem reasonable to hold that an unfortunate woman who has once surrendered herself, should not on that account alone irrevocably be deprived of the protection of the statute.

But there must be, at all events, between the two acts of seduction, such conduct and behaviour as to imply reform and self-rehabilitation in chastity, which the young woman's behaviour in this case leaves no room to infer.

Then, on a similar charge, the Supreme Court of Nova Scotia *in banco,* in *Rex* v. *Comeau* (1912), 19 Can. C.C. 350 took, in essentials, the same view of the matter, adding that the statute does not require the complainant to be "*virgo intacta.*" Graham, E.J., said, Russell, J., concurring, p. 355:

These qualifications require such a case to be submitted to the jury to say whether the female was of chaste character or not. It is not therefore an absolute physical intactness which is required to constitute "chaste character." And if that has to be submitted to the jury why not the case of a woman who has yielded once before but has at the time of the seduction a chaste character?

MARTIN, J.A.

The Legislature is speaking of character, something that may be amended, not a material substance like glass. This provision covers the case of a widow being seduced. It would not be considered very extraordinary to speak of a widow as having been seduced twice. Of course it would go to credit.

And Ritchie, J., p. 358, said:

What the statute is dealing with is character; otherwise a young girl who goes wrong, quickly repents and is absolutely virtuous for the next twenty years, has no "previously chaste character," and she never can acquire such character. I do not think the words of the statute properly bear this construction, and it is not in my opinion the ordinary meaning of the words.

In Ontario, in *Rex* v. *Farrell* (1916), 36 O.L.R. 372, the County Judge of Frontenac, on two charges under the section, held, p. 374, that the complainant had not lost her previously chaste character because while "being under the influence of liquor" she had only once before had illicit connection with the accused five months (in May) previous to the act complained of in December. An appeal was taken, and in delivering the judgment of the Court of Appeal Meredith, C.J.O., said, p. 376:

It does not necessarily follow that, because the prosecutrix testified that she had had sexual intercourse with the prisoner in the previous December, the judge was bound to find as to the second charge that she was not of previously chaste character.

Dealing with that question, the learned judge said: "I thought, as she was under the influence of liquor on the night in December, she might be mistaken as to what occurred; and, if not, being under the influence of liquor, and this being the only previous act of carnal connection alleged, I was not bound to accept it as necessarily proving previously unchaste character."

I agree with that view; and, in addition to what is there said, I may point out that it would be an extraordinary result if the prisoner, having secured his acquittal on the first charge on the strength of his denial that he had sexual intercourse with the prosecutrix on the 15th December, 1914, should be entitled to be acquitted as to the second charge on the ground that he had proved the unchastity of the prosecutrix because of the very act of intercourse which he testified had never taken place.

The appeal was therefore dismissed on the said evidence as set out in the case reserved, as stated, "and we must take it correctly," by the judge from his notes only. The Court, needlessly, went on to say at the end of its judgment, p. 377, that if the "whole evidence," *i.e.*, that in addition to what had been stated, was before them their "conclusion might be different," which merely speculative language does not detract from their decision on what was before them, and therefore alone relevant to their decision.

MARTIN, J.A.

In Quebec, at the Sessions of the Peace for Quebec the matter was considered in *Rex* v. *Fiola* (1918), 29 Can. C.C. 125 by Langelier, J.S.P., largely on the authorities cited, but the decision is not of present practical assistance because the complainant was found on the evidence (not set out) to be of "a lewd and lascivious disposition" and a voluntary prostitute, and therefore must necessarily have been of "unchaste character."

Very fortunately we have the decision of our now (since 1933) final National Supreme Court of Appeal in criminal cases in *Magdall* v. *Regem* (1920), 61 S.C.R. 88, which held that the question of previous chaste character is one of fact for the jury, Chief Justice Davies saying, pp. 90-1:

Some evidence was given in prisoner's behalf by some young men to the effect that the girl complainant was not chaste, but the jury disbelieved that evidence, and the sole question, therefore, remains whether the single lapse of virtue by her with the prisoner on or about the last of December when the parties were under a mutual promise of marriage prevented the jury finding her to be of "chaste character" when the offence of March 27th was committed.

I am not able to accept the argument that such a single fall from grace of a woman, engaged to a man to whose solicitations she yields, either

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because of a weaker will than his or that combined with affection and a hope of their prospective marriage under his promise, necessarily stamps that woman as one of an unchaste character for all future time. That surely cannot be so. There must come a time when repentance and pureness of living can rehabilitate her as a chaste character within the meaning of the statute.

And he proceeds, p. 92:

I cannot set up my judgment, not having seen or heard the witnesses but simply from reading the record, against the findings under proper direction of the jury who did see and hear them.

Then Anglin, J. said, p. 96:

It was for them to determine what credit should be given to the complainant's evidence, and what inference should be drawn as to the chastity of her character—for that was the issue—on the 27th of March, three months after the one previous act of unchastity which she admitted.

And Mignault, J. at pp. 98-9, took substantially the same view, saying:

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It is not for us to say that we would have so considered her, but the question is whether the previous seduction of the complainant precluded the jury on the evidence from finding that she had rehabilitated herself, or, in the words of the statute, that she was then an "unmarried female of previously chaste character under twenty-one years of age."

This was eminently a fact for the jury's determination, and I cannot say that there was no evidence to go to the jury on which they could find this fact.

These safe principles must be applied to the special facts of each case, and in applying them to those before us, which are of an unusual and shocking nature (and I shall not attempt to recite them because they are sufficiently outlined by my brother M. A. MACDONALD) it is abundantly clear that the learned judge below was justified in coming to the conclusion that the offence charged was established thereupon because the young girl had never lost her previous chaste character in submitting to defilements through fear of one who occupied a position of authority and control over her, even though based not upon paternity but upon irregular domestic relations with her mother of long duration in their common home.

It follows that the appeal should be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This is a case where the accused has been convicted under the Criminal Code, Sec. 301 (2)—carnally knowing a girl between 14 and 16. The accused is a man who lived in adultery several years with the mother of the girl.

The girl was born in lawful wedlock but the mother was living apart from her husband and several children were born following this illicit cohabitation with the accused. The facts as I read them go to shew that the mother getting tired of having the accused about embarked upon a plan to destroy the accused. The girl in question is a Girl Guide. The mother arranged that the accused would escort her to the camp many miles away. All provision was made for the travellers by the mother—provision for sleeping if necessary, food, etc., and they set out on horseback. Rain overtakes them. The girl says she did not want to stop as evening approached feeling that something would occur; that is, that the accused would have sexual intercourse with her, as that had occurred before. However, the decision was that they should halt for the night. Then that occurred which the girl expected. It seems that all that she did was to say to the accused that she did not want to do it. No evidence that she cried out or offered any resistance whatever, and where they were camped was beside the regular highway. The next day they proceeded upon their journey and the accused returned to the home where the accused, the mother, and younger children all lived. When the time came to bring the girl home from the Girl Guide camp to which she had been taken by the accused the mother makes all preparations as before and the accused sets forth to bring the girl home, which he does and the girl says nothing wrong took place on the return journey. After arrival home—some time after—the mother and the girl go for the cows. The girl does not mention this episode to the mother at all, but the mother plies the girl with questions suggesting that the accused had sexual connection with her on the trip. It is evident that she was bent on attempting to make a case against the accused—asked her whether she loved the accused as a daddy or as a husband. The girl said as a daddy. On the prosecution the girl admitted having sexual connection with the accused on other occasions than the one complained of but told no one and on the prosecution undertook to say that she was afraid of the accused but there was no evidence of any forced relationship whatever. In truth on the occasion complained of on the roadside she said:

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He [the accused] asked me for intercourse. I can't remember the words he used. I did not say anything. I did not know what to do. . . . He had intercourse with me. He did it once. That is all that is all that I can remember. I went to sleep and in the morning I went on to the Guide Camp. He went with me. No man had ever done this to me before. Accused had done this to me before. He is the only man who has ever done this to me in my life.

It is clear upon the evidence that the girl was not of previous chaste character when the act complained of took place. My learned brother the Chief Justice has arrived at the same conclusion—that is, that the Crown failed to make out a case and I am in agreement with the judgment of the Chief Justice.

It would appear that the learned trial judge did not advise himself that under section 301 (2) of the Criminal Code there is not the provision which is to be found in section 211 (2):

2. Proof that a girl has on previous occasions had illicit connection with the accused shall not be deemed to be evidence that she was not of previously chaste character.

It is to be noted that at the present time a movement has been on foot to ask Parliament to enact the same provision as above quoted in section 301 under which this prosecution was had, but

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apparently in the wisdom of Parliament any such action was refused. I would here quote a portion of the Report of the Committee on Administration of Criminal Justice of the Canadian Bar Association presented at the Eighteenth Annual Meeting held at Ottawa, August 30th and 31st and September 1st, 1933:

PREVIOUS CHASTE CHARACTER IN CARNAL KNOWLEDGE SECTION.

This Committee recommends that section 301 of the Criminal Code be amended by making present clause 3 of that section, clause 4 thereof, and by adding a new clause 3 as follows:—

"(3.) Proof that a girl has on previous occasions had illicit connection with the accused shall not be deemed to be evidence that she was not of previously chaste character." . . .

Suggested amendment to section 301.

This suggested amendment was brought to the attention of the Chairman by Deputy Attorney-General Blackwood of Regina who indicates that he suggested the amendment during the last session of Parliament, but it is not clear that he has suggested the amendment on different occasions to the Department of Justice.

It will be noted that chapter 53 of 23-24 Geo. V. which governs the amendments to the Criminal Code at the last session of Parliament, does not include this proposed amendment, so in view of the fact that it may have been considered and rejected by Parliament, the Committee should perhaps give it very special thought before including it in their Report.

The new clause 2 proposed is precisely similar to clause 2 in section 211 of the Code.

See 11 C.B. Rev. pp. 481 and 483-4.

It is plain that the Crown failed to make out a case. The Court cannot legislate and constitute that a crime which is not within the provisions of the Criminal Code. It follows, in my opinion, that the appeal should be allowed, the conviction quashed and the accused (the appellant) discharged from custody.

MCPHILLIPS, J.A.

MACDONALD, J.A.: The accused was convicted under section 301 (2) of the Criminal Code of carnal knowledge of a girl under the age of 16 and above the age of 14 years. The section reads as follows:

Every one is guilty of an indictable offence and liable to imprisonment for five years who carnally knows any girl of previous chaste character under the age of sixteen and above the age of fourteen years, not being his wife, and whether he believes her to be above the age of sixteen years or not; but no person accused of any offence under this subsection shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused.

It was urged that because the accused, according to the testimony of the prosecutrix, had on one occasion illicit intercourse with her prior to the date of the offence for which he was indicted she was not "of previous chaste character." Where, however, the offender pleads his own wrong as a defence to the charge the victim if she did not submit may be treated as a child "of previous chaste character." The question was considered in *Magdall* v. *Regem* (1920), 61 S.C.R. 88. At the trial the complainant admitted that she had on one previous occasion illicit intercourse with the accused under promise of marriage. It was held that the jury were not precluded from finding the complainant on all the facts and surrounding circumstances to be "of previously chaste character within the meaning of section 212 of the Code." The Chief Justice at pp. 90-91 said:

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I am not able to accept the argument that such a single fall from grace of a woman, engaged to a man to whose solicitations she yields, either because of a weaker will than his or that combined with affection and a hope of their prospective marriage under his promise, necessarily stamps that woman as one of an unchaste character for all future time. That

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surely cannot be so. There must come a time when repentance and pureness of living can rehabilitate her as a chaste character within the meaning of the statute.

And again, at p. 91:

There is no arbitrary lapse of time which I can suggest as necessary before a jury can so find. It must be a case for determination on the facts and circumstances of each case.

It is obvious therefore that the inquiry is not ended favourably to the accused when the mere fact of illicit intercourse on one previous occasion is established. It is not necessary to decide what conclusion should follow from repeated acts of this sort.

We have to find if in the case at Bar the trial judge was justified in finding previous chastity by the decision referred to. That depends upon the facts. The complainant's mother was a widow and for many years lived with the accused. They were not married. The child lived with them. The home was at a remote point 24 miles from Fort St. John in the County of Cariboo. The accused stood *in loco parentis* to the complainant. The evidence shews that she did not consent to his advances. She said "I was afraid of him and he said I would not have a home or anything if I did not give it to him." It occurred in a place where an outcry would be unavailing and escape impossible. In view therefore of the relationship and the facts referred to it was open to the trial judge to find that chastity, if lost at all under such circumstances, might at least be regained and her character in that respect rehabilitated. Such a conclusion is not clearly wrong.

MACDONALD, J.A.

It was also submitted that there was no corroboration of the complainant's evidence as required by the section. The child, on being questioned, told her mother what occurred. That however does not afford corroboration. Complaint at an early date merely adds weight to the complainant's story. But corroboration is found in the evidence given by the mother. She questioned the accused and asked him "why he did it." In reply, "he said he did it because I had accused him of doing it with other women and that was the reason he gave for doing it with Dorothy."

I would dismiss the appeal.

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

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

Solicitor for appellant: *W. E. Burritt.*
Solicitor for respondent: *A. C. Des Brisay.*

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Negligence — Damages—Automobiles—Collision at intersection—Right of way—Priority of entry on intersection—R.S.B.C. 1924, Cap. 85.

The plaintiff's daughter, with the plaintiff as a passenger, drove her Ford coupe south on Blenheim Street in Vancouver on the afternoon of October 1st, 1932. She had nearly crossed the intersection of 33rd Avenue when the rear right side of her car was struck by an Oldsmobile car coming from the west on 33rd Avenue driven by the defendant Lawson and owned by the defendant Givins who was in the car. The Ford car was shoved to the south-east corner of the intersection where it fell over the curb. Both occupants fell out, the plaintiff falling clear of the car but the car fell on the daughter and she was killed. In an action for negligence the jury found that the defendant was solely responsible for the accident and assessed special damages at $3,129.05, general damages at $2,000 and damages for the death of the daughter at $3,000. Judgment was entered accordingly.

Held, on appeal, affirming the decision of Morrison, C.J.S.C., that the Court would not be justified in disturbing the verdict.

Per Macdonald, J.A.: The defendants were some distance from the intersection when the deceased "reasonably and substantially" occupied it and had a right to cross in front of them. The driver at the right must drive at such a reasonable speed and have his car under such control in approaching an intersection that when he perceives it is properly occupied by another, he can stop, or at least reduce his speed to enable the other to cross safely. It was because of inability through excessive speed to do this that the accident occurred.

Statement

APPEAL by defendants from the decision of Morrison, C.J.S.C., of the 4th of May, 1933, and the verdict of a jury in an action for damages owing to a collision between automobiles

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at an intersection. The plaintiff with her daughter, who was the owner of a Ford coupe which she was driving south on Blenheim Street on the afternoon of the 1st of October, 1932, approached the intersection of 33rd Avenue. She proceeded to cross the intersection and was nearly across when the rear right side of the car was struck by an Oldsmobile car coming from the west on 33rd Avenue, owned by the defendant Givins and driven by the defendant Lawson. The Ford car was shoved to the south-east corner of the intersection where it fell over the curb. Mrs. Reed was thrown several feet from the car and very severely injured and Miss Reed, on falling out, the car fell on her and she was killed. The jury found the defendant Lawson was solely responsible for the accident and fixed the special damages at $3,129.05, general damages at $2,000 and damages for the death of Miss Reed at $3,000.

The appeal was argued at Vancouver on the 3rd and 6th of November, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Argument

J. W. deB. Farris, K.C. (*C. L. McAlpine,* with him), for appellants: The Oldsmobile was owned by the defendant Givins and driven by Lawson. They entered the intersection at from 15 to 20 miles per hour. Lawson looked and saw nothing to his right and then turning his eyes to the left suddenly found himself confronted by the Ford car which Miss Reed was driving at about 25 miles per hour. We had the right of way and she had no business to enter the intersection at that excessive speed. If she had taken reasonable care she would have seen our car approaching on her right and it was her duty to see us and stop. She was responsible for the accident.

Maitland, K.C. (*J. G. A. Hutcheson,* with him), for respondent: We were on the intersection well ahead of the defendants. We were nearly across as they hit the back of our car. If they had taken reasonable precautions we would have cleared their car. The instructions in the charge were sufficient for the jury to give a general verdict: see *British Columbia Electric Railway Co.* v. *Dunphy* (1919), 59 S.C.R. 263 at p. 269; *Lloyd* v. *Hanafin* (1931), 43 B.C. 401.

Farris, replied. *Cur. adv. vult.*

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MACDONALD, C.J.B.C.: The judgment in this case should not be interfered with. I am satisfied that the plaintiff, keeping a sharp look-out for other cars in the intersection, was not mistaken when she said no other cars had entered the intersection while the car in which she was riding was within it. On this set of facts the defendants had no right to enter and interfere with her. The jury believed this evidence so that the defendants' car must have entered the intersection later than did the car in which she was riding. The space was too small to permit of a mistake and therefore the appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A.: After full consideration of the questions involved herein, I find myself unable to come to any other conclusion than that we should not be legally justified in disturbing the verdict returned by the jury, and therefore the appeal should be dismissed.

MCPHILLIPS, J.A.

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

MACDONALD, J.A.

MACDONALD, J.A.: Appeal from a judgment awarding respondent $5,129.05 for personal injuries sustained in a motor accident, and $3,000 under Lord Campbell's Act for the death of her daughter, upon whom she was partially dependent. The respondent and the deceased (the latter driving) were proceeding southerly along Blenheim Street on October 1st, 1932, in a small Ford coupe, and in crossing 33rd Avenue, an intersecting street running east and west, were struck by an Oldsmobile motor-car approaching from the right on 33rd Avenue, controlled by the appellant Givins and driven by the appellant Lawson.

As the main contention is that the evidence does not justify the verdict, it is necessary to examine it in detail, having regard to the evidence of respondent's witnesses, which the jury accepted, and to parts of appellant's evidence, if any, that supports the respondent's case. It turns on the presence or absence of sufficient evidence to support the contention that appellants were driving at an excessive rate of speed. The negligence found by the jury was "not exercising reasonable

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precaution." The material precaution neglected, if at all, was failure to approach the intersection from the right at a reasonable speed, or in driving so fast that it was impossible to control and direct the car (*e.g.*, by swerving behind the Ford coupe) at the crucial moment. If the evidence supports this view, the finding of the jury, although general in its terms, may be read as indicating this particular act of negligence.

The respondent, Agnes Charlotte Reed, was a passenger in her daughter's car. She is 76 years old and her evidence, possibly due to her advanced years, is of little value. She said that when 12 or 15 feet from the intersection she looked to the right as her daughter, the driver, approached 33rd Avenue, "and there was no car in sight." Her vision was obstructed to some extent by high bushes, but extended about 125 feet up 33rd Avenue. Her daughter proceeded to cross at a uniform speed of 25 miles an hour, and without reducing it, as she approached the intersection. She said "my daughter never went fast; she never went more than 25 miles an hour." As they proceeded across the intersection, presumably after having just entered it, respondent again looked to the right and "there was no car to be seen," although in that position she would have —unless her vision was defective, and there is no evidence on that point—a clear view for at least a block. This second look was fruitless; she failed to notice the appellant's car: "no car to be seen at all" she said, and a moment later when "nearly over" the intersection, the appellants' car collided with them "with a terrific crash." She added "it is a mystery where that car came from." Respondent's car was a few feet beyond the centre of the intersection when hit. The intersection is 66 feet square. This evidence throws no light upon the inquiry. It may suggest that Lawson was driving at a high rate of speed, because the crash was "terrific." Appellants' car was, of course, clearly within the view of anyone who could see a few hundred yards, when respondent looked after entering the intersection. If at that time it was 100 feet away it must have been coming like a thunderbolt. On the other hand a car approaching at a high rate of speed should readily attract the deceased driver's attention. A finding of "excessive driving" could not be supported on this evidence alone.

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A civil engineer explained the nature and extent of the damage to the Ford coupe, to shew the force of the impact and the probable speed that produced it. A diagram, Exhibit 7, shews that the chassis was bent. The indented part was pressed steel and it was crushed in two inches. He was not, however, a mechanical engineer and could not make deductions as to speed from the indentation. A mechanical superintendent for the Vancouver police force, with seventeen years' experience in "relation to the mechanics of automobiles" also gave evidence. It was his duty to examine cars after accidents. The Ford coupe weighed 2,265 pounds and appellants' Oldsmobile 2,800. A mark of one of the head-lights of the Oldsmobile was found on the right door of the Ford coupe just below the handle. This does not help in determining speed but does shew that appellants' car ran into the coupe and would have avoided it if they arrived a fraction of a second later or had swerved a little to the left with their car under control. He described in great detail the damage to both cars; some of it, as to the coupe, likely attributable to damage it received when it turned over and hit the curb at the south-east corner of the intersection. A juror asked:

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What was the force or speed of the impact on the Ford?

and he replied:

It is impossible for me to answer that.

Would it be heavy or light? I would say it would take considerable force to cause the damage to this particular car, this Oldsmobile car.

This evidence alone does not establish excessive speed. "Considerable force" can be exerted by a moving body travelling at an ordinary rate. He also spoke of "the resistance or the power needed to cause the damage as I saw it," and said:

I would say possibly a blow of 8,000 to 10,000 pounds would cause the damage as shewn in the Oldsmobile photo and as I found it when I examined it.

This is a speculative estimate of little value unless translated in terms of speed. He stated, in fact, that the speed would not necessarily be high as indicated by this pressure. He gave this evidence:

It would not take a great speed for a car weighing 2,800 pounds and the other 2,000 pounds to get a blow of that sort? Yes.

You can cause damage at a low rate of speed if you have a collision head on? Yes, you can with the opposing parts.

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You see what happened here, apparently the Oldsmobile went into the Ford car. That would cause, you saw the marks on the radiator, that would cause a tremendous blow? Yes. No matter what speed that cars were going they would not have to be going very fast.

Later, speaking, or attempting to speak of speed as shewn by marks, he said "It is merely conjecture." We are still far from satisfactory proof of speed.

A police officer shortly after the accident found the Ford coupe at the south-east corner of the intersection, where it was driven by the force of the impact. It was overturned. He gave evidence as to skid marks and I consider it to see if it bears upon speed. I refer only to his conclusions which might properly be accepted. The marks indicated "that the Ford car had travelled sideways and had swung making half a revolution causing it to point back in the direction from which it had come," and "the car from the marks on the pole (a telegraph pole at the south-east corner) had evidently turned over." Hitting the curb probably upset it. He referred to one single skid mark 27 feet long running east and west of the point of impact "9 feet north of the south curb of 33rd Avenue." The jury could draw the inference that this mark was caused by appellants' car and that a high rate of speed was reduced by the application of the brakes in the 27 feet traversed before the impact. I say so, having in view the force of the impact, the distance the Ford coupe was moved, the damage to it and to its occupants. No expert evidence was given, however, on the point (possibly it is not possible to secure it) as to what rate of speed would be indicated at the point before the brakes were thus applied, having in view all known factors established in evidence, *viz.*, the condition of the brakes, their capability of stopping in a certain distance, and the impact of from 8,000 to 10,000 pounds. Scientific evidence of this nature may not be available. It is necessary also to point out that any inference that might be drawn from the 27-foot skid mark was to some extent destroyed by another police officer (Dunn), who gave this evidence:

These marks west of that [the 27-foot mark] obviously had nothing to do with the accident? I don't think it had.

This, however, is an opinion, and his mind was not directed to the point we are discussing.

Another officer testified that rusty water marks, presumably from the radiator of a car, could be traced on 33rd Avenue for 122 feet to the point marked S-2 on Exhibit 6. The Oldsmobile continued to that point, or near it. It proceeded this distance after the impact, as a witness (Coates) standing on Blenheim Street 240 feet from the intersection, after hearing the crash saw the rear end of the Oldsmobile going along 33rd Avenue beyond his vision. It was not going fast (another witness said it was going slowly) when he saw it, *i.e.*, after the crash. After Coates arrived at the intersection he noticed it parked "about 150 or 200 feet down from the lane." The lane is in the middle of the block. I take it he means that distance from the intersection, and should read "down by the lane." The fact that the car moved slowly for 122 feet would not indicate inability to stop because of speed, and appears to support Givens's statement that Lawson drove ahead slowly after the impact for a place to park. The brakes, of course, were heavily applied before the impact. He (Coates) found the body of the deceased on the curb at the south-east corner of the intersection and the injured Mrs. Reed on a gravel path nearby, about 20 or 25 feet from where the car was standing. The car may have moved after she was thrown from it.

The respondent particularly relies on the evidence of Dobbin, a pilot and air engineer, as to the speed of the Oldsmobile. He was in a house within a half block of the intersection (500 feet) west of Blenheim. He said:

I heard a car passing the house: I followed that sound as it increased speed to the corner: I heard the squeak of tires, a loud smash followed immediately by tinkling of glass.

He continued:

It indicated speed. And as the car went to the corner it indicated increased speed.

And then you heard the crash, did you? Distinctly, yes.

And in cross-examination:

You couldn't see this car, Mr. Dobbin? No.

And hearing it go by the street, do you tell us now that you could tell the speed of the car by the sound of the tappets? Yes.

You say you could. You know that it is most difficult to tell the speed of a car watching it go by, don't you? No.

You don't know that? No.

Don't you know that it is almost impossible for a man to tell the speed

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of a car going by him by observation in half a block, or do you? Well, I don't. I believe I can come within five miles of the speed.

You could do as well not seeing the car as you could seeing it? Very much so.

You tell us now that while in the box there or somewhere blindfolded, not watching the car, you could tell the speed within the same distance, could you? Yes.

And again:

Would you be in a better position to estimate the speed of this car than a person who actually saw it pass? I believe so.

The amazing feature about his evidence is that although he said he could from sound "estimate the speed of this car" better than a person "who actually saw it pass"—that he believed he could "come within five miles of the speed," he ventured no estimate of the rate, nor was he asked to do so. His professed ability to satisfy the jury on this all-important point was not used. He says "it increased speed," but to what extent? That might mean that the motion of the car increased from, *e.g.*, 15 miles an hour to 20 miles. It is reasonable to conclude that if he could say that it was travelling 50 or 60 miles an hour or more, he would have been asked to do so. It is true, that any-

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one listening to a car passing close by can tell by the sound if it is travelling at a high or moderate rate of speed, but to estimate it within 5 miles of its actual speed is, I think, impossible. This witness may have been able to do so: if we assume that he could, we are no further ahead, as he failed to place this knowledge at the disposal of the jury. What was left with the jury was an impression of high speed without any real evidence to warrant it. The respondent is in the unfortunate position that no independent witnesses saw the Oldsmobile approach the intersection.

The respondent also put in as part of her case part of the discovery evidence of the appellants. I refer to that part only from which deductions as to speed might be drawn. Lawson testified as follows:

Where were you when you saw her car? I think I was approximately, as you can figure out. You can't determine on the exact distance, but I would say she was fully twice as far from the intersection as I was.

Were you relying on the rule of the road in this case, or relying on your own powers of observation? I was relying on my powers of observation.

Why didn't you stop? Why didn't I stop? I looked up as I was approaching here, and I decided I had enough time to pass her car by

continuing, and when I looked over here to see another car, if there was a car to my right, and then when I looked again the car was right on top of me, and I put on my brake, and she was right in front of me.

Appellant Givens said they were travelling 15 or 20 miles an hour when approaching the intersection. Some children, he said, were in the street, in the last block traversed, and because of it Lawson slowed down. A witness for respondent passed a few minutes before the accident and said no children were there. Approaching Blenheim they were travelling, Givens said, "approximately 20 miles an hour." He got a glimpse of the Ford car when they were about 35 feet from the intersection, and at that time it was 70 feet back on Blenheim. That is not true, if the jury, as they might, accepted Mrs. Reed's evidence as to the speed at which the Ford coupe was travelling. He said that after the impact Lawson changed into second or low gear because "the car was going so slowly it would have stalled the motor to have kept it in high gear and tried to move it." Speaking of the speed at which they were going at the time of the impact, and I take it after the brakes were applied, *i.e.*, during the last 27 feet, he gave this evidence:

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Now, I think your suggestion is that you were going just about a mile an hour at the time of this impact? Well, possibly two or three miles an hour.

Well, didn't you say a mile on discovery? Do you remember? I said we were going very very slowly.

Did you say a mile? I may have.

Yes, or maybe less? Or maybe a little more.

You said that, did you? I don't exactly remember. It was only an approximate speed.

And again:

And in view of all of that force that is apparent from these marks, do you still say you only hit that car going at the rate of one mile an hour? Possibly three miles an hour.

I see. The car was practically stopped.

THE COURT: What do you say? I said possibly three miles an hour.

No, but you said the car was practically— Practically stopped.

Practically stopped. At the time of the collision? At the time of the collision.

And later:

You felt the force of this impact did you? Very slightly.

And on discovery:

Maitland: How fast was your car going? I would say it was going not more than one mile an hour. It was either at a dead stop or proceeding at a very slow pace.

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Now, I want to know whether you take that position today or not in view of the marks on that Ford car? I do.

That is the position you are taking? I do.

Then it was not going three miles an hour?

THE COURT: Oh, well.

I said about one mile an hour.

I refer to this because it is not convincing and the jury would be justified, in view of the damage to the cars and the distance the Ford car was pushed, in disbelieving it altogether and also would be justified in concluding that the real speed was concealed because it would be dangerous to state it. Lawson gave this evidence:

Wismer: What speed were you going as you entered the block—about? I would say approximately around about 15 miles an hour.

Yes? And while approaching the block, about 35 feet from the centre of the intersection going east on 33rd—

Yes? I noticed a car driven by Miss Reed approaching on my left.

Yes, how far was it from the intersection? From what I could figure out it would be about as far again back from the intersection as I was. I was in a position—

She was on your left? She was on my left, yes.

Yes, what about the traffic on the right? I then looked to my right.

MACDONALD, J.A.

Yes? To see that there was no cars approaching my right—on my right.

Yes? And on proceeding and looking to my right, I then looked to my left and Miss Reed's car was right in front of me. I jammed—practically right in front of me—I jammed on my brake, and as far as I can figure out I think my car was very close to being stopped when I collided with Miss Reed's car.

Now, as you went up the block between Collingwood and Blenheim, did you proceed at the same speed all through the block? No, I had to slow down, I forget, there was either one or two children playing with a ball.

I see, and you say you slowed down on that account? I had to slow down.

Where would that be in the block, what part of the block, about? Oh, about half way up the block—somewhere round about that.

He first told the police that he was not the driver, but later admitted it. The jury could regard this incident in testing his credibility.

I have, I think, indicated all the evidence at the disposal of the jury in making the finding that the appellants were "not exercising reasonable precautions." It is not a satisfactory answer. However, one is not "exercising reasonable precautions" if he approaches an intersection at such a rate of speed that he cannot stop or decrease it if the occasion for doing so arises, *e.g.*, by finding that another car having entered the inter-

section (occupying it) should be permitted to cross in safety. Having in view the course of the trial, that may fairly be taken as the jury's meaning. It is based upon excessive speed. Were they justified in so finding? One would be inclined to conclude from the review of the evidence outlined, that they were not. Taking each witness separately their evidence is largely negative. But the jury might view the evidence as a whole and by piecing it together find excessive speed. Regarded cumulatively I cannot say that the finding is clearly wrong or that a jury could not reasonably and fairly reach that conclusion. Isolated facts of little or no value alone, when taken together may justify the conclusion sought. The two appellants were not candid in testifying as to speed just prior to the impact, and one of them behaved in a way that suggested a guilty mind, leading to the inference that the truth was dangerous. The 27-foot skid mark could be accepted as made by appellants' car, notwithstanding appellants' denial for reasons stated by them. As explained in evidence, if one of the four brakes (as may happen) grips one wheel only, leaving the rest revolving, the single skid mark will be shewn. The evidence shews that in spite of Lawson's effort to stop, an impact of 8,000 or 10,000 pounds was applied to the Ford coupe, an impact heavy enough to drive it back the distance indicated and in the direction described. This in conjunction with other facts, might reasonably be taken to predicate high speed before the brakes were applied. If this could happen after effective brakes were used in this way, a jury might reasonably say that the speed was dangerously high before they were applied. I am not altogether satisfied that it does but if a jury says so I cannot say they were clearly wrong. Again, the damage to the Ford coupe, particularly the indentation in the chassis, would afford some evidence of speed. The fact too that the Oldsmobile proceeded along 33rd Avenue for 122 feet after the impact and after brushing the Ford coupe out of its way, with brakes applied at least before the impact, might lead the jury to say notwithstanding the explanation of the appellants, and the evidence of witnesses that it was moving slowly at that time, that it was originally going so fast that it could not be stopped any quicker. If they could stop quicker they should

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have done so. Their explanation is not convincing. Again, the fact that the Oldsmobile hit the Ford coupe broadside and a little to the rear, and after it got beyond the centre of the intersection, would indicate that only a high and excessive rate of speed would prevent a driver from, if not stopping, at least swerving to the left behind the Ford coupe, thus avoiding the accident. Add to this Mrs. Reed's evidence of the "terrific crash," the extensive damage to the cars, the distance the Ford was propelled, the force with which it struck a telephone pole a considerable distance from the point of impact, cumulatively, leading the jury to believe that the speed was excessive. They were justified in taking a comprehensive view of all the facts and in concluding that, as a whole, they pointed to an act of negligence on appellants' part solely responsible for the accident.

Assuming excessive speed there is no other point for serious debate. The alleged right of way is valueless to a driver approaching an intersection at a high and dangerous rate of speed. One cannot secure a right of way in that manner. If the cars were equidistant from the point of impact and travelling at the same rate of speed when both were say 50 feet from the crossing, the appellants would undoubtedly have the right of way. That right should not be whittled down. One must reasonably (*i.e.*, without speeding, etc.) and substantially enter the intersection before one about to enter from the right loses the right of way. Granted, however, that an excessive and dangerous speed on appellants' part is established, they were some distance from the intersection when the deceased "reasonably and substantially" occupied it, and had by law the right to cross in front of them. The driver coming from the right must drive at such a reasonable speed and have his car under such control in approaching an intersection that when he perceives it is properly occupied by another in the way mentioned, he can stop, or at least reduce his speed to enable the other to cross in safety. It was because of inability through excessive speed, to do this that the accident occurred.

MACDONALD, J.A.

I would dismiss the appeal.

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

Appeal dismissed.

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Solicitor for appellant Lawson: *G. S. Wismer.*
Solicitors for appellant Givins: *McAlpine & McAlpine.*
Solicitors for respondent: *Maitland, Maitland, Remnant & Hutcheson.*

PERDUE v. EPSTEIN.

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Negligence—Pedestrian struck by automobile—Contributory negligence—Continuing negligence of defendant—Damages—Liability.

A truck going west on a highway stopped close to the north curb. The deceased alighted on the curb side and walked around the back of the truck, intending to cross the road. As he emerged from the back of the truck, another truck going the same way (west) was close upon him and he started to run across to avoid it and continued at a slow dog trot until about five feet from the south curb of the road, when he was struck and killed by the defendant's car travelling east at about 25 miles an hour. The defendant had full view of the deceased from the time he emerged from behind the stationary truck. An action by deceased's wife for damages under the Families' Compensation Act was dismissed.

Held, on appeal, reversing the decision of Murphy, J., that assuming deceased was negligent in not looking to his right after reaching the centre of the highway, the respondent was at least 100 feet away when he should have first seen the deceased coming from behind the stationary truck. His failure to keep a proper look-out at this crucial time and stop or reduce his speed was the real cause of the accident.

Statement

Appeal by plaintiff from the decision of Murphy, J. of the 8th of February, 1933, dismissing the plaintiff's action for damages, her husband having been killed on Kingsway, near Vancouver, B.C., on the 5th of September, 1932. Perdue was driving west on a truck on Kingsway which stopped on the north side of the road at the intersection of McPherson Avenue at about 5 o'clock in the evening. He got off the truck on the north

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side and walked around the back of the truck, intending to go across Kingsway. As he emerged from behind this truck another truck going the same way was approaching so close that he had to quicken his step in going across the road to avoid it. He continued at a jog to go across and when he was from three to five feet from the south curb he was struck by the defendant's car going east at about 25 miles an hour. The action was dismissed.

The appeal was argued at Vancouver on the 27th and 30th of October, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Argument

H. C. Green, for appellant: As Perdue emerged from behind the truck on which he was driving, another truck going west was approaching so close that he had to hurry across the road to avoid it and his attention was drawn to that truck on his left. This may have confused him as to traffic coming from his right, but the defendant should have seen him as soon as he emerged from behind the truck from which he had alighted. He was driving for 200 feet with Perdue in full view and it was gross negligence in not seeing him in plenty of time to slow up. He could have avoided the accident by the exercise of reasonable care. Traffic on the highway was light at the time. He is entitled to damages where the defendant could have avoided the accident by the exercise of reasonable care: see *Swadling* v. *Cooper* (1930), 46 T.L.R. 597 at p. 599; *Springett* v. *Ball* (1865), 4 F. & F. 472; *White* v. *Hegler* (1916), 10 W.W.R. 1150 at p. 1154; *M'Lean* v. *Bell* (1932), S.C. (H.L.) 21; *Stanley* v. *National Fruit Co. Ltd.* (1931), S.C.R. 60; *Rex* v. *Broad* (1915), A.C. 1110 at 1115; *British Columbia Electric Railway Company, Limited* v. *Loach* (1916), 1 A.C. 719 at p. 726. The deceased was a first-class electrician and earned $8 per day.

Sullivan, for respondent: After deceased had passed the centre of the road he should have looked to his right; this was negligence on his part. We must drive with reasonable care in all the circumstances: see *Stanley* v. *National Fruit Co. Ltd.* (1931), S.C.R. 60 at pp. 64-5; *Jeremy and Jeremy* v. *Fontaine* (1931), 1 W.W.R. 671 and on appeal (1931), 3 W.W.R. 203.

Green, in reply: The *Jeremy* case is in our favour.

MACDONALD, C.J.B.C.: We have a judgment below of the learned judge, who, if I may say so, is a very able judge, and he has come to a conclusion with which I am compelled to say I cannot agree. The circumstances of the case are these, that the deceased person got off a truck on Kingsway at the north side of the street, right up close to the boulevard, went around the end of the truck and started to cross the street at McPherson Avenue. The distance between that and the place of impact would be the width of that truck from the north boulevard and the distance of the impact from the south boulevard. The street is 30 feet in width. Allowing, if you will, ten feet for these two distances, then he went 20 feet across that street, without any obstacle to his view, and the defendant ran down and killed him. The defendant was driving on his proper side of the street, along the south side of that highway, and he did not see him, until he got almost on top of him. That is probably perfectly true, but he ought to have seen him. He was, as the learned judge said, concentrating his attention on the approaching traffic, which consisted of a truck which was following the truck standing on the north side of the street. Of course he was quite right in keeping his eye on that traffic, but between that traffic and himself was the deceased crossing the street, and yet he did not see him. Well, he ought to have seen him. There was nothing to prevent him from seeing him.

Again, while the deceased was travelling that 20 feet in plain view of the defendant, if he had been keeping a good look-out, he walked about half the distance, and went at a dog-trot—slow dog-trot, as the learned judge put it—the balance of the distance. Allowing, say, five miles an hour for the slow dog-trot and the walk together, the defendant would be at least 80 feet away, and in covering that 80 feet he failed to see the deceased. I can scarcely conceive of any case of greater negligence than that. It is not a case of being caught in the agony of collision, he had ample time to see, and in addition to that (to which I attach very little importance in view of the facts that I have already stated) his brake was not in good order, and when he did see him, he could not stop as quickly as he ought to have stopped, but as I say, I do not attach much importance to the inefficiency of his brakes, because we have the negligence of his

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not looking and not seeing the deceased while he was travelling about 80 feet, and when he could have stopped, if his brakes had been in good condition, easily within half that distance.

I do not think there is much else to be said. We have been referred to several decisions upon the law relating to traffic on streets, but this is a question of fact. Nearly all these cases are ones of fact, and that fact must be ascertained by what is reasonable in all the circumstances of the case, that is, what a prudent man would regard as reasonable in all the circumstances. The circumstances in this case I have stated, and it seems to me that there is only one conclusion to be drawn from these circumstances, and that is, that the defendant was negligent, not only was he negligent, but he was guilty of ultimate negligence, he was the sole cause of the accident and ought to pay damages.

MACDONALD, C.J.B.C.

The learned judge came to a different conclusion and therefore did not consider the question of damages at all. We are not in the habit, particularly in personal injury cases, of assessing damages in this Court, and therefore the only thing we can do is to direct a new trial for the sole purpose of assessing the damages, and that I would do.

MARTIN, J.A.: I agree in the allowance of this appeal. In my opinion the negligence of the plaintiff, if there was any, did not contribute to this accident, and it was so remote that it should be excluded from the consideration of the case. It was not, in fact, within the real meaning of the words "contributory negligence," *i.e.*, conduct of that description, because if it did not contribute to the accident in the legal sense, of course it is something really foreign to the collision which did occur, and was not a contributing cause.

MARTIN, J.A.

Therefore, as I view this case, contributory negligence should be excluded, because the evidence at pages 88 and 91 and 92 of the appeal book shews that the deceased, in crossing, as he had a right to do, this highway, found himself, by the unusual position in which the on-coming truck from the east had taken up, in the agony of collision, and he did not have time from the moment when the horn was sounded by the on-coming eastern truck to take into consideration any other danger than that which then immediately came upon him; and there is no evi-

dence to shew, when that danger did suddenly come upon him from the east, that he conducted himself in a way which can be held to be negligent as regards any other vehicle approaching from the west. The position of the truck was peculiar, because it was coming down the middle of the street, and one of the witnesses, in answer to the Court, says that he saw that the close approach of the deceased was placing him in a position of danger, and the driver of the truck sounded his horn, and in response to that the deceased looked towards it. On one of the appeal book pages I noted that one of the occupants of that truck admitted that when he heard the horn sounded by its driver he saw the deceased look towards him, but he disclaimed that he [deceased] could not have seen before that the approach of the other truck, *i.e.*, that there was nothing to shew that the deceased was guilty of any real negligence. I put it higher than that; I say that even if he did not at the moment look towards the truck approaching from the west, the reason for that was that he did not have time because of the agony of collision. If I am right in that, there is an end of this case, because there is absolutely no excuse given for the more than surprising fact that one of the occupants of the car from the west says he did not see the deceased until they were within ten feet of him. It is difficult to understand how such a thing could have occurred. It is almost idle to speculate upon it, it seems to be a case of peculiar blindness, but whatever it is, that is the dreadful situation that resulted in this man's death. It is also to be observed that no reason is given why the defendant did not observe the situation of difficulty in which the deceased was placed by the truck coming upon him in the middle of the road, and in due time take adequate precautions to forestall any danger: that failure is no more explicable at that time than the later one of not being able to see the man until they were practically upon him.

MARTIN, J.A.

Therefore, the evidence being as I have read it substantially, it seems to me impossible to say in law that any liability at all can be attached to the deceased person, and therefore the cause of this accident must be so attributed to the unexplained negligence of the defendant, and therefore the appeal should be allowed.

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The portion of the evidence that I wish to refer to and had not at the moment, is at page 106, and it is that of Jack W. Morrisett, who was on the truck driven by Stewart, and it is his admission there on cross-examination that I had in mind. This is the paragraph:

> Are you in a position to say for sure here, on oath, that Perdue did not glance to the west before he started to cross? No, so far as I noticed I did not see him glance to the west.
>
> But if he were facing south at all he could turn his eyes southward and take in a considerable range of vision to the west without turning his head in that direction, couldn't he? Yes.

I might add, of course, that once he is found to have been placed in the agony of collision then no negligence at all can be attributed to him for making even a misjudged effort to save himself.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: With great respect to the learned trial judge, I cannot agree with the conclusion at which he arrived. The case is to be viewed, it seems to me, in this way, that the defendant driving a motor-car and approaching an intersection —that is a cross-street—is absolutely guilty of negligence unless, to put it broadly, he is enabled to say that he looked coming into the intersection and when about to cross the street. He must be in a position of being able to say that he looked. Why? Because the law of the land is that the person who has entered upon a crossing, an intersecting street, having entered upon it before anyone else has occupied it, is to have a free passage on that intersecting street. The decision of the Privy Council in *Rex* v. *Broad* (1915), A.C. 1110, the case which went from New Zealand, and very recently has been referred to by the House of Lords as a binding decision upon the point, is applicable to this case. The deceased entered upon that crossing, and the evidence shews that he had appreciably entered upon that crossing. Further, he was dog-trotting, as it is called. That in itself ought to have apprised the on-coming motorist, still he does not see him, because he did not look. Then again coupled with it is this, that if the deceased did appreciate that a motor-car was bearing down upon him, and that is the inscrutable, he was in the agony of collision—he was knocked unconscious and later died without recovering consciousness. The

on-coming truck in the rear sounding the horn, and this motorist coming upon him, he was in the position that even if he did not do the right thing to obviate that which did happen, the law still will say that there is no responsibility for that even if he made a wrong move there is the right to recover. The principle of *Rex* v. *Broad, supra,* it seems to me, is only a fair one. Is it not a proper view, and a common-sense view of the circumstances, that if one has entered upon a crossing that a person coming up to that crossing must be held to be conscious of the circumstances and the conditions there? In this case the defendant is unable to meet the position, he is unable to say that he was aware, he is unable to say that he took any precautions; further, he had handicapped himself by operating a motor which is incapable of being stopped within a reasonable distance; so that he was in a position that it was impossible for him to prevent any accident, that was the case here, he had incapacitated himself from being enabled to save the life of the deceased. I do not think that the evidence can in any way be marshalled so as to entitle it to be said that the defendant was other than guilty of negligence. I do not think that there is any question of ultimate negligence. I think the negligence is upon the defendant. It was his complete fault. *Swadling* v. *Cooper* (1930), 46 T.L.R. 597 supports the view that I have expressed and *British Columbia Electric Railway Company Limited* v. *Loach* (1916), 1 A.C. 719 undoubtedly supports the case. There (in the *Loach* case) there was initial negligence when the car was taken out of the car-barn in the morning, the brakes were not in order. In this case the defendant's car had brakes which were not in order. Further, there is this other fact, even the horn apparatus upon the car for the purpose of warning was not sounded. Why was it not sounded? Because, owing to the condition of the brakes and the desperate efforts made by the defendant to prevent the collision he was unable to sound the horn.

MCPHILLIPS, J.A.

I am of the opinion that the judgment below should be reversed and that a new trial should be had, confined to an assessment of the damages.

MACDONALD, J.A.: There is, with deference, a fundamental error in the reasons for judgment of the learned trial judge.

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A salient fact at the inception of the case was overlooked, *viz.*, the relative position of the respondent and the deceased at the time the latter stepped from the north side of the highway and reached the south side of the truck from which he alighted. Briefly the facts are as follow:

The deceased, on alighting from a truck which drew up close to the curb on the north side of Kingsway, started to cross the street diagonally at an intersection and having regard to traffic from east to west, he should have been permitted to do so in safety. I say so because a truck approaching from the east and respondent's car from the west were, when he commenced to cross, at such a distance away (225 feet) that they should not interfere with him in the exercise of this lawful right. As the deceased approached the centre line the truck from the east, astride the centre of the road, bore down upon him without reducing speed, sounding its horn in the meantime as a command to get out of the way. If that driver had shewn proper regard for the rights of a pedestrian crossing the intersection he would have reduced his speed to enable him to get beyond that part of the highway his truck was about to occupy. Instead by continuing at unabated speed and by sounding his horn he created confusion and a sense of danger in the mind of the deceased. Whether or not at this stage the deceased acted prudently is not a decisive factor against him. Confronted with this dilemma his action, in continuing to cross at a slow dog trot, instead of taking the almost equally dangerous course of retracing his steps, should not be regarded as a negligent act. On proceeding across and when within about six feet of the southerly curb, he was struck by respondent's car approaching as stated from the west, and died from the injuries received.

Referring under the foregoing circumstances to the liability, if any, of the respondent we should view anew the whole situation from the outset. The all-important point is the distance between the deceased and respondent's car when the former emerged from behind the truck from which he alighted and proceeded to cross. At that time respondent, who was over 100 feet away, failed to see him at all and this neglect to keep a proper look-out on approaching an intersection upon which the

deceased had entered for the purpose of crossing led to the fatality. This failure to look was also the cause of respondent's failure to notice the situation that developed in respect to the truck from the east and to take the necessary steps to avert danger.

Having regard to the whole distance travelled by the deceased in crossing, and the distance traversed by the driver of respondent's car, the latter was at least 100 feet away—possibly 125 feet—when he should have first seen him. Deceased was proceeding at a speed of—I would say—less than four miles an hour (a slow dog-trot); respondent was travelling six times as fast (25 miles an hour). While deceased travelled approximately 20 feet the respondent drove approximately 120 feet. He was therefore, so far from the intersection, when he first should have seen the deceased, that he should have permitted him to cross in safety. The fact is that respondent did not see him until within 15 or 18 feet notwithstanding all that occurred to properly attract his attention. Even, if we assume, that deceased upon reaching the centre of the highway was negligent in not looking to the right, the respondent should have, and could have, averted the accident. Having seen deceased for the first time only when within 15 or 18 feet of him, it is clear that so far as ensuring the safety of this pedestrian was concerned he might as well have been blindfolded while travelling approximately 100 feet. His failure therefore to keep a proper look-out at the crucial time and to stop or reduce his speed was the real cause of the accident. As, therefore, respondent, by exercising proper care might have avoided the accident, he is liable for the consequences of his neglect though the deceased may have been negligent in failing to look to the right (*Davies* v. *Mann* (1842), 10 M. & W. 546). It may be submitted that as respondent, through his own negligence, only became aware of the situation when within 15 or 18 feet of the deceased he could not avoid striking him but by closing his eyes, so to speak, until that point was reached, he cannot avoid a finding that his failure to keep them open and his failure to act caused the accident. It was in the true sense "subsequent and several negligence."

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I would hold therefore, firstly, that the deceased was placed

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in a position of imminent peril by the negligence of the truck-driver from the east in which event negligence cannot be imputed to him but if wrong in that view the negligence of the respondent was the real cause of the accident.

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The appeal should be allowed and a new trial directed limited to the assessment of damages.

MCQUARRIE, J.A.

MCQUARRIE, J.A.: I also agree that the appeal should be allowed, and the directions of the Chief Justice carried out.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The appeal is allowed, and a new trial for the purpose only of assessing the damages is ordered.

Appeal allowed and new trial ordered to assess the damages only.

Solicitor for appellant: *F. Kay Collins.*
Solicitor for respondent: *Harry J. Sullivan.*

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DANGERFIELD v. SMITH

Negligence—Contributory negligence—Driving with light out—Duty of police constable—Motor-cycle—Duty to keep car under control.

The defendant, a police constable, was standing 65 feet north of Robson Street on Burrard Street (a wide street) in Vancouver at about 5.30 in the afternoon. The defendant on a motor-cycle, going south, was waiting to cross the intersection with three rows of cars on the north side of Robson Street on Burrard Street, he having the third position in the middle row. There was an automatic stop signal at the intersection, and on the green light appearing the cars started across. The front car in the middle row had one light out, and when it came opposite to where the policeman was standing he stepped out on to the street and signalled the car to stop which it did. The car behind it stopped abruptly, but the plaintiff going at about 15 miles an hour was too close to the second car, and in order to avoid a collision he swerved to the left, but in doing so he swiped the left rear fender of the car in front, his right leg being caught between the motor-cycle and the fender and badly injured. The jury found the policeman was negligent in stepping out on the street instead of blowing a whistle and signalling the car to pull to the curb, and that the plaintiff was negligent in being too close to the car ahead and in the wrong position to see signals of the driver ahead. The degree of fault was found at defendant 60 per cent. and plaintiff 40 per cent.

Held, on appeal, reversing the decision of MORRISON, C.J.S.C., that there was no obligation either in the regulations or as a duty for the policeman to blow a whistle. To travel without both head-lights lit is a danger to others on the street and the policeman was right in stopping the traffic as he had a right to assume the other cars would be kept under control and meet traffic regulations. The plaintiff not keeping the motor-cycle under control was solely responsible.

APPEAL by defendant from the decision of MORRISON, C.J.S.C. of the 26th of May, 1933, in an action for damages for injuries sustained through the alleged negligence of the defendant. The defendant is a police constable employed by th City of Vancouver. On the 19th of December, 1932, at about 5.30 p.m. the defendant was on the sidewalk on the west side of Burrard Street about 65 feet south of Robson. The plaintiff was on a motor-cycle going south on Burrard Street and stopped behind two other cars waiting for the green signal to cross, there being three rows of cars waiting to cross at the time. Upon the

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green signal appearing, all the cars started across and when the front car ahead of the plaintiff came opposite to where the defendant was standing, the defendant, seeing that one of the lights on this car was out, stepped out on to the road and gave a signal for the car to stop. The car stopped and the one behind it (a Chevrolet) then abrutly stopped. The plaintiff, who was about eight feet behind the Chevrolet and going about 15 miles an hour, seeing that he could not stop without hitting the car in front, immediately swerved to the left but was unable to avoid side swiping the left end of the back fender of the car in front. His right foot was caught between the motor-cycle and said fender and was badly injured. The jury found that the defendant was negligent in stepping out on to the street instead of blowing his whistle and signalling the car to pull in to the curb. They also found plaintiff was negligent in being too close to the car ahead and being in the wrong position to see signals of driver ahead. They found the degrees of fault 60 per cent. to the defendant and 40 per cent. to the plaintiff. The jury further found the special damages were $343 and general damages $500.

Statement

The appeal was argued at Vancouver on the 26th and 27th of October, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

McCrossan, K.C., for appellant: There was error in not withdrawing the case from the jury. A motion for non-suit was refused. The policeman was checking up on lights. The front car (Hope's car) had a light out and he stepped out and held it up by holding up his hand. The accident was due to the plaintiff being too close to the car in front and not being in the right position: see *Stanley* v. *National Fruit Co. Ltd.* (1931), S.C.R. 60 at p. 67; *Baker* v. *E. Longhurst & Sons, Ltd.* (1933), 149 L.T. 264 at p. 265; *McGinitie* v. *Goudreau* (1921), 59 D.L.R. 552 at p. 554; *Toomey* v. *London, Brighton, and South Coast Railway Co.* (1857), 3 C.B. (N.S.) 146 at p. 149; Halsbury's Laws of England, Vol. 21, p. 442, sec. 755; *Wright v. Midland Railway Co.* (1885), 1 T.L.R. 406; *McLaughlin* v. *Long* (1927), S.C.R. 303 at p. 310; *Beaumont* v. *Ruddy* (1932), 3 D.L.R. 75 at pp. 77 and 79. The duty to take care increases

Argument

in proportion to the risk involved: see Beven on Negligence, 4th Ed., p. 559.

Maitland, K.C., for respondent: If what a statute authorizes is done negligently an action arises: see Salmond on Torts, 7th Ed., 270; Beven on Negligence, 4th Ed., p. 202. The Court will not interfere with the jury's finding when there is evidence to support it: see *Mueller* v. *B.C. Electric Ry. Co.* (1911), 1 W.W.R. 56 at p. 57; *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43 at p. 53; *Burchill* v. *City of Vancouver* (1932), 45 B.C. 169; *British Columbia Electric Rway. Co.* v. *Dunphy* (1919), 59 S.C.R. 263; *Geel* v. *Winnipeg Electric Company* (1932), 3 W.W.R. 49; *Stuart* v. *Moore* (1927), 39 B.C. 237. What the officer did was improper considering all the surrounding circumstances: see *Pronek* v. *Winnipeg, Selkirk & Lake Winnipeg Ry. Co.* (1932), 3 W.W.R. 440; 102 L.J., P.C. 12; (1933), A.C. 61.

Argument

McCrossan, replied.

Cur. adv. vult.

9th January, 1934.

MACDONALD, C.J.B.C.: I think the trial judge should have withdrawn the case from the jury and dismissed the action. There is absence of a *prima facie* case for the plaintiff. The defendant is a police officer whose duty it was to enforce the traffic regulations, one of which was that motor-cars should travel at night with both head-lights burning. It was said there were three lines of motor-cars going abreast on the street after crossing Robson Street at which there was a "Stop and Go Sign" shewing red and green lights. The plaintiff was riding a motor-cycle and was in the centre line of the traffic. The defendant in pursuance of his duty signalled the person whose lights were defective to stop and come to the curb. That person, Hope by name, gave evidence that he stopped in the regular way and not suddenly or with a jerk. The line of traffic was travelling at the rate of about fifteen miles per hour after crossing Robson Street. The plaintiff was about eight feet behind the car ahead of him, a distance in which he said he could not stop his car so as to prevent colliding with the car ahead. He, therefore, swung to one side and endeavoured to pass the car ahead when

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his foot came into collision with that car causing the injury complained of. The case was tried by a jury. The judge's charge is not complained of. A motion was made at the close of the plaintiff's case, however, which was equivalent to a motion for non-suit. The defendant offered no evidence. The plaintiff contends that the action of the defendant was a countermanding of the green light that is to say the "Go Light." The accident happened about 85 feet beyond Robson Street; the stoppage of the traffic was brought about by the defendant stepping from the sidewalk and holding up his hand and motioning the offender to come to the sidewalk. It was sought to prove that this was a dangerous and negligent thing to do although done in accordance with the regulations. It was submitted that he ought to have foreseen that some person in the situation of the plaintiff would be unable to stop and might be injured. I think this is an entirely wrong view to take of the matter. To travel without both head-lights lit is a danger to other persons on the street, and I think the defendant was quite right in stopping the traffic as he did so as to remove that danger. He was not in a position to observe the danger, if any, complained of by the plaintiff. He would have the right to assume that all persons in the line of cars would have their vehicles under control and be prepared to meet the traffic regulations, and the defendant knew this. Now the defendant's negligence as found by the jury, though not of importance to my finding, was:

> In stepping out on road instead of blowing whistle and signalling the car to pull in to curb.

There was no obligation either in the regulation, or as a duty to blow a whistle. The blowing of the whistle might be for quite other purposes than stopping the traffic and would be unintelligible to those driving cars.

Although unimportant in my view of the case it also appears from the answers of the jury to questions that the plaintiff was guilty of negligence in keeping too close to the car ahead of him and in being in the wrong position to observe the signals of the driver ahead of him. It appears from the evidence that he ought to have kept his motor-cycle over to the left so that he could see the driver's signal instead of which he was riding in the middle of the course of the car ahead. Now the plaintiff

knew or ought to have known of the regulations requiring the police officer to stop one who was contravening the law and his excuse for not keeping further back from the car ahead was that he was afraid the car behind might run into him. That, of course, is no valid excuse. If it had run into him the driver would do so at his peril. He had no valid excuse either for not keeping to the place where he could see the signal of the car ahead. In this respect, I think, he was the cause of his own misfortune. In any case there was no obligation on the defendant to avoid stopping the traffic unless indeed he was aware of circumstances which might render that course dangerous to the plaintiff. The circumstances proved were not such and were not found by the jury.

The appeal should be allowed.

MARTIN, J.A.: This appeal is grounded substantially upon the finding of the jury that the defendant police constable, on traffic duty at a busy intersection of streets, was negligent in the way he stopped a motor-car with one light out, *viz.*, "in stepping out on road instead of blowing whistle and signalling car to pull in to curb." What the officer did was to step off the sidewalk about 5 feet and hold up his hand to the driver of the offending car as a signal, whereupon the car stopped, "a fairly quick stop," and then came in to the curb. There were three lines of cars approaching the constable on a broad street, and the said car was in the second line out from the curb, and during the time that the officer, after signalling, went up to it, a distance of about 20 feet, and was talking to its driver, the two other lines of cars kept on, passing him in safety, except the plaintiff on his motor-cycle, who was following close upon a car which was about eight feet ahead of him, and behind the stopped car, and he was caught by that near car and injured in his attempt to pass it when it came to an "abrupt stop" upon the car in front of it being halted by the officer as aforesaid.

Objection is taken to the said finding of negligence because the failure to employ a whistle is not included in the particulars charged, and that there is no evidence at all to warrant the adoption of the whistle as a mode of signalling in preference to that employed by the officer: it is submitted, on the contrary,

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that blowing a whistle, being a general signal of alarm, and one to attract attention from all car-drivers and pedestrians within hearing, was much more likely to cause an accident by creating unnecessary alarm and confusion, even if it was understood to be intended for car-drivers, than a particular signal given, quietly and unmistakably, by the hand to the individual car only that was transgressing traffic regulations and creating danger by its defective lights; and there was no evidence that greater, or any safety would have resulted from the use of the whistle.

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That submission is to my mind sound, under these circumstances, and the jury was not warranted in attributing negligence on that ground on the facts before them. Their finding necessarily approves the defendant's action in stopping the car when he did and only, and wrongly, on the evidence, disapproves the means he employed to do so; no negligence therefore arose from what he lawfully did to protect the public and hence it is unnecessary to consider the plaintiff's own conduct, and so the judgment in his favour must, on his own shewing, be set aside.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree in the allowance of this appeal.

MACDONALD, J.A.

MACDONALD, J.A.: The facts in this action in which damages were awarded by a jury against a police constable employed by the City of Vancouver, are unusual. On the 19th of December, 1932, at about 5.30 p.m. on a wet, dark evening, the respondent on a motor-cycle was travelling south on Burrard Street, and after proceeding about 20 feet beyond Robson, a cross street, was injured under the following circumstances. He was in the centre of three lines of motor-cars going south on the west side of Burrard (a street 99 feet wide), and on approaching Robson all were halted by a red light from a mechanical traffic signal. The respondent was in the centre lane with at least two cars ahead of him and several behind. He stopped his motor-cycle when the red light appeared, about eight feet behind the car in front of him. When the green light appeared as a signal to advance, the three lines of cars and respondent crossed Robson Street, all accelerating their speed. The constable (appellant) charged with the duty of preventing infractions of traffic regula-

tions, was standing on the curb on the west side of Burrard Street about 60 feet south of the Robson Street intersection. He noticed that one of the head-lights in a motor-car in the middle lane, driven by Mr. Hope, was out. While all three lines of cars were still advancing and increasing their speed, he stepped from the curb, walked out on the roadway about five feet and held up his hand as a signal to Mr. Hope to stop, and he did so. It was "a fairly sudden stop." Mr. Hope said he did not stop quickly "not with a sudden jerk—just came to an ordinary stop." He could not say that he gave the usual stopping sign for drivers behind him.

The constable walked in front of Mr. Hope's car and asked him to drive to the curb, all the other cars proceeding southward in the meantime. There is conflict in the evidence as to whether he drove to the curb before the line of cars proceeded south, or as Mr. Hope put it, "I waited until the traffic passed through on the lane to my right and I drew into the curb." The difference is not material.

When the Hope car was halted in this way, the driver of the car directly behind necessarily stopped his car and did so without difficulty or mishap. The respondent on the motor-cycle, still eight feet behind the last-mentioned car, being unable with a one-wheel brake, to stop in that distance when travelling 15 miles an hour, swerved slightly to the left and in doing so crushed his right foot between a part of his motor-cycle and the left bumper of the car ahead of him, receiving severe injuries. Had he been driving further to the left in line with the left wheels of the car ahead, he could have avoided the accident by making a slight turn. The collision occurred at a point about 28 feet south of the Robson Street intersection. Respondent said "I was afraid that the on-coming traffic would crush me to death, so I endeavoured to go around the car." He first put on his brakes but it was not possible to stop or to turn out further with safety—he skidded a little in the turn he made—and quite impossible in the distance available to avoid the collision. His fault, if any, therefore was in driving too close to the car ahead to enable him to stop if what he ought to anticipate occurred, *viz.*, a sudden stop of a car ahead; and also in maintaining a position in the

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centre line of the car ahead of him where he could not probably see a stop signal.

On this state of facts it is submitted that the proximate (not the remote) cause of respondent's injuries was the constable's negligence in stopping the Hope car in the manner described, or alternatively that the accident was caused as the jury found, by the joint negligence of both.

The particulars of negligence alleged are as follow:

(1) The constable negligently stepped out into the street in the path of and in front of the approaching cars.

I assume this means that he should not have left the curb at all, or should have done so with greater care ("negligently stepped out").

(2) (a) The constable compelled the line of cars to stop "in a negligent, dangerous, unnecessary and unwarranted manner"; and (b) stopped it under circumstances "when he knew, or ought to have known, that his act would be likely to cause injury to persons driving in the line of traffic."

This means, although it might be stated more explicitly, that

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(a) his method, *viz.*, stepping out and raising his hand, was negligent, and a safer method might have been employed, *e.g.*, by whistling either while on the curb or when a short distance from it. (Stepping about five feet into the roadway did not so far as the evidence shews, interfere with anyone, nor did it contribute to the accident); and (b) that notwithstanding the dead head-light, in view of the heavy traffic close to an intersection, with cars "all coming in a bunch," he should not have signalled the Hope car to stop at all as he knew or ought to know that under these special circumstances someone might be injured in a possible jam. Had the jury adopted the latter view it would at least leave the case in the strongest position for the respondent.

The jury's view, however, is shewn by the following answers to questions submitted:

1. Was the defendant guilty of negligence? Yes.

2. If so, in what did such negligence consist? In stepping out on road instead of blowing whistle and signalling car to pull in to curb.

3. Was the plaintiff guilty of negligence? Yes.

4. If so, in what did such negligence consist? Too close to car ahead and wrong position on road to see signals of driver ahead.

7. If both plaintiff and defendant were negligent, to what degree was each at fault? Defendant 60 per cent. Plaintiff 40 per cent.

On this verdict judgment was entered for the respondent for 60 per cent. of the total damages.

The trial judge, on a motion for non-suit, reserved for disposal after verdict, refused to interfere. He thought it would be better for the officer to allow "the infraction to continue," *i.e.*, that it was negligent to attempt to stop the Hope car, involving the necessity of stopping others, under the circumstances. He thought it did not make "much difference as far as endangering the traffic was concerned if both lights were out." While not expressing a final opinion (it is not necessary) there is merit in this view—that weighing the danger of stopping a car among a large group after passing an intersection, against the danger of allowing one car to proceed with a dead light, it would be safer to permit all to pass, when possibly an officer at a less congested spot might safely intervene. While it was the officer's duty to carry out the law, he must do so without negligence. The unsurmountable difficulty, however, is that the jury did not take this view. Their verdict assumes that the officer was justified in seeing that the law in this respect was observed at that point, and in taking steps to enforce it under these conditions. The negligence found was in the manner of doing it; it is method that is criticized. The only negligence attributed to the appellant is:

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Stepping out on road instead of blowing whistle and signalling car to pull in to curb.

I think this finding is within the particulars of negligence already referred to. They find that he should have whistled from the curb and then (or simultaneously) signalled to Mr. Hope to turn in.

The point arises, is there any evidence to support this finding, and if so, could failure to follow this method cause the accident or contribute to it? There is no direct evidence on the point. The facts as outlined were simply narrated and conclusions must be a matter of inference. The first pertinent observation is this: if stepping out and raising the hand to enforce a stoppage of the Hope car, was negligent as the jury found, how does it differ, so far as consequences go, from

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whistling and signalling from the curb? The first method—the one condemned—would more naturally direct attention to one car only, as we should assume the officer looked directly at Hope when he signalled. The other cars would not feel the necessity of stopping except in so far as it might be necessary to avoid the Hope car. On the other hand if we assume that drivers in other cars would not know which driver was directed to stop by a hand signal, and because of that all might stop, with the consequent danger of a collision, the same result would follow if the officer whistled. In fact a whistle would likely be interpreted as a sharp command and cause more confusion than a quiet signal. In addition it might be disregarded. Drivers might think that the officer was whistling for a different purpose. It is usually used to call for assistance. It might be interpreted as a command to stop, to all indiscriminately. No matter how it is viewed, it is idle to suggest that it was a safer method than the one employed. There is no evidence to support that view. It would in any event be an opinion, and an unsound one. I think the officer pursued a more sensible course.

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He stepped out on to the roadway not far enough to compel the first line of cars to stop abruptly, or possibly to do more than to reduce speed, but far enough to secure the attention of the driver he wished to stop. He either adopted the course that offered less interference with the whole body of traffic, or at least interfered with it to no greater degree than he would if he adopted the course the jury thought more safe and prudent. The conclusion is irresistible, that granted he was right in stopping the Hope car at all (and the jury so found) no process of reasoning can induce the conclusion that his method was negligent. If any choice had to be made the balance favours the course adopted.

It follows that this accident happened either because the driver of the car immediately ahead of the respondent stopped negligently (too quickly) for which appellant is not responsible, or more likely because, as the jury found, respondent was maintaining a position too close to that car and should be further to the left of his line of travel. He was not compelled to maintain that position because of danger that drivers of cars behind him

might run into him. He was driving in semi-darkness, on a wet street, in heavy traffic, under circumstances that called for more than ordinary care. He ought to know that it is always possible for a car ahead to properly stop, and should maintain a distance behind it that would enable him to pull up with safety. If, too, he elects to drive a vehicle more than ordinarily difficult to control (it had one brake only and could not be stopped as quickly as a four-braked motor-car) and he knows it, he must exercise greater care. That duty increases dependent upon the nature of the vehicle he brings into relation to others. He unnecessarily maintained a position of danger. His negligence solely explains the accident. The acts of the appellant were not a decisive or contributing cause.

MACDONALD, J.A.

It follows that the verdict of the jury cannot be upheld on the evidence, particularly in view of the findings.

I would allow the appeal.

MCQUARRIE, J.A.: I would allow the appeal. In my opinion the answer to question 2 reasonably understood does not constitute any negligence.

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I would say further that, as I see it, the evidence does not shew any negligence on the part of the appellant.

Appeal allowed.

Solicitor for appellant: *J. B. Williams.*

Solicitors for respondent: *Maitland, Maitland, Remnant & Hutcheson.*

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BONIFACE v. HARBOUR NAVIGATION CO. LTD.

BONIFACE v. HARBOUR NAVIGATION COMPANY LIMITED.

Negligence—Contributory—Steamboat—Discharge of passenger at floating wharf—Injury to passenger jumping from boat—Damages.

The defendant's small steamer "Scenic" approached a floating wharf at Frame's Landing in Burrard Inlet. The plaintiff was the only passenger to get off. When the boat reached the float the mate jumped off, his right hand holding the guard of the boat and with his left hand he was about to take down the step from the deck when the plaintiff, who was behind him, jumped to the float about two and one-half feet down. Her right foot doubled under her and was sprained. She stated the captain told her to jump, but this is denied by both captain and mate. When she jumped the mate turned and said "What did you do that for?" to which she did not reply. He then asked her if she was hurt and she replied she was all right. In an action for damages the jury answered questions finding that the defendant's negligence was "Lack of proper care and warning in preventing plaintiff from disembarking in the proper manner" and that the plaintiff's negligence was "Over-anxiety to disembark." The proportion of fault was decided, plaintiff one-quarter, the defendant three-quarters.

Held, affirming the decision of MACDONALD, J., on an equal division of the Court, that the appeal should be dismissed.

Per MARTIN and MACDONALD, JJ.A.: That there was no evidence to support the finding that the defendant company was negligent in "lack of proper care and warning in preventing plaintiff from disembarking in the proper manner." Negligence never in fact arose because the plaintiff prematurely jumped from the deck without giving the defendant any opportunity to warn or prevent her from so doing, and the appeal should be allowed.

Per MCPHILLIPS and MCQUARRIE, JJ.A.: That the verdict of the jury is complete in form, the essential findings in no way vague, and judgment was properly entered for the plaintiff.

Statement

APPEAL by defendant from the decision of MACDONALD, J. of the 10th of May, 1933, in an action for damages for injuries suffered by the plaintiff when disembarking from the defendant's ship "Scenic" at Frame's Landing on the north arm of Burrard Inlet. At Frame's Landing passengers got off the boat on to a float which was a short distance out from the shore. On the 1st of September, 1932, when the plaintiff was waiting to disembark there was considerable wind, and when the boat got

near the float the mate jumped off, his right hand on the guard of the boat, and as he was about to take down the step with his left hand the plaintiff, who was standing just behind him, jumped on to the float, the deck of the boat being about two and one-half feet above the float. Her right foot doubled up under her and her foot and ankle were badly sprained, but no bones were broken. She stated in her evidence that the captain told her to jump, but this is denied by both the captain and the mate. After she jumped the mate turned and asked her "What did you do that for?" to which she did not reply. He then asked her if she was hurt and as she was getting up she said she was all right. The mate then jumped on board and the boat proceeded on its way.

Statement

The appeal was argued at Vancouver on the 9th to the 13th of November, 1933, before MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Bull, K.C. (*Ray,* with him), for appellant: On the answers to questions by the jury the learned judge should have dismissed the action. These floats are put where they are anchored by the campers. She jumped on to the float without warning. She says the captain told her to jump but both captain and mate deny this and the jury believed them. There was no negligence upon which an action could be maintained: see *Gebbie* v. *Saskatoon City* (1930), 2 W.W.R. 625; *Airey* v. *Empire Stevedoring Co.* (1914), 20 B.C. 130 at 135. The jury, answering question 2, found the negligence of the defendant was "Lack of proper care and warning in preventing plaintiff from disembarking in the proper manner." This answer does not constitute negligence and the judgment should be set aside: see *Andreas* v. *Canadian Pacific Ry. Co.* (1905), 37 S.C.R. 1 at p. 10. Their answer negatives all other charges of negligence: see *Westenfelder* v. *Hobbs Manufacturing Co. Ltd.* (1925), 57 O.L.R. 31; *Antaya* v. *Wabash R.R. Co.* (1911), 24 O.L.R. 88; *Siner* v. *Great Western Railway Co.* (1869), L.R. 4 Ex. 117; *Grand Trunk Rway. Co.* v. *Mayne* (1917), 56 S.C.R. 95; *Sharpe* v. *Southern Railway* (1925), 2 K.B. 311; *The Quebec Central Railway Company* v. *Lortie* (1893), 22 S.C.R. 336. There is no question of a new trial here, the action

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should be dismissed: see *Glow* v. *Paquin* (1932), 1 W.W.R. 737; *Canadian Pacific Rway. Co.* v. *Hay* (1919), 58 S.C.R. 283. The grounds of appeal are sufficiently set out: see *Cameron* v. *Milloy* (1864), 14 U.C.C.P. 340.

Reid, K.C., for respondent: On the attitude of the Court of Appeal on the finding of a jury see *Jamieson* v. *Harris* (1905), 35 S.C.R. 625; *British Columbia Electric Rway. Co.* v. *Dunphy* (1919), 59 S.C.R. 263 at p. 271; *Giddings* v. *C.N. Ry. Co.* (1920), 13 Sask. L.R. 314. The answer to question 2 [as above cited] shews what they consider to be lack of care by the defendant: see *Bridges* v. *Directors, &c. of North London Railway Co.* (1874), L.R. 7 H.L. 213 at pp. 231 and 238; *Robson* v. *North Eastern Railway Co.* (1876), 2 Q.B.D. 85. "Volens" was not pleaded as associated with the act of jumping. The captain told her to jump: see *Edgar et ux.* v. *Northern R.W. Co.* (1884), 11 A.R. 452. The fact of her jumping off the boat is not necessarily negligence, it is a question to be decided by the jury, and this Court should not interfere: see *Keith* v. *Ottawa R.W. Co.* (1902), 5 O.L.R. 116; *McDougall* v. *Grand Trunk R.W. Co.* (1912), 27 O.L.R. 369 at p. 377.

Bull, replied.

Cur. adv. vult.

9th January, 1934.

MARTIN, J.A.

MARTIN, J.A.: This appeal should, in my opinion, be allowed because there is no evidence to support the finding that the defendant company was negligent in "lack of proper care and warning in preventing plaintiff from disembarking in the proper manner," and that head of negligence never in fact arose because the plaintiff prematurely jumped from the deck without giving the defendant any opportunity to warn or prevent or even to assist her in so doing.

Her case justifying and explaining that rash action was an entirely consistent one and, from the beginning of her statement of claim to the end of her evidence, did not vary, and it was that she disembarked as she did, jumping from the deck to the landing, "pursuant to the direction of the defendant's servants" (meaning by that, as her evidence disclosed, the direction of the captain to do so), quite regardless of any other facilities for

disembarking, and if her crucial statement to that effect had been credited by the jury she had established her case, under the circumstances, and it was a legal impossibility for the jury to find as they did that she had been guilty of contributory negligence consisting of "over-anxiety to disembark."

Unfortunately for the plaintiff that finding cannot be reconciled with her evidence, and it negatives the whole base of her case which therefore cannot be supported and hence no case properly arose for the invocation of the Contributory Negligence Act, so it follows that the judgment entered should be set aside and the action dismissed.

MARTIN, J.A.

This view of the matter renders it unnecessary to consider other aspects of the trial arising out of the charge to the jury which, with all due respect was confused and misleading to the defendant's detriment in certain respects, wherein the attempt of the jury to give a compromise verdict may have its origin, and much moral, if not legal, excuse.

MCPHILLIPS, J.A.: The plaintiff (respondent) suffered severe injuries in landing from the steamer—being a passenger thereon—operated by the defendant (appellant) and the jury upon certain questions put to them by the learned trial judge answered them and upon those answers judgment went for the plaintiff. The questions put to the jury and answers thereto are as follow:

1. Was the defendant company guilty of negligence causing the accident and injury to plaintiff? Yes.

2. If so, in what did such negligence consist? Lack of proper care and warning in preventing plaintiff from disembarking in the proper manner.

MCPHILLIPS, J.A.

3. Was the plaintiff guilty of negligence contributing to the accident? Yes.

If so, in what did such negligence consist? Over-anxiety to disembark.

5. If you answer questions one (1) and three (3) in the affirmative, then in what proportion do you find the plaintiff and defendant were at fault? Plaintiff one-quarter, defendant three-quarters.

Damages, $3,000.

I am satisfied upon the evidence that negligence was established and the jury were right in their answers—in fact the case is one that if the jury had not so found this Court could rightly find negligence. (*McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43 at p. 53, Duff, J. (now Chief Justice of Canada.)

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The captain of the ship, according to the evidence of the plaintiff, told her to jump to the float or wharf and that evidence, in my opinion, was believed by the jury. The situation being of this nature the ship was nosed up to the float or wharf, not tied up, and that was the class of landing place afforded to the plaintiff, the ship making only what might be termed a flying landing, and as the ship, carried by the wind, was receding from the float or wharf, the captain, according to the evidence of the plaintiff, shouted out "You will have to jump quick because the wind is carrying me out." This was negligence of the grossest kind and it staggers one to think that in the face of these facts an appeal has been brought. It is argued that the jury did not believe the plaintiff in her statement that she was told to jump. With that submission I cannot agree. The questions and answers amply establish, in my opinion, the case of the plaintiff. I would particularly refer to:

1. Was the defendant company guilty of negligence causing the accident and injury to plaintiff? Yes.

2. If so, in what did such negligence consist? Lack of proper care and warning in preventing plaintiff from disembarking in the proper manner.

MCPHILLIPS, J.A.

The jury plainly mean that the captain, instead of preventing the plaintiff jumping, directed her to jump and hence the accident, which might well have been the loss of the life of the plaintiff. Providentially it fell short of that, but resulted in very serious injuries. The evidence throughout shews want of care upon the part of the captain and officers of the ship. The main matter with them was to hurry on and the passenger was not to impede or delay the ship. Well, such conduct must bring in its train some punishment and the law is not powerless in the matter. It being a plain case of gross negligence the jury were right in assessing the damages as they did at $3,000. I cannot say that I agree that the jury were right in finding contributory negligence to the degree of one-quarter as the plaintiff was in the agony of being carried away from her point of destination if she did not jump, and the plaintiff is not to be blamed in any way for acting as she did. Further, it may well be said that there should have been a barrier which would prevent passengers alighting until all was safe and clear, or some officer standing by to prevent any precipitate action of a passenger. All

such proper precautions were absent. Notwithstanding this palpable negligence we have this appeal.

The governing law is well known. *Cameron* v. *Milloy* (1864), 14 U.C.C.P. 340 is a case relative to a passenger on a steamboat and dealing with the question of negligence in landing passengers and it was held:

That a steamboat owner who departs from the ordinary and proper method of landing passengers is responsible for the increased danger of the method he adopts.

In that case Adam Wilson, J. at p. 348 said:

It was important for the plaintiff to be landed at Niagara; it was his right to be landed there; but not from a boat in motion, and from a gangway run out, from which he had the privilege of jumping ashore.

In *Edgar et ux.* v. *Northern R.W. Co.* (1884), which was before the Court of Appeal of Ontario (11 A.R. 452) it was held that there was evidence of an invitation to alight and that it was for the jury to say whether she had acted in a reasonably prudent and careful manner in availing herself of it. *Keith* v. *Ottawa R.W. Co.* (1902), 5 O.L.R. 116. The head-note reads as follows:

MCPHILLIPS, J.A.

The fact of a passenger getting off a train while it is in motion is not necessarily negligence. In every case it is a question to be decided by the jury whether the passenger acted as a reasonable man would do under the circumstances.

Where a train, scheduled to stop at a named station, did not on arriving there stop a sufficient length of time to enable the passengers to get off, and a passenger in attempting to do so, after the train had started again, fell and was injured, and it was found by the jury on the evidence that he acted as a reasonable man would do under the circumstances, the Court declined to interfere with the finding.

McDougall v. *Grand Trunk R.W. Co.* (1912), 27 O.L.R. 369 is also a case in point—that what the plaintiff did was in the circumstances reasonable and that the defendants were liable; and *Keith* v. *Ottawa R.W. Co., supra,* was specially referred to.

As to whether the answers of the jury are in terms complete enough I have no hesitation in stating they are and amply cover the case tried and the learned judge was rightly entitled to enter judgment thereon. In this connection I would refer to the case of *British Columbia Electric Rway. Co.* v. *Dunphy* (1919), 59 S.C.R. 263. It will be seen by the head-note to the case what is the guiding principle, *i.e.,* the jury's findings

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are construed in the light of the issues presented by the pleadings, the evidence and the charge of the trial judge. The headnote reads as follows, and well portrays the judgment of the Supreme Court of Canada:

The action is for damages for injuries suffered in a collision between an automobile driven by the respondent, and appellant's street-car. At the trial one witness for the respondent, who was in the automobile, testified to having warned the respondent before the accident; and the respondent was not called to explain his failure to act upon this warning. The jury, after having found the appellant guilty of negligence, specified such negligence in the following terms: "Insufficient precaution on account of approaching crossing and conditions existing on morning in question."

Held, that the jury's findings, if read with and construed in the light of the issues presented by the pleadings, the evidence and the charge of the trial judge, were justified both as to appellant's negligence and as to absence of respondent's contributory negligence and were not too vague to support a judgment for respondent.

Per Duff, J.: The practice in jury cases in British Columbia is that the jurors are not bound to believe the evidence of any witness; and they are not bound to believe the whole of the evidence of any witness; they may believe that part of a witness's evidence which makes for the party who calls him, and disbelieve that part of his evidence which makes against the party who calls him, unless there is an express or tacit admission that the whole of his account is to be taken as accurate. *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery* ([(1878)], 3 App. Cas. 1155), followed.

Judgment of the Court of Appeal ((1919), 48 D.L.R. 38; (1919), 2 W.W.R. 201), affirmed.

Here we have the jury saying in answer to question 2:

"Lack of proper care and warning in preventing the plaintiff from disembarking in the proper manner."

Upon the whole case I am of the opinion that the verdict of the jury is complete in form, the essential findings in no way vague, and the learned trial judge was right in entering judgment for the plaintiff thereon.

I would therefore dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: Respondent, a passenger on appellant's boat, on arriving at her destination at Frame's Landing on the north arm of Burrard Inlet, jumped from the deck to the wharf or float, when the boat was about one foot away from it and gradually drifting out. She leaped across this space and dropped about two feet to the wharf below. In doing so severe injuries were sustained. In the statement of claim it is alleged that the defendant (appellant)

failed to provide for the safe disembarking of the plaintiff and the plaintiff in attempting to disembark under the direction of the defendant's servants was severely injured.

The particulars of this general negligence, so far as they affect the issues in the action, were given as follows:

(c) No gangway, or in the alternative no proper gangway was put out for the disembarking of the plaintiff on said landing-place.

(d) The defendant omitted to provide steps or other safe means to enable the plaintiff to disembark from the ship at Frame's Landing aforesaid.

(e) The defendant's servants . . . without due regard to the plaintiff's safety directed the plaintiff to jump from the ship's deck to the said wharf.

(f) The defendant's servants . . . without due regard to the plaintiff's safety negligently omitted to give the plaintiff any assistance in disembarking at Frame's Landing aforesaid.

The jury answered questions submitted as follows: [already set out in the judgment of MCPHILLIPS, J.A.]

Respondent's case at the trial was simple and direct. She said she jumped from the deck to the wharf across the intervening space "because the captain told me to jump." She quoted the captain's words in giving this order including his reason for giving it, *viz.*:

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You will have to jump quick because the wind is carrying me out.

If the jury had accepted her evidence the appellant would be liable. Passengers should not be landed in this dangerous way. But it is clear that on this vital point, stressed throughout the trial, asserted by respondent and denied by the appellant the jury did not accept her evidence. It is impossible to say from the answer to question 2 that the jury believed that the captain ordered her to jump and it is placed beyond doubt by the answer to question 4. They say in assigning negligence to her "over-anxiety to disembark," meaning that she acted of her own volition.

The jury, however, although rejecting the case put forward by the respondent, found the appellant negligent for

lack of proper care and warning in preventing plaintiff from disembarking in the proper manner

viz., I assume, by a gangway or by some facilities of a similar nature. Such a finding could only be properly referable to an allegation that facilities for landing safely were not provided or, if provided, were not placed in position for the respondent

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at the proper time or within a reasonable time after arriving at the wharf and that respondent was not warned against alighting in any other way. If such a case had been presented with evidence in aid I would not say that it could not be supported by the pleadings and the particulars referred to. It is, however, impossible to reject the respondent's account of how the accident occurred, and substitute for it another version. She does not allege that no facilities to land were provided and because of that omission the only alternative was to jump. She gave another reason for jumping, *viz.*, that the captain ordered her to disembark in that way and the Court cannot assign a different reason for the act. The fact is, if it should be material, that facilities were available to land properly if she had waited a reasonable time to enable the mate to place them in position. Even if, as suggested, he first alighted with milk-bottles it would only take a few seconds to return to place the steps or gangway in the proper place to enable her to descend safely. In her "over-anxiety to disembark" she would not wait. She was therefore solely responsible for the injuries received.

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The learned trial judge told the jury that "aside from the question of jumping altogether" they might find appellant liable. This direction possibly created confusion in their minds. It is, with deference, clear from the respondent's evidence that the case cannot be viewed "aside" from that episode. No objection in precise terms was taken to the charge in this respect. Possibly, if the jury had been properly instructed, they might have found that the captain ordered her to jump. That of course is mere speculation and also carries the suggestion that, if necessary, they would return an effective verdict for the respondent. It is not necessary in the interests of justice to give another opportunity to a jury to so find when the allegation was distinctly put forward and adhered to throughout the trial and when, as I read the answers, we have the equivalent of a specific finding that no such command was given. It is highly improbable that the captain gave such an unusual order. It follows too that once she adopted that negligent method of disembarking appellant could do nothing to restrain her nor can it reasonably be said that the act should have been anticipated and prevented

by a warning. No negligence therefore can be assigned to the appellant as the real cause of the accident nor as a contributing factor in bringing it about. I would allow the appeal and dismiss the action.

MCQUARRIE, J.A.: It is contended by counsel for the appellant that on the jury's answers to the questions submitted to them the action should have been dismissed because in answer to question 2 the jury found as the negligence of the defendant something that was not pleaded and was never put to them. I do not agree with that contention. In my opinion the answer to question 2 comes within the allegations contained in the statement of claim and more particularly paragraph 3 thereof. The learned trial judge placed the matter fairly to the jury and there was evidence to support the finding.

I would dismiss the appeal.

The Court being equally divided the appeal was dismissed.

Solicitors for appellant: *Walsh, Bull, Housser, Tupper & Ray.*

Solicitors for respondent: *Reid, Wallbridge, Gibson & Sutton.*

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REX v. PEGELO.

Criminal law—Incest—Evidence to prove previous similar acts—Corroboration—Criminal Code, Secs. 204 and 1014 (a).

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On a charge of incest on a certain date evidence of conduct at an earlier date tending to prove guilty relations and that a sexual passion existed is admissible.

Corroborative evidence implicating the accused in some material particulars is not necessary unless the complainant is an accomplice.

APPEAL by accused from his conviction on a charge of incest. The charge was made by accused's daughter who swore her father had had carnal knowledge of her on Christmas Eve of 1931, when she was 14 years of age. On that night she slept in the same bed with her father and a brother 11 years of age. An old man slept in a room close by at the back of the house and a Mr. and Mrs. Murphy slept in a room at the front of the house and one Tinkler slept on a couch in the sitting-room. Tinkler and Mrs. Murphy only of those in the house gave evidence. Tinkler stated Mrs. Murphy told him that accused was sleeping in the same bed as his daughter and that was all he knew. Mrs. Murphy denied having told Tinkler anything and denied having any knowledge of improper relations between accused and his daughter. The accused appealed mainly on the ground that there was no evidence corroborating the daughter's evidence, and that the jury was not properly charged as to the effect of the daughter's evidence of previous acts of incest.

Statement

The appeal was argued at Vancouver on the 10th and 11th of October, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Henderson, for appellant: There is the girl's evidence alone as to the charge laid. There is not a particle of corroboration of what the girl said. One Tinkler who was in another room on the night in question gave evidence but there was no corroboration in what he said. The girl's brother (11 years of age) was in the sister's bed all the night and he was not called. In the

Argument

charge the jury was not told to erase from their minds the girl's evidence of other acts of incest. The girl had a miscarriage at the hospital when she was 13 years of age. There was no corroboration: see *Rex* v. *Dimes* (1911), 7 Cr. App. R. 43; *Rex* v. *Bloodworth* (1913), 9 Cr. App. R. 80; *Rex* v. *Draper* (1929), 21 Cr. App. R. 147. There must also be corroboration of the forcing: see *Rex* v. *Ball* (1911), A.C. 47; *Desellier* v. *Regem* (1925), 45 Can. C.C. 246; *Rex* v. *Cooper* (1914), 10 Cr. App. R. 195; *Rex* v. *Parkin* (1922), 31 Man. L.R. 438; *Rex* v. *Brown* (1910), 6 Cr. App. R. 24. There were seven people in the house at the time of the alleged offence and this was not properly brought to the attention of the jury: see *Hubin* v. *Regem* (1927), 48 Can. C.C. 172; *Rex* v. *Nicholson* (1927), 39 B.C. 264; *Rex* v. *Deal* (1923), 32 B.C. 279.

Selkirk, for the Crown: It is clear from the evidence that complainant was not an accomplice: see *Rex* v. *Dimes* (1911), 7 Cr. App. R. 43. Corroboration is not required: see *Bergeron* v. *Regem* (1930), 56 Can. C.C. 62 at p. 65; *Vigeant* v. *Regem* (1930), 54 Can. C.C. 301 at p. 304. Evidence of similar acts may be given as proof of intent: see *Rex* v. *Bond* (1906), 75 L.J., K.B. 693; *Rex* v. *Ball* (1910), 5 Cr. App. R. 238, and on appeal (1910), 6 Cr. App. R. 31. There was no substantial wrong as to the charge: see *Rex* v. *Moke* (1917), 3 W.W.R. 575; *Rex* v. *Draper* (1929), 21 Cr. App. R. 147. Where the irregularity is trivial the Court may not give effect to it: see *Allen* v. *Regem* (1911), 44 S.C.R. 331; *Rex* v. *Kelly* (1917), 1 W.W.R. 463; *Ibrahim* v. *Regem* (1914), A.C. 599; *Rex* v. *Miller* (1923), 32 B.C. 298; *Rex* v. *Lew* (1912), 19 Can. C.C. 281. It is only in capital cases that the duty is on the Crown to call all witnesses.

Argument

Henderson, in reply, referred to *Rex* v. *Gregg* (1932), 24 Cr. App. R. 13 at p. 17.

Cur. adv. vult.

9th January, 1934.

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

MACDONALD, C.J.B.C.

MARTIN, J.A.: Several questions were raised and ably presented by Mr. *Henderson,* but, on the facts before us, they are

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all in law covered, by the authorities cited, adversely to the appellant, and as to the verdict returned it cannot, to my mind, be said that "it is unreasonable or cannot be supported having regard to the evidence" within section 1014 (*a*), and therefore the appeal and also the motion for leave to appeal should be dismissed.

MCPHILLIPS, J.A.: In my opinion the case for the Crown wholly fails. Even the evidence of the witness Tinkler in no way can be said to be corroborative. Further the Crown failed in its duty in not calling the boy (the son of the appellant) who was said to be in the bed with his sister, and the appellant, if guilty of the crime charged, would have to pass over the boy to get to the sister as she says she was next to the wall. The story is too fantastic to have a vestige of truth and the jury were perverse in finding guilt. The appellant is shewn to be a business man of worth and integrity. Unfortunately though, cursed with a dissolute wife, a wife who was time and again urged to reform but would not. Finally the appellant had to get a housekeeper to care for the home and children and even after that the wife, living apart from her husband (the appellant), was beseeched to mend her ways and she would be taken back. She would not. The daughter upon whom this crime is said to have been committed by her father (the appellant) was evidently a girl bent upon gaiety in company with young men and resented any control or guidance, and it is evident in venom against her father made this atrocious charge. It is to be noted that when in the hospital she never ventured to say that the child she was bearing was because of the misconduct she alleged against the father but in relationship with someone else. Further, Mrs. Murphy's evidence—the housekeeper—is diametrically opposed to that of Tinkler whose evidence is relied upon as being the necessary corroboration in law. Further evidence is patently unbelievable, and in any case, does not amount to corroboration in law.

MCPHILLIPS, J.A.

Upon the whole case there has been, in my opinion, a grave miscarriage of justice in this case.

I would allow the appeal in that there was no evidence upon

which the conviction can be substantiated. Plainly, there is no corroboration which the law requires.

MACDONALD, J.A.: The appellant was convicted under section 204 of the Criminal Code of incest with his daughter 14 years of age. As charged in the indictment the offence was committed on or about the 24th of December, 1931. Evidence was given by the child of other acts of incest at earlier dates and it was submitted that the trial judge failed to state clearly to the jury that the charge related solely to the act of December 24th, 1931, and that other alleged acts of incest could not be treated as further proof of guilt. This objection is not well founded. Having in view the charge, discussion with counsel for the accused in the presence of the jury at the conclusion of the main charge, but forming part of it, and the earlier discussion when evidence of previous acts of incest was about to be introduced there is no doubt that the minds of the jury were directed to the charge on which alone appellant could be convicted. They were also told "as to any other acts prior to December, 1931, there is no corroboration of the girl's story." There is no doubt as to the admissibility of this evidence, not to convict a man of one crime by proving he committed another but to establish guilty relations and that a sexual passion existed. *Rex* v. *Ball* (1911), A.C. 47.

As to the need of corroboration of the child's evidence I do not think the point is distinctly raised in the notice of appeal. In any event corroborative evidence implicating the accused in some material particular is only necessary where the complainant is an accomplice. If she consented to the act she would be equally guilty under the Code. But

to constitute the offence of incest on the part of a woman there must be something in the nature of permission and not merely submission to the act of the accused:

Rex v. *Dimes* (1911), 76 J.P. 47 at p. 48. She testified:

I didn't want to do it and he made me.

She tried to prevent him without however making any outcry that would bring others in the house to her rescue. She gave as a reason

because my father threatened me, if I called out or did anything—if I ever told any one—he would kill me and then kill himself, too.

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This of course was not permission to do the act. Corroboration therefore was not necessary. However, if there is any doubt on the point, the trial judge, without in precise terms stating the circumstances under which corroboration would be necessary, did say to the jury:

> as to that incident [*viz.*, the act of December 24th, 1931] there is only the evidence of Tinkler.

meaning, as the context shews, that Tinkler's evidence corroborated the girl's story. He slept in the house that night and testified that the accused when about to retire "went into the kitchen." It was necessary to go into the kitchen to reach the bedroom in which the child was sleeping with a younger brother. The only other room adjoining it was occupied by another. Having regard to the plan of the house and to his knowledge that all other rooms were occupied his evidence shewed "opportunity" on the part of the accused to commit the offence. In *Rex* v. *Dimes, supra,* Hamilton, J., at p. 48, referring to corroborative facts implicating the accused, said:

> . . . first, the evidence was clear that the girl was in the company of the appellant for some hours on August 23rd under such circumstances as to afford the appellant an opportunity to commit the offence.

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It is true that the trial judge did not state Tinkler's evidence accurately to the jury. He said:

> Tinkler says that the man [meaning the accused] did occupy that room with those children that night.

He did not in fact say so: that was simply an inference from the fact that when about to retire the accused "went into the kitchen." He might have slept on the kitchen floor. This error would not necessarily mislead the jury as the true facts were in evidence before them.

It was submitted that on the whole evidence the jury should not have convicted the accused: in other words that the verdict was perverse. It might be plausibly submitted that the girl's story was improbable. It is difficult to conceive of conduct so sordid commencing, as she testified, when she was nine years of age and continuing ever since. There was evidence which, if accepted, suggested that she might have had illicit relations with boys and that her father's treatment of her (thrashing her) for being out late at night led to the conception of the plan, as testified by Mrs. Murphy "to get even with him." The rela-

tions of the accused with his wife, since deceased, and the latter's alleged bad character gave some point to appellant's allegation that she incited her daughter to injure him. It was however for the jury to decide. The trial judge warned them "to be very careful before you convict" in a charge that on the whole is not open to objection and in the absence of misdirection it is not possible to order a new trial or to say that the verdict was perverse. The jury had the opportunity of observing the demeanour of the witnesses; the appearance of the complainant and the manner in which she testified, and were doubtless justified in finding that so heinous a crime was not falsely imputed by her to her father.

MACDONALD, J.A.

I would dismiss the appeal.

MCQUARRIE, J.A.

MCQUARRIE, J.A.: I agree that the appeal should be dismissed.

Appeal dismissed, McPhillips, J.A., dissenting.

Solicitor for appellant: *H. Castillou.*

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

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THE KING v. REGISTRAR OF COMPANIES

THE KING. v. REGISTRAR OF COMPANIES.

Company — Incorporation — Certificate to commence business — Security Frauds Prevention Act—Application—"Person"—Scope of word—Mandamus—B.C. Stats. 1929, Cap. 11, Sec. 40 (3); 1930, Cap. 46, Sec. 4.

Under the definition of the word "person" in section 2 of the Security Frauds Prevention Act, corporations are excluded from the operation of section 4 of said Act.

APPEAL by the Registrar of Companies from the order absolute for *mandamus* of MCDONALD, J. of the 6th of October, 1933. The Enid-Julie Mines Limited (non-personal liability) was incorporated as a specially limited company under the Companies Act of British Columbia on the 16th of August, 1933. On the company's application for a certificate to commence business under subsection (3) of section 40 of the Companies Act the registrar of companies refused to issue the certificate because the company had not complied with the provisions of section 4 of the Security Frauds Prevention Act. The said company obtained an order *nisi* for a writ of *mandamus* on the 28th of September, 1933.

Statement

The appeal was argued at Vancouver on the 23rd and 24th of October, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, J.J.A.

Lucas, K.C., for appellant: They must comply with section 4 of the Security Frauds Prevention Act. They cannot trade in securities unless they become a "broker" within said section. The word "trade" includes "sale": see *Lymburn* v. *Mayland* (1932), A.C. 318 at p. 323. They claim that the word "person" does not include "company" and they therefore do not come within said section 4. The section includes companies that trade in shares. There is no ground for a writ of *mandamus*: see *Rex* v. *Port of London Authority. Ex parte Kynoch, Ltd.* (1919), 1 K.B. 176.

Argument

McPhillips, K.C., for respondent: The Act does not give the superintendent of brokers the right to say we must register.

The company has a property that is a good mine, and the registrar admits all our material is in order as to the Companies Act. Section 4 of the Security Frauds Prevention Act applies to "persons" only and this does not include "company." The Alberta Act is different and does not apply. The order absolute was properly made.

Lucas, replied.

MACDONALD, C.J.B.C.: The question turns upon the statute, and it turns upon these words in the statute:

> In case the company is required to comply with the Security Frauds Prevention Act then the certificate may issue upon compliance with the Act.

That is compliance not as required by the registrar, but by the Act itself. When you look at the Act you find that this company is not required to register before it can sell shares to the public. I would expect that to be so. The company may not ever desire to sell shares to the public and that they should be required to register and pay a high fee, or give a bond would be a hampering of trade not contemplated at all by the Legislature.

Mr. *Lucas* contends that discretion is with the registrar, that is, that the Act should be read in this way, "In case the company is required by the registrar to comply with the Security Frauds Prevention Act—" that is not what the Act says. It is "Upon compliance with the Act." That seems to me to be clear enough on the words used.

MACDONALD, C.J.B.C.

We have to look at the Act to see if the company is required to register. If it is, then the registrar is entitled to withhold his certificate, and if it is not, then he is not entitled to withhold his certificate.

I am clearly of opinion that he is not entitled to withhold his certificate in this case, because there has been no failure to comply with the provisions of the Act on the part of the company. That is the neat question involved. I can quite see that difficulty might arise if, in a case of this kind whereby a statement—it takes the place of the prospectus—the company says it proposes to do certain things with its stock. It may do it, or may not, but nevertheless the registrar says "I am going to prevent you doing that by refusing my certificate." This company may not sell any stock to the public at all, or if they do,

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they may sell it through a broker who will have to comply with the Act. At the present time it may procure the registration of a broker who will put up a bond and it might say tomorrow "We do not want this broker to act for us, we will have another broker." It seems to me what is intended by the statute is this, that the company shall not do anything contrary to the true interpretation of the statute. If it, in the future, should attempt to sell shares to the public, then it will have committed a breach of the law and may be punished according to the statute in that case, but to say in the first place the company ought not to be allowed to do business until it has complied, not with the requirements of the statute, but the requirements of the registrar, I think is beyond the scope of this Act.

Therefore the appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A.: This appeal lies in a nutshell and "the pinch of the case," to adopt Lord Macnaghten's expression, is that unless Part I. of the Security Frauds Prevention Act applies to this incorporated company the registrar had no power to make the requirement that it must be registered as a broker-salesman under section 4 of that Part which relates only to the registration of brokers and salesmen.

To my mind it is clear under the definition of "person" in section 2, that corporations are excluded from the operation of section 4, as appears from the Privy Council's decision in *Lymburn* v. *Mayland* (1932), A.C. 318 at p. 323; 101 L.J., P.C. 89; 3 W.W.R. 578.

It follows that the registrar had no authority to make this premature requirement, and consequently the *mandamus* should issue and this appeal be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would dismiss this appeal.

MACDONALD, J.A.

MACDONALD, J.A.: I agree.

MCQUARRIE, J.A.

MCQUARRIE, J.A.: I agree.

Appeal dismissed.

Solicitors for appellant: *Lucas & Lucas.*

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

COWLEY v. COWLEY.

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COWLEY v. COWLEY

Contract—Action for breach—Divorce—Subsequent agreement for maintenance—Future instalments—Whether abandoned by statement of counsel—Judgment for damages as final disposition of plaintiff's claim—Appeal.

The plaintiff, who had divorced her husband, subsequently entered into an agreement with him as to monthly payments for maintenance. She brought action for damages for breach of contract, for a declaration that there was a valid and subsisting contract between them, and for an accounting. It was held that statements made by plaintiff's counsel at the trial meant that she had abandoned all claims set forth in her statement of claim except for damages for breach of contract, and judgment was given for the amount claimed including damages up to date of trial as final and complete damages for breach of contract.

Held, affirming the decision of FISHER, J., that the appeal be dismissed on an equal division of the Court.

Per MARTIN and MACDONALD, JJ.A.: That in view of the course of the trial, the evidence and the proper interpretation of the correspondence, the learned judge below reached the right conclusion.

Per MACDONALD, C.J.B.C. and MCQUARRIE, J.A.: That the question of the plaintiff's right to future instalments under the agreement should have been left for future adjudication should the matter be brought up.

APPEAL by plaintiff from the decision of FISHER, J. of the 28th of March, 1933, in an action for damages for breach of contract, for a declaration that there is a valid and subsisting contract between the parties for the support and maintenance of the plaintiff, and for specific performance. The plaintiff and defendant were married in Victoria in December, 1909. The marriage was dissolved by decree of divorce on the 9th of June, 1928, at the suit of the plaintiff (wife). On July 5th, 1928, the parties entered into an agreement whereby the defendant agreed to pay the plaintiff $90 per month for support of wife and child for one year, but when the child was in the keeping of the defendant the monthly payments would be reduced to $60 per month. On January 1st, 1929, the child was taken and

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cared for by the defendant. Said agreement further provided that on or prior to the 30th of June, 1929, the parties should confer for the purpose of extending the agreement or entering into a further agreement as to the maintenance of the wife and child. In pursuance of this and in consideration of the wife not applying for alimony the parties entered into an agreement on August 16th, 1929, partly in writing and partly oral, whereby the defendant would provide adequate support for the plaintiff until she could secure a position and the defendant paid the plaintiff $60 per month until she got a position on September 1st, 1930. In May, 1931, the plaintiff lost her position and was out of work for four months, during which time the defendant only paid her $85. On January 1st, 1932, the plaintiff again lost her position and has been out of work continually up to the present time. The plaintiff claimed in all the sum of $1,055 for breach of contract. Judgment was given for the plaintiff for this sum. It was held that the real intention of the parties was that the defendant was to see the plaintiff through financially for a reasonable time under the circumstances to the extent of $60 per month, but the Court was relieved from settling when the time would expire, as counsel for the plaintiff at the trial abandoned his claim for a declaration and asked only for damages for breach of contract up to the date of the trial, the plaintiff to recover against the defendant damages for breach of contract as claimed, including damages up to date of trial.

The appeal was argued at Vancouver on the 12th and 13th of October, 1933, before MACDONALD, C.J.B.C., MARTIN, MACDONALD and MCQUARRIE, JJ.A.

Argument

A. J. Cowan, for appellant: The action is to enforce an agreement for maintenance. We recovered judgment for $1,055, but it was held the agreement was that payments be made for a reasonable time but not for the defendant's life. The judge said that upon payment of the $1,055 the contract terminated. We say it was for life: see *Kelly* v. *Watson* (1921), 61 S.C.R. 482; *Adolph Lumber Co.* v. *Meadow Creek Lumber Co.* (1919),

58 S.C.R. 306. By entering into the contract there was the loss of the right of alimony by plaintiff: see *Watcham* v. *East Africa Protectorate* (1919), A.C. 533; Leake on Contracts, 8th Ed., 815; *Clossman* v. *Lacoste* (1854), 2 W.R. 455.

McPhee, for respondent: There never was any agreement to carry out what they contend. They endeavour to make out the contract from letters between the parties that are so vague in their terms that the parties were never *ad idem*: see Leake on Contracts, 8th Ed., pp. 154 and 158.

Cowan, replied.

Cur. adv. vult.

9th January, 1934.

MACDONALD, C.J.B.C.: This is an action brought by plaintiff, who had divorced her husband, for maintenance founded upon an agreement made subsequent to the divorce. It is comprised in two letters one written by the plaintiff to the defendant, dated the 13th of August, 1929, in which amongst other things not affecting the case, she states this:

> So if you will give me your word to see me through financially, until such time as I can obtain a suitable position and will renew such financial help should I lose my position or be out of work from the cause of ill health, I will give you my word to look out for a position and so release you of some of your liabilities. If you will undertake this and I know from my experience with you that you will carry through what you say you will do, then I shall be glad to have my petition for maintenance cancelled.

This was answered on the 15th of August by the defendant in which he stated:

> In reply to your letter of the 13th August, I am quite in agreement with the spirit of the arrangement there suggested, which agreement I accept, and will begin doing my share just as soon as the legal proceedings are disposed of, which I understand will be next Tuesday.

The legal proceedings there referred to was the petition for alimony.

In my opinion, the trial judge correctly interpreted the agreement so far as the payment for maintenance was concerned. The plaintiff's claim was

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3. The taking of accounts to ascertain the amount due under the said contract and judgment for the said amount.

I think what she was asking was for the payment of overdue instalments and the taking of an account to ascertain the amount and had that course been pursued throughout there would be no difficulty in the case at all but at the end of the trial her counsel said this:

Cowan: As I say, I am quite willing to abandon everything except my claim for damages for breach of the contract, and I submit that there is a valid contract there contained in the letters and elucidated in the cases I have cited, and by the conduct of the parties at the time in paying $60 a month, and I think that a judgment for damages for breach of contract really disposes of the whole matter; that would really dispose of the whole matter. Now, as to the amount of my claim . . .

This might well be taken to mean the plaintiff claimed only the instalments in arrears at the date of the trial. It does not go the length of a distinct abandonment of future instalments. When the question of the settlement of the formal judgment came up Mr. *Cowan* contended that his language above quoted was misconstrued by the learned judge. He said:

MACDONALD, C.J.B.C.

. . . I certainly intended, and I think my remarks can be read to mean that I ask for damages up to the date of the trial and that the matter is only disposed of up to the date of the trial. That is where I say I think that a judgment for damages for breach of contract really disposes of the whole matter—that is up to the date of trial. It leaves the question open as to any future claim for damages for breach of the contract which your Lordship has found. In other words, it leaves open as your Lordship states the time when the contract expires.

This view was opposed by defendant's counsel and the learned judge said after hearing argument:

My view is that the plaintiff abandoned all claims set forth in the statement of claim except for damages for breach of contract. My view is that from what was said by counsel at the trial, I am disposing of the whole matter and I would settle the minutes of my judgment as it has been submitted by Mr. *McPhee* that it should be settled and I order and adjudge that the plaintiff do recover from the defendant the sum of $1,055 as final and complete damages for breach of contract.

The learned judge construed the language of the plaintiff's counsel at the trial as authorizing him to pronounce the judgment above mentioned, but it does not necessarily imply that. It may very well mean what plaintiff's counsel said he meant

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to express. He was dealing with other issues involved in the litigation not with the duration of the contract. Was it necessary, therefore, to put a strained construction on doubtful words?

In that view of the case the plaintiff is entitled to all instalments overdue at the date of trial, but I do not think the plaintiff is estopped from hereafter claiming for default in instalments in future litigation.

MACDONALD, C.J.B.C.

I would, therefore, allow the appeal and dismiss the cross-appeal and leave the question of such instalments for future adjudication should the matter be brought up. It was not an issue raised by the plaintiff's claim.

MARTIN, J.A.

MARTIN, J.A.: This appeal should I think be dismissed because I find it impossible to say that, on the very unusual facts before him, the learned judge below has not reached the right conclusion.

MACDONALD, J.A.

MACDONALD, J.A.: I have read the whole record carefully and considered all points raised and, after doing so, the best conclusion I can reach is that the appeal and cross-appeal should be dismissed. By failing to apply for alimony in an orderly way to secure an order for maintenance that might be varied from time to time the parties placed themselves, with possibly the best intentions, in a position where it is difficult to dispose of the matter with confidence that a wholly satisfactory conclusion has been reached. I think, however, the trial judge, in view of the course of the trial, the evidence and the proper interpretation of the correspondence reached a conclusion which, under all the circumstances, should not be disturbed.

MCQUARRIE, J.A.

MCQUARRIE, J.A.: I agree with the learned trial judge that there was an agreement between the parties as set out in the correspondence between them, referred to by him in his reasons for judgment.

I also agree with him as to the amount for which plaintiff should have judgment.

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With all deference however I cannot agree that the judgment should stipulate such amount to be "as final and complete damages for breach of contract" and I think the said stipulation should be eliminated. To that extent I would allow the appeal. The cross-appeal should be dismissed.

The Court being equally divided the appeal was dismissed.

Solicitors for appellant: *Cowan & Cowan.*
Solicitor for respondent: *J. D. McPhee.*

WHITWORTH v. DUNLOP *ET AL.*

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Criminal law—Arrest without warrant—Charge of keeping common bawdy-house—Charge dismissed—Action for false arrest—Criminal Code, Secs. 30, 229, 646, 647 and 648.

A rooming-house, of which the plaintiff's father was proprietor, had been watched by the police for some time because of the resort of known prostitutes thereto accompanied by men and on a certain night two detectives entered the premises when it was in charge of the plaintiff, looked over the transom into two rooms and in each room saw a man and woman in bed with their clothes off. The doors were not opened when the detectives knocked, so they burst open the doors and arrested the occupants. They then arrested the plaintiff without a warrant and took him to the police station, where a charge was laid against him for unlawfully keeping a disorderly house, to wit, a common bawdy-house. The charge was dismissed by the magistrate. In an action for damages for false arrest and imprisonment the plaintiff recovered judgment.

Held, on appeal, reversing the decision of MACDONALD, J. (MACDONALD, C.J.B.C. and MCQUARRIE, J.A. dissenting), that on the facts in this case the officers could arrest the accused without a warrant under section 648 of the Criminal Code, and assuming the facts did not warrant the conclusion that the offence was committed, the arrest can be justified under section 30 thereof.

APPEAL by defendant from the decision of MACDONALD, J. of the 13th of April, 1933, in an action for damages for false arrest and imprisonment and malicious prosecution. The plaintiff's father had a lease of a premises known as the Star Rooming-house. On the 28th of May, 1932, the plaintiff was in charge and a man and woman came in and registered as man and wife. They took a room for which they paid $1. Shortly after the defendants Dunlop and McGregor, who are detectives, entered the premises. McGregor looked over the transom of two rooms and both were occupied by a man and woman undressed and in bed. He ordered them to open the doors and when they refused both doors were burst open. The detectives then arrested the two men and two women, also the plaintiff, without a warrant and took them to the police station where a charge was laid against the plaintiff for keeping a disorderly house, to wit a common bawdy-house. He was bailed

Statement

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out shortly after by his father. The charge was heard by deputy police magistrate *Findlay* on the 1st of June, when the plaintiff was acquitted and a certificate of dismissal granted him. On the trial, judgment was given against the defendants for the sum of $25.

The appeal was argued at Vancouver on the 15th of November, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

McCrossan, K.C., for appellants: The charge was under section 229 of the Criminal Code, and section 648 authorizes a police officer to arrest without a warrant anyone whom he finds committing any criminal offence. The plaintiff was charged with keeping a disorderly house. Section 648 authorizes an arrest such as this and the peace officers were justified in arresting the plaintiff in this case under section 35. The learned judge below gave judgment for damages following *Rex* v. *Roach* (1923), 1 W.W.R. 433. No warrant was required and the arrest was justified under both sections 30 and 648: see *Rex* v. *Graman* (1921), 3 W.W.R. 607 at p. 611; *Rex* v. *Bottley* (1929), 2 W.W.R. 76 at p. 80; *Altman* v. *Majury* (1916), 37 O.L.R. 608; *Rex* v. *Iaci* (1925), 35 B.C. 95; *Rex* v. *Flavin* (1921), 56 D.L.R. 666; *Rex* v. *McLatchy; Ex parte Wong* (1923), 3 D.L.R. 291; *Re Rex* v. *Isbell* (1929), 2 D.L.R. 732. Sections 35 and 648 are significant of what Parliament meant: see *Rex* v. *Coy* (1925), 36 B.C. 34; *Rex* v. *Hills* (1924), 1 W.W.R. 651. The *Roach* case is discarded by the Court of Appeal of Alberta: see *Rex* v. *Selock* (1931), 2 W.W.R. 745. The evidence is sufficient to constitute this place a disorderly house: see *Reg.* v. *Rice and Wilson* (1866), 10 Cox, C.C. 155; 3 C.E.D. 270; *Rex* v. *Fabri* (1917), 28 Can. C.C. 6; *Rex* v. *Sullivan* (1930), 42 B.C. 435. The evidence was sufficient to convict: see Taylor on Evidence, 12th Ed., Vol. 2, p. 1044, sec. 1667; Phipson on Evidence, 7th Ed., 392.

Argument

Orr, on the same side: Whether he committed an offence or not the defendants were justified in arresting him. This case is added to the list under section 647 of the Criminal Code.

McKenzie, for respondent: *Rex* v. *Roach* (1923), 1 W.W.R. 433 is in our favour and should be followed. There is no

evidence of wrong-doing here and the arrest without a warrant is not justified: see *Rex* v. *Young Kee* (1917), 2 W.W.R. 442; *Cheng Fun* v. *Campbell* (1909), 16 Can. C.C. 508; *Anderson* v. *Johnston* (1918), 3 W.W.R. 620. The amendment to section 641 in the 1930 statutes sets out the procedure the police shall take.

McCrossan, replied.

Cur. adv. vult.

9th January, 1934.

MACDONALD, C.J.B.C.: I would dismiss the appeal. The question is, had the constables power to arrest without a warrant? I do not think they had. They are, therefore, guilty of a tort against the plaintiff. The judgment is therefore right.

MACDONALD, C.J.B.C.

MARTIN, J.A.: This is an appeal from a judgment of W. A. MACDONALD, J., awarding damages to the plaintiff for false arrest and imprisonment by the defendants, two of whom, Dunlop and McGregor, are detectives of the Vancouver City police force, and the third Black (since dead) was the desk-sergeant and laid the information, after the plaintiff was brought to the police station, on the 28th of May, 1932, for unlawfully keeping a disorderly house, to wit a bawdy-house, at 637 Seymour Street in Vancouver. When the charge came on for hearing on the 1st of June it was dismissed by the deputy police magistrate and this action was brought on the 24th of November following.

The premises in question, licensed as a rooming-house known as the Star Hotel, had been watched very closely by the police for some time because of the resort of known prostitutes thereto accompanied by men, and the proprietor, the plaintiff's father, had been warned in the plaintiff's presence by defendant McGregor on the 23rd of August previous (when a known prostitute and a Chinaman were found together, by McGregor in a room therein) and on the night in question while watching the place he saw, about 10 o'clock, a known prostitute accompanied by a man go into it, and upon following them upstairs with detective Dunlop, they found them, under circumstances unnecessary to detail, and another couple, in two different rooms in *flagrante delicto* (section 228) and thereupon without a war-

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rant arrested them and the plaintiff who was then in charge of the place: the detectives' testimony that it was being used for immoral purposes was fortified, though unnecessarily, by the evidence of a known prostitute that she had been so using it.

In support of his judgment the learned judge below says in his reasons that he had no hesitation in following the decision of the Appellate Division of Alberta in *Rex* v. *Roach* (1922), 19 Alta. L.R. 119; (1923), 1 W.W.R. 433; wherein it was held that the keeping of a common gaming-house, contrary to section 229, was not an offence for which a peace officer could arrest without a warrant, because primarily, upon reasoning which, assuming it may be sound as applied to gaming-houses then alone under consideration, is, with respect, not so as regards other offences within that section which may frequently, as herein, come wholly and completely under the eye of the officer, and do not depend upon those very different circumstances which exist in gaming-houses wherein the officer, as Stuart, J., p. 434, said:

> Ordinarily he would not know and could not discern whether there was a banker, or whether the object was gain or whether there were equal or unequal chances. That was the position in which the constable in the present case found himself. It was, therefore, quite impossible for him to say that he had found the accused committing the offence.

MARTIN, J.A.

The general and beneficial operation of section 648 (*post*) should not in my opinion be frustrated by reasoning appropriate only to a particular class of cases, and there is a wide distinction between, *e.g.*, the facts in this case, which were clearly patent and conclusive to a trained observer, and those in the cases of *Field* v. *Musgrove* (1867), 16 L.T. 536 (embezzlement) and *Horley* v. *Rogers* (1860), 2 El. & El. 674; 29 L.J., M.C. 140 (failing to maintain a family), and the very citations therefrom, which are relied on by Beck, J., in *Roach's* case, p. 440, establish that distinction, because herein the offence was in fact "in course of perpetration by the offender before the eyes of the constable" and pursued to completion.

It is to be observed, also, that in *Field's* case, Lush, J. was careful to keep this distinction in mind saying:

> The Act specifies a great number of offences, and says that, under certain circumstances, persons shall be able to avail themselves of this Act to escape liability. Now, embezzlement may be one of these offences, although, as it is rather an offence depending on the mind of the person

than on an act, it would not as a general rule come within this Act. But I can easily imagine a case in which embezzlement would be one of the offences contemplated by this Act. As where a master sees his servant putting money into his pocket instead of into the till, and which the master supposes is his own (*i.e.*, the master's money) there would be a case that might come under this statute. But this is not a case of that kind, as the plaintiff cannot be said to have been found in the act.

Besley.—In that view of it, my Lord, embezzlement would practically not come under the statute at all.

Lush, J.—No doubt generally it would not; but, as I have already said, there are cases where one can see that it might.

The Act then in question, 24 & 25 Vict., Cap. 96, s. 103, provided that:

Any person found committing any offence punishable, either upon indictment or upon summary conviction by virtue of this Act (except only the offence of angling in the daytime), may be immediately apprehended without a warrant by any person, and forthwith taken together with such property, if any, before some neighbouring justice of the peace, to be dealt with according to law, &c.

The words in our section 648 are:

648. A peace officer may arrest, without warrant, any one whom he finds committing any criminal offence.

2. Any person may arrest, without warrant, any one whom he finds committing any criminal offence by night.

It is, moreover, unaccountable why in *Roach's* case the prior contrary decision of the same Court in *Rex* v. *Graman* (1921), 17 Alta. L.R. 356; 3 W.W.R. 607, was overlooked though it expressly held, Beck, J., dissenting, that on a charge, like the present, of keeping a common bawdy-house, as defined by section 225, no warrant was necessary to arrest, under certain circumstances at least, saying, *per* Clarke, J.A., pp. 361-2:

This objection presupposes that the authority to arrest in such a case is governed wholly by sec. 641 of the Criminal Code. If so, or if any inference is sought to be drawn from some obstruction to the officer seeking to enter, under sec. 986 the form and sufficiency of the order would be material, but as I understand the procedure in case of persons charged with committing a criminal offence no order or warrant is required in order to justify an arrest by a peace officer.

Section 648 provides that a peace officer may arrest, without warrant, anyone whom he finds committing any criminal offence.

Section 30 provides that a 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.

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I think that in the present case the arrest was authorized under either of these sections.

Then the same Court in *Rex* v. *Bottley* (1929), 2 W.W.R. 76, on a conviction for keeping a disorderly house, considered these two cases and at p. 80 said that they could be reconciled on the difference in the facts, *viz.*, that on *Roach's* case the peace officer "did not see over a period of time all the essential features of the offence," whereas he did see them in *Graman's* case, as in the one before us.

This view was followed by the same Court in *Rex* v. *Selock* (1931), 2 W.W.R. 745, on a charge of keeping a common betting-house, the cases being again considered, and the said failure of the Court in *Roach's* case to observe *Graman's* case noted, p. 749, and the decision in the former was declared (p. 750) to be no longer "an authority for the view that a person cannot be found committing the offence of keeping a disorderly house," that conclusion being grounded on the amendment of section 641 by Cap. 11, Sec. 19 of 1930, but whether that ground be right or wrong the result is that even on its own facts and particular charge *Roach's* case is no longer an authority, even in its own Province; this view also receives support from the decision of the Appellate Division of Ontario in *Altman* v. *Majury* (1916), 37 O.L.R. 608.

MARTIN, J.A.

It follows, therefore, that *Roach's* case must be confined to those facts alone on which its reasoning is based, if indeed it can now be of weight at all on the present point in view of the decisions cited, and it is the more unsatisfactory because the holding on its other branch, the magistrate's lack of jurisdiction, is now, at best, very questionable: *cf.*, the cases collected in Tremeear's Criminal Code, 4th Ed., 853, including our own decisions, and also the later case of *Rex* v. *Selock, supra.*

Upon applying these authorities to the facts of the case before us (which it is necessary to do, apart from the evidence given at the trial, in order to determine the legal questions) arising under section 30 at least, Taylor on Evidence, 12th Ed., Vol. 2, 1045, 1065; Phipson on Evidence, 7th Ed., 392-5; *cf., Rex* v. *Johnson* (1924), 1 W.W.R. 828, 833-6, and Kenny's Outlines of Criminal Law, 14th Ed., 460-5) there is, to my mind, no doubt that within the true meaning of section 648 the appellant

was "found committing a criminal offence" by the peace officers concerned, and therefore his arrest without a warrant was lawful.

We do not know what evidence was before deputy police magistrate *Findlay,* nor for the said present purpose is it necessary that we should know, but it is in my opinion clear that if the facts there were the same as here, the appellant should have been convicted.

Be that as it may, however, the result is that on said evidence the present offence that the said officers had under observation was one for which the offender was capable of being arrested without a warrant if committed, and therefore the arrest by the officers can be "justified" under section 30, in any aspect thereof, and apart from section 35, because, beyond all serious question, they had "reasonable and probable grounds" for believing that the offence had been committed by the man they arrested.

MARTIN, J.A.

The appeal, therefore, should be allowed and the action dismissed.

MCPHILLIPS, J.A.

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

MACDONALD, J.A.

MACDONALD, J.A.: This was an action for false arrest and malicious prosecution at the instance of appellants, police officers of the City of Vancouver. The respondent, Charles Whitworth, a minor, suing by his father, was arrested without a warrant on the charge of keeping a disorderly house. The rooming-house was conducted by his father, but, at the time appellants entered and found inmates therein, the son was in charge. The magistrate, presumably on the ground that the accused was not the keeper, overlooking that for the time being he was in charge of the premises, acquitted him.

The action against appellants, based upon malicious prosecution, properly failed as the officers with reasonable and probable cause brought the respondent to trial in furtherance of justice. The learned trial judge, however, held that because the arrest was made without a warrant (the information was laid two days later) it was an illegal arrest followed by short detention,

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and awarded nominal damages. From that decision this appeal was launched.

Section 646 of the Code outlines many offences (not, however, keeping a disorderly house) for which any person may arrest without warrant anyone found committing them. The list of offences for which a police officer may arrest without warrant is enlarged by section 647. These sections relate to specific offences. The following section, however general and wide in its terms (648) enables a police officer to arrest without warrant "anyone whom he finds committing any criminal offence."

Under the latter section the accused must be found actually committing the offence. It may be a specific criminal act or an offence determinable by a series of acts. If the offence consists of a course of conduct and the officer does not observe all its elements he cannot act under this section without a warrant. In the case at Bar the appellants had general as well as special knowledge. They knew from observation that women of questionable character were resorting to this rooming-house accompanied by men and in fact warned the keeper to desist. They could therefore arrest without a warrant under section 648 and if further justification should be necessary it is found in section 35. It is not material either that the magistrate decided erroneously that an offence was not committed.

I refer also to section 30 reading as follows:

> Every peace officer who, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, whether it has been committed or not, and who, on reasonable and probable grounds, believes that any person has committed that offence, is justified in arresting such person without warrant, whether such person is guilty or not.

Even if all the elements of the offence were not observed or an honest mistake made in drawing conclusions the appellants are entitled to the protection of this section if a judge or jury on all the facts could reasonably so find. This section is not restricted to the offences outlined in section 646 or 647; it also includes an offence within the purview of section 648. As there is conflict in judicial decisions however a reference to cases may be desirable.

In *Rex* v. *Roach* (1923), 1 W.W.R. 433 (followed by the

trial judge), it was held by the Appellate Division in Alberta that keeping a common gaming-house is not an offence which one can be found committing; hence an arrest without warrant could not be justified under section 648 as the offence depended upon a course of conduct that could not be apparent when the arrest was made; also that while sections 30 to 37 "justify" or "protect" police officers and others where an arrest is made without warrant, they do not authorize an arrest without it. Objection was taken by the accused before the magistrate, that he was illegally before him because of arrest without a warrant, and on this ground it was held that the magistrate was without jurisdiction. In *Rex* v. *Graman* (1921), 3 W.W.R. 607, however, where it was sought to quash a conviction for keeping a common bawdy-house on the ground that the search order under which the accused was arrested was bad, Clarke, J.A., with whom Scott, C.J. concurred, held that the arrest was warranted under either section 648 or 30.

In *Altman* v. *Majury* (1916), 37 O.L.R. 608, a new trial was ordered to enable the defendant, a police officer sued for damages for forcible entry on premises wrongly thought to be a bawdy-house, to plead section 30 as a defence to the action.

MACDONALD, J.A.

In *Rex* v. *Pollard* (1917), 3 W.W.R. 754, it was again held by the Alberta Appellate Division in respect to an offence under a Provincial Act, that where the accused was arrested without a warrant the magistrate had no jurisdiction to try him if he objected thereto.

In *Rex* v. *Bottley* (1929), 2 W.W.R. 76 where a conviction for keeping a disorderly house was quashed on the ground that the magistrate after objection had no right to try the accused as the arrest was made without a warrant the decision in *Rex* v. *Pollard, supra,* was followed. It was held too that the question whether an arrest without warrant could be supported under section 648 of the Code, could not be determined before the magistrate enters upon his inquiry but only when he completed it; also that where the offence consists, not of a specific act, but a course of conduct (*e.g.,* the keeping of a disorderly house) if the peace officer over a certain period observed all the essential elements of the offence, it could then be said that he found the

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accused committing it as defined by section 648. This is true and it suggests the need for a further section, *viz.*, section 30, to protect the officer when he honestly but mistakenly acts under section 648. Harvey, C.J. however did not so view it. He stated (p. 29) that because this was not one of the offences specified in section 646, section 30 cannot protect the officer. He would only be justified under section 648 if the elements already referred to were present. His Lordship does not, as in earlier cases, base his view on absence of jurisdiction in the ordinary sense, but rather on the "disregard of the forms of legal process or the violation of the principles of natural justice" in the words used by the Judicial Committee in *Nadan* v. *Regem* (1926), A.C. 482.

MACDONALD, J.A.

However, in *Rex* v. *Selock* (1931), 2 W.W.R. 745, not cited to the trial judge, the Appellate Division of the Supreme Court of Alberta held that in view of an amendment to the Code by Can. Stats. 1930, Cap. 11, Sec. 19, substituting a new section 641 for the former section, *Rex* v. *Roach, supra,* can no longer be considered an authority. I do not, with great respect, agree that this follows because of the enactment referred to. It shews however that the *Roach* case is no longer treated as an authority in the Alberta Courts and had *Rex* v. *Selock* been cited to the trial judge he doubtless would not have followed it. It follows that in my opinion on the special facts in the case at Bar the appellants might arrest the accused without a warrant under section 648. Further, even if the true facts did not warrant the conclusion that the offence was committed, the acts of the appellants would be justified under section 30.

MCQUARRIE, J.A.

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

Appeal allowed, Macdonald, C.J.B.C. and McQuarrie, J.A. dissenting.

Solicitor for appellants: *J. B. Williams.*
Solicitor for respondent: *David McKenzie.*

THE ATTORNEY-GENERAL FOR BRITISH COLUMBIA v. COL.

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Feb. 20.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA *v.* COL

Revenue—Succession duties—Powers of Provincial Legislature—Indirect taxation—Ultra Vires—R.S.B.C. 1924, Cap. 244, Secs. 21, 22, 23 and 24—R.S.A. 1922, Cap. 28, Secs. 11, 12 and 13.

The petitioner as administrator of the estates of two deceased persons who were domiciled in California, each leaving wills whereby they devised certain real property in British Columbia, contested the validity of the legislation imposing succession duty on the estates and filed petitions under section 43 of the Succession Duty Act on the ground that the duty is not a direct tax. It was held that the British Columbia Act contains the identical provisions set out in the Alberta statute and the case of *Provincial Treasurer of Alberta* v. *Kerr* (1933), A.C. 710, should govern and the Succession Duty Act was declared invalid.

Held, on appeal, affirming the decision of McDONALD, J. (MARTIN, J.A. dissenting), that the conclusion arrived at by the Privy Council in the above case was that when an executor or administrator applies for administration, the Alberta Act is to be taken to mean that he will pay the duty, and when the application is assented to by the minister his obligation to pay is complete. That construction is arrived at upon consideration of sections 11 and 12 and the statutory bond of the Alberta Act. Section 24 of the British Columbia Act entitles the Court to make the like inference. This construction being applicable to both Acts the above case should be followed by this Court and the appeal is dismissed.

APPEAL by the Attorney-General from the decisions of McDONALD, J. of the 29th of November, 1933, on two petitions by A. G. Col as administrator with the will annexed of the estate of Oscar Promis, deceased, and also as administrator with the will annexed of the estate of Sophie Promis Frank, deceased. By consent the two appeals were consolidated. Both deceased were domiciled in the State of California, leaving wills whereby each devised certain real property situate in British Columbia, and subsequently the petitioner received grants of letters of administration with will annexed in both cases on the 19th of September, 1933. Meanwhile, pursuant to section 22 of the Succession Duty Act, the deputy minister of finance determined the amount of succession duty payable to be $623.74 with inter-

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est as to the Promis estate and $524.63 with interest as to the Frank estate. The minister of finance, pursuant to said section 22, then forwarded to the registrar the statement of duties payable and his consent to letters of administration upon such duties being paid or security given for payment thereof. In lieu of immediate payment the petitioner gave a bond in each case as provided by sections 23 and 24 conditioned for due payment of any duty found to be payable. The petitioner contested the validity of the legislation imposing this duty and filed petitions under section 43 of the Act alleging that such legislation was beyond the legislative authority of the Province, on the ground that the duty in question is not a direct tax. It was held that the sections of the British Columbia Act applicable to this case, although not the same word for word, do include the identical provisions contained in the sections of the Alberta Act upon which the case of *Provincial Treasurer of Alberta* v. *Kerr* (1933), A.C. 710, was decided, that the opinion of the Judicial Committee of the Privy Council in that case should govern in the present one and the statute imposing this duty should be declared invalid.

The appeal was argued at Victoria on the 25th and 26th of January, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Argument

J. W. deB. Farris, K.C., for appellant: The question is whether our Act is so similar to the Alberta Act that *Provincial Treasurer of Alberta* v. *Kerr* (1933), A.C. 710 must be followed. There is a long history as to whether succession duty is a direct or indirect tax: see *Cotton* v. *Regem* (1914), A.C. 176. He said it was an indirect tax in making the executor primarily liable: see *Burland* v. *Regem* (1922), 1 A.C. 215; *Re Doe* (1914), 19 B.C. 536; *In re Succession Duty Act and Inverarity, Deceased* (1924), 33 B.C. 318. The *Kerr* case is close to the line and if any other statute does not go equally as far as the Alberta Act, that case should not be followed. The bond in British Columbia makes the estate primarily liable. In Alberta he is guaranteeing his own obligation, whereas here he is guaranteeing that if the duty is not paid he, in his second capacity, will make good. The obligation under our bond is a

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secondary obligation. In Alberta he is primarily liable. This was the determining factor in the Privy Council decision.

Bull, K.C., for respondent: *Cotton* v. *Regem* (1914), A.C. 176 is in our favour. The proper definition of "direct tax" as appears from *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575 and *Attorney-General for British Columbia* v. *Kingcome Navigation Co.* (1933), 3 W.W.R. 353; 103 L.J., P.C. 1; 50 T.L.R. 83; [(1934), A.C. 45] (fuel-oil case) is that given by John Stuart Mill. It is obvious that the executor must recoup himself from the beneficiaries. The case of *Burland* v. *Regem* (1922), 1 A.C. 215 at 223 comes within the principles of the *Cotton* case. The distinction in *In re Succession Duty Act and Inverarity, Deceased* (1924), 33 B.C. 318 does not now hold good in face of the decision in *Provincial Treasurer of Alberta* v. *Kerr* (1933), A.C. 170. As far as the bonds are concerned the result is the same and there is no substantial difference between the British Columbia Act and the Alberta Act. The two Acts are moulded from the same source. The *Kerr* case was decided on sections 11 and 12 of the Alberta Act and sections 20 and 21 of the British Columbia Act are the same. In fact the British Columbia Act is stronger in respect of imposing personal liability. One must look to the statutory provisions as to the nature of the bond. Section 24 of the Act sets out what the bond shall contain and there is the same provision in the Alberta Act. The beneficiary who receives any portion of the estate is liable for taxes under both Acts. The question is what the statutes say and the two are the same. That decisions of the House of Lords or the Privy Council should be followed see *Robins* v. *National Trust Co.* (1927), A.C. 515 at p. 519.

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Farris, in reply: Section 12 of the Alberta Act expressly includes bond in its terms. In Alberta the bond makes the executor personally liable; in British Columbia it does not. As to following the Privy Council see *Negro* v. *Pietro's Bread Co. Ltd.* (1933), O.R. 112 at p. 117. *Cur. adv. vult.*

20th February, 1934.

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MACDONALD, C.J.B.C.: The distinction urged by counsel for the appellant between the Alberta Succession Duties Act and our Act was that while the Alberta Act imposes a liability to pay the

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succession duty upon the executor or administrator the British Columbia Act imposes the tax upon the estate of the deceased and not on the executor or administrator. Unless this distinction is sound the appeal is not sustainable. I am bound by *Provincial Treasurer of Alberta* v. *Kerr* (1933), A.C. 710. The section in the Alberta Act imposing the obligation is section 7 (1) as follows:

> 7. (1) Save as otherwise provided, all property of the owner thereof situate within the Province, and passing on the death, shall be subject to succession duties at the rate or rates set forth in the following table, the percentage payable on the share of any beneficiary, being fixed by the following or by some one or more of the following considerations as the case may be.

The corresponding section of the British Columbia Act is section 5 (1):

> 5. (1.) Save as aforesaid, the following property shall be subject on the death of any person, to succession duty as hereinafter provided, to be paid for the use of the Province over and above the probate duty prescribed in that behalf from time to time by law.

I read these as meaning substantially the same things.

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The procedure for collecting the tax in Alberta is found in sections 11 and 12, 12 being of particular importance. No mention is there made either of the property to be charged or of the persons to be charged. A statutory bond is found in the Alberta Act, which assisted their Lordships in interpreting sections 11 and 12. That bond makes the executors liable as principal debtors and the sureties as guarantors. Our statute includes no statutory bond but section 24 provides what it shall contain, the relevant words being:

> In cases where a bond is required to be given under the last preceding section, such bond . . . shall be executed by the applicant, or all the applicants in case there is more than one, each of whom shall be bound in the whole amount of such bond, and two or more sureties to be approved by the minister, who shall justify each in an amount equal to the sum for which he is to be liable, and the aggregate shall equal the amount of the penalty of the bond, and such bond shall be conditioned for the due payment to His Majesty of any duty to which the property coming to the hands of the said applicant or applicants may be found liable.

Both Acts make the payment of the duty a lien upon the estate and provide that the same may be recovered out of the value of the property given to each beneficiary.

Their Lordships came, I think, to the conclusion that when

an executor or administrator applies for administration that Act is to be taken to mean that he will pay the duty and when the application is assented to by the minister his obligation to pay is complete. That construction was arrived at upon consideration of sections 11 and 12 and the said statutory bond. The section of our Act above referred to entitles me, I think, to make the like inference. This construction is clearly applicable to both the Alberta and British Columbia Act. In the case above cited their Lordships said this, pp. 722-3:

> There can be no doubt that normally the application for probate will be by executors, and the issue is whether the Legislature intended or desired that an executor should pay the duties without any expectation that such executor should indemnify himself at the expense of some other person. . . . If the executor is so liable, then the tax is imposed on the executor, with the obvious intention that he should indemnify himself out of the beneficiaries' estate, and the taxation is indirect. If the executor is not personally liable for the duties, then the tax is truly imposed on the beneficiaries and the taxation is direct.

There is nothing in either Act imposing the obligation in terms upon the executors. The conclusion arrived at by their Lordships in the Alberta case, *supra,* was arrived at on this construction of the sections above mentioned assisted by the statutory bond. They referred to the Succession Duty Act of the Province of Quebec and called attention to the fact that in that Act (p. 725)

> "No notary, executor, trustee or administrator shall be personally liable for the duties imposed by this section. Nevertheless the executor, the trustee or the administrator may be required to pay such duties out of the property or money in his possession belonging or owing to the beneficiaries, and if he fails to do so may be sued for the amount thereof, but only in his representative capacity, and any judgment rendered against him in such capacity shall be executed against such property or money only."

And because of this clause in that Province the duty was a direct tax. They pointed out that the Alberta Succession Duties Act contained no corresponding section (nor does ours) and said that in their Lordships' opinion:

> It is clear, under ss. 11 and 12 of the Act, that an executor who applies for probate becomes personally liable for the amount of the duties determined by the Provincial Treasurer, and must either pay them or give security for their payment by a bond in the statutory form, and, further, that under the terms of the bond the executor is personally liable for payment of the duties in respect of any of the property coming into his hands. It follows that the taxation is indirect and beyond the competency of the Province.

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I find nothing further in said Acts to assist me. The contention therefore relied upon by counsel for the appellant is unsound and the appeal must be dismissed.

It may be that Mill's definition of an indirect tax has, by the Courts, been extended beyond its intended application. It has most often been applied to cases of Customs and Excise where there was no fiduciary relationship between the first taxpayer and the ultimate one. That is not the situation in a case such as the present one. The ultimate taxpayer is the beneficiary and the executor merely his trustee. It is, however, too late now to change the current of the decisions—a task which must be left to the Legislature, if expedient.

MARTIN, J.A.: This is an appeal from the judgment of Mr. Justice D. A. MCDONALD declaring that no duty is payable by the administrator, with the will annexed of the Promis and Frank estates, under our Succession Duty Act, R.S.B.C. 1924, Cap. 244, because the relevant sections thereof are *ultra vires* of the Provincial Legislature in that the duty imposed thereby is indirect taxation contrary to section 92 (2) of the B.N.A. Act.

The question arises out of the recent decision of the Privy Council on an appeal from the Appellate Court of Alberta in *Provincial Treasurer of Alberta* v. *Kerr* (1932), 2 W.W.R. 705; (1933), A.C. 710; 102 L.J., P.C. 137; 3 W.W.R. 38; wherein the Succession Duties Act of Alberta, R.S. Cap. 28, and, in particular, sections 7, 11 and 12, were considered, and the present question comes down to a short and narrow point which in substance is: Are the provisions of our statute so similar in essentials to that of Alberta that the Privy Council's decision should govern our construction of them?

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I pause here to say that for the purposes of this case I shall assume that we are bound to follow that decision from the Courts of another Province (though it was submitted that we should not do so) reserving for further consideration the recent judgment of the Ontario Court of Appeal in *Negro* v. *Pietro's Bread Co. Ltd.* (1933), O.R. 112, wherein the view was expressed that such decisions are only binding upon the Courts of the particular Province or Dominion concerned, the Court saying, p. 119, *per* Middleton, J.A. in referring to the decision

of the Privy Council in the Australian case of *Victorian Railways Commissoners* v. *Coultas* (1888), 13 App. Cas. 222:

These considerations lead me to the conclusion that it is open to us to refuse to follow the decision of the Australian case which stands alone and which is so adversely criticized and which is out of harmony with the whole trend of the English cases.

And *cf. Fanton* v. *Denville* (1932), 2 K.B. 309, 332, *per* Greer, L.J.

To resume: In this case it was submitted by appellant's counsel that the two statutes differed in material respects to such an extent that the reasoning of the Privy Council declaring the Alberta sections invalid as being indirect taxation could not be applied to invalidate ours, and the turning clauses of their Lordships' judgment, based on their own decisions in *Cotton* v. *Regem* (1914), A.C. 176, 83 L.J., P.C. 105, and *Burland* v. *Regem*. *Alleyn* v. *Barthe* (1922), 1 A.C. 215 (on the Quebec Succession Duty Act) are these, p. 723, A.C.:

In their Lordships' opinion the determination of this issue depends on the answer to a simple test, which was applied in the cases of *Cotton* and *Alleyn*, already referred to—namely, whether the executor is personally liable for the duties. If the executor is so liable, then the tax is imposed on the executor, with the obvious intention that he should indemnify himself out of the beneficiaries' estate, and the taxation is indirect. If the executor is not personally liable for the duties, then the tax is truly imposed on the beneficiaries and the taxation is direct.

And, p. 725:

The Alberta Succession Duties Act contains no similar clause excluding personal liability of an executor, etc., and, in their Lordships' opinion, it is clear, under ss. 11 and 12 of the Act, that an executor who applies for probate becomes personally liable for the amount of the duties determined by the Provincial Treasurer, and must either pay them or give security for their payment by a bond in the statutory form, and, further, that under the terms of the bond the executor is personally liable for payment of the duties in respect of any of the property coming into his hands. It follows that the taxation is indirect and beyond the competency of the Province.

It was submitted that the only controlling meaning that can fairly be attached to the language of this latter, and crucial, clause is that the decision turns primarily upon the fact that the "executor who applies for probate becomes personally liable for the amount of the duties" which he must pay or give security for payment by a bond therefor, "and, further, that under the terms of the bond the executor is personally liable for payment

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of the duties in respect of any property coming into his hands," and that it is upon the combination of those two statutory requirements that their Lordships founded their decision and then proceeded to say that upon that combination, "it follows that the taxation is indirect and beyond the competency of the Province."

On the other hand, the respondent's counsel submitted that all the words after "statutory form" should be disregarded as mere surplusage and that the reasoning could be supported and the result would be the same if the clause had there ended, and that the additional language is "only by way of emphasis." I find myself, however, unable to take this latter view and it would be what Brett, M.R. styled in *Britain* v. *Rossiter* (1879), 11 Q.B.D. 123 at 129, a "bold decision on the words" of their Lordships were we to reject them as surplusage, especially in a case of such constitutional importance and difficulty where every word of this crucial passage must have been weighed with care: it would, indeed, be hardly complimentary to their Lordships to assume that they intended otherwise. The whole language employed must be read together and taken as based upon the sections cited and it is not a warrantable construction to disregard the "further" addition of a statutory enactment to the base of the decision and amputate that final reason given for what "follows" from the whole context.

Turning then to the Alberta sections and bond prescribed thereby (section 12) and contrasting them with our corresponding sections 21-4, it is apparent, to me at least, that there is a substantial difference in their language in that the opening condition of the Alberta statutory bond is absolute and requires the applicant, executor or administrator, to "well and truly pay, or cause to be paid . . . any and all duty to which the property of the [deceased] coming into the hands of the said [applicant] may be found liable," and therefore the condition of that bond is the payment by the applicant and he is both primarily liable as a debtor and secondarily liable as a surety upon his own default. But by our sections no form of bond is prescribed and the only relevant requirements are that, if one is "authorized" for acceptance by the registrar in an "approved"

form (section 23), it "shall be in such penal sum as the Lieutenant-Governor in Council may approve, . . . " (amendment 1930, Cap. 66, Sec. 4), and executed by the applicant and sureties, and "shall be conditioned for the due payment to His Majesty of any duty to which the property coming to the hands of the said applicant . . . may be found liable." There is nothing here that obligates the applicant to pay the tax in the first instance and his only obligation arises upon the failure of "due payment" thereof by any person, and till that default occurs, whoever may be responsible for it, there is no personal liability imposed on him to pay; in other words, he is simply in the position of a guarantor of the debt due to the Crown, obligating himself only to pay a penalty and not a tax.

This view of his non-personal liability is fortified by the last paragraph of said section 24, which provides that

> In lieu of the said bond, the bond or policy of guarantee of any incorporated company empowered to grant guarantees, bonds, covenants, or policies for due and faithful accounting may be accepted as such security, and the above provisions shall, *mutatis mutandis*, apply to such security.

This declares clearly that the security furnished by the said bond may also be sufficiently furnished by that of another description, *viz.*, by "a bond or policy of guarantee of any incorporated company empowered to grant guarantees . . . " alone, quite apart from the applicant's liability, and the provision is general in its terms and a distinct alternative to the special bond "authorized" by the Lieutenant-Governor under sections 23 and 24, which requires "two or more sureties," and because of its business facility this special single bond invites a large resort thereto. The words *"mutatis mutandis"* clearly have not the effect of requiring the inclusion of the applicant in this optional substituted security of a specially "empowered" corporation policy or bond; on the contrary, the intention is, manifestly, to dispense with him by simply accepting an "empowered" corporation as the sole surety for the payment of the duty.

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I am quite unable to regard the proviso in subsection (2) of section 13 of the Alberta Act as being of similar import, and the Privy Council do not rely on it or even cite it: to my mind its very different language is not intended to relieve the appli-

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cant of his personal liability but only to relieve him in special cases from the necessity of "securing" an approved guaranty company as "surety" with himself after he has "satisfied" the Provincial treasurer that he is "unable" to do so in his particular case; this essential difference is emphasized by the fact that the treasurer is even empowered to reduce the amount of the security, though nothing of the kind is to be found in our said "lieu" clause.

I have not overlooked the reference to section 34 of our Act but it is so clearly a general section relating to special summary proceedings to enforce payment of duty "forthwith" under unspecified circumstances, not, be it noted, by the executor or administrator only, but also by the "heir or devisee of the property liable to duty," that it does not require further attention, except to note that it does furnish support to the view that executors and administrators are not personally liable because, if so, there was no necessity for special provisions to compel them to pay the duty they were already bound to pay if said sections 21-24 so obligated them: counsel told us that there is no similar provision in the Alberta Act.

It should not be overlooked that a personal obligation to pay a tax can only be imposed by clear and unambiguous language, and that rule was reaffirmed by the Privy Council in *Oriental Bank Corporation* v. *Wright* (1880), 5 App. Cas. 842, wherein the appellant bank was held not to have violated an Act for "imposing duty upon bank notes," their Lordships saying, *per* Lord Blackburn, p. 856:

> Their Lordships, therefore, having regard to the rule that the intention to impose a charge on the subject must be shewn by clear and unambiguous language, are unable to say that the obligation of the bank to make the return applied for, and its consequent liability to pay duty on the notes put into circulation by its Kimberley Branch, are so clearly and explicitly imposed by the present Act as to satisfy this rule.

And after pointing out that the application of that rule would in that case have the effect of creating an anomalous position whereby the issue of bank notes of a certain class would be relieved from the duty "however large the amount so put into circulation may be," their Lordships proceeded to say:

> But if the Legislature, from want of foresight or for any other reason, has omitted to provide for such a case, it is the province of the Legislature itself, and not of the Courts, to supply the omission.

With the greatest respect for the opinion of my learned brothers, from whom I have the misfortune to differ in this matter, I venture to say that the language in our statute on which it is sought "to impose [this] charge upon the subject" is beyond question very far from being "clear and unambiguous" and therefore the rule laid down by their Lordships, that the tax must be "clearly and explicitly imposed" applies in full force and should be given effect to, and hence it follows that, there being no personal liability herein, the decision of their Lordships in the *Treasurer of Alberta* case does not apply to this one, and so the present taxation is direct and within the competency of this Province, and therefore this appeal should be allowed and our decision in *Inverarity's* case (1924), 33 B.C. 318, affirmed.

In conclusion I may say that I share the difficulty some of my brothers have expressed in finding a satisfactory solution to these frequently recurring questions of direct provincial taxation, a difficulty indeed, which occurs in the Privy Council itself, as is shewn in its most recent decision on the question, *Attorney-General of British Columbia* v. *Kingcome Navigation Co.* (1933), 103 L.J.P.C. 1, pronounced three months after the Alberta case, and in the latter it was said, p. 722:

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> There remains the question of "direct taxation." The principle to be applied in such cases is now well settled. Is the duty imposed on the very person whom the Legislature intended or desired should pay it, without any expectation or intention that he should indemnify himself at the expense or some other person?

But despite this brief disposition of the question as "well settled" their Lordships in the *Kingcome* case (on our Fuel-oil Tax Act, 1930, Cap. 71) found it necessary to review their leading decisions upon it for over 50 years, beginning with *Attorney-General for Quebec* v. *Queen Insurance Company* (1878), 3 App. Cas. 1090, and from the instructive exposition of the principles which have guided their Lordships it appears that, since their adoption in *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, 582, of part only of John Stuart Mill's definition of direct and indirect taxes "as a fair basis for testing the character of the tax in question," but excluding Mill's term that it should be general, there has been a progressive

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restriction of that partial definition to the extent that contentions which might have been open at the time of its original adoption in 1878 have been "excluded by later decisions of the Board to which their Lordships will next refer," and they proceed to do so: (p. 5 *et seq.*).

It would be out of place, now, to pursue that discussion, but it may be observed that the result of the said progressive restriction of Mill's partial definition is to give it a rigidity which has added to the original difficulty of applying it at all to many conditions which it was not framed to meet even at that time, which difficulty has since been accentuated by the further changes in our times of over half a century, which, one would have thought, with all due deference, would have been better met by an expansion, or adaptation of the definition in keeping with the march of events, or better still, perhaps, as has been suggested, by the substitution of a more aptly defined and elastic one, which the changed times are ripe for.

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This view, indeed, received support from Mill himself because a careful examination of his ideas upon the question (which, it may be noted, the Privy Council declined in the *Lambe* case to undertake, p. 582) discloses the fact that his said definition (to be found in Book V., chapter iii., "Principles of Political Economy" at p. 823 of Longman's 1 Vol. Ed. of 1909, edited by W. J. Ashley) is not directed at all to such matters as the present, but primarily to commodities and transactions of trade and commerce in relation to the "increased cost of production using that term in its most enlarged sense," as more fully appears by his further consideration of the subject in chapter iv., "Of taxes on commodities," p. 837; and what is of much present interest is that, at p. 868, of chapter vi., on "Comparison between Direct and Indirect Taxation," he treats taxes on legacies and inheritances as being direct, saying:

> Besides the present land-tax, and an equivalent for the revenue now derived from stamp duties on the conveyance of land, some further taxation might, I have contended, at some future period be imposed, to enable the state to participate in the progressive increase of the incomes of landlords from natural causes. Legacies and inheritances, we have also seen, ought to be subjected to taxation sufficient to yield a considerable revenue. With these taxes and a house tax of suitable amount, we should, I think, have reached the prudent limits of direct taxation, save in a national

emergency so urgent as to justify the government in disregarding the amount of inequality and unfairness which may ultimately be found inseparable from an income tax. The remainder of the revenue would have to be provided by taxes on consumption, and the question is, which of these are the least objectionable.

And he then proceeds to consider "forms of indirect taxation." He had previously said, p. 809:

I conceive that inheritances and legacies, exceeding a certain amount, are highly proper subjects for taxation; and that the revenue from them should be as great as it can be made without giving rise to evasions, by donation *intervivos* or concealment of property, such as it would be impossible adequately to check. The principle of graduation (as it is called), that is, of levying a larger percentage on a larger sum, though its application to general taxation would be in my opinion objectionable, seems to me both just and expedient as applied to legacy and inheritance duties.

And, again, p. 822, Book V., Cap. ii.:

I cannot, therefore, attach any importance, in a wealthy country, to the objection made against taxes on legacies and inheritances, that they are taxes on capital. It is perfectly true that they are so.

The significance of these citations from this edition of his very valuable work is that they represent his revised opinion brought down to 1871 (*vide* Introduction, p. xxv.) and therefore he had in mind the existence of succession duty in England which was first created by the Succession Duty Act of 1853 (16 & 17 Vict. c. 51), five years after the first publication of his "Principles," in 1848.

It becomes apparent, therefore, that the effect of the long continued pruning, so to speak, of Mill's real views upon the subject has, in the present case at least, been to misapply them to circumstances where a person in a representative capacity is simply following a course of procedure and discharging a duty imposed by statute, on behalf of beneficiaries, thereby bringing about a result which is contrary in principle to that contemplated by the author of the definition.

Though this view of the matter is largely by the way, because of my opinion that the *Alberta* case does not apply, yet as it will very probably come up again for still further consideration, it is not, I feel, under the unusual circumstances, out of place to make this slight contribution to what, it is to be hoped, may be its final elucidation, and the more so because a close analysis of their Lordships' reasons for deciding their latest case, *i.e.*,

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Kingcome's, discloses the fact that they afford substantial support to these conclusions.

MCPHILLIPS, J.A.: This appeal has relation to whether the Succession Duty Act, Cap. 244, R.S.B.C. 1924 is or is not valid.

The question of validity or non-validity of the Act turns upon whether it is direct or indirect taxation. The learned judge in the Court below, in a considered judgment held the Act to be invalid upon the view that it was beyond the power of the Legislature of British Columbia to enact as it imposed indirect taxation, and followed the binding authority upon the question, namely, *Provincial Treasurer of Alberta* v. *Kerr* (1933), 102 L.J., P.C. 137, that is if the British Columbia Act in all respects or in its essential features is the same as The Succession Duties Act, of Alberta (R.S. 1922, Cap. 28), Sec. 7, as amended in 1927, considering British North America Act, 1867 (30 & 31 Vict. c. 3), s. 92, head (2). The learned judge concluded his reasons for judgment in these terms:

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> The determination therefore is that no property belonging to the said estate is liable to succession duty, for the reason that the statute imposing the duty is invalid and of none effect.

With the learned judge's conclusion I feel I cannot disagree. I might, however, call attention to an additional feature that we have in this case—that is section 34 of the British Columbia Act which reads as follows:

> 34. A judge of the Supreme Court may at any time after the death of the deceased, upon the application of the minister, issue a summons directing the executor, administrator, heir, or a devisee of the property liable to duty to appear before a judge of the Court on a day certain to be therein named, and shew cause why the duty should not be paid forthwith, or on a day to be fixed by the judge. Upon the return of the summons, a judge shall have power to order payment of the duty forthwith, or to fix a day upon which the duty shall be paid. The procedure applicable to such an application, including the enforcement of any order made, shall be the procedure of the Court governing applications to and orders made by judges in Chambers.

It will be seen that the executors or administrators may be proceeded against personally in a summary manner and a judge shall have the power to order payment of the duty forthwith or to fix a day upon which the duty shall be paid. In practice the

effect of the British Columbia Act is that probate or administration cannot be issued until the amount of succession duty is determined and paid to the registrar or security is given by way of an approved bond (see section 22 (1), (2), Cap. 24, R.S.B.C. 1924). This means that the executor or administrator must, before he obtains the power to deal with the assets of the estate, pay or secure the amount of the succession duty, and as we have seen may be personally and summarily compelled by the order of a judge to do so and the enforcement of the order for judgment is summary, *i.e.*:

> The procedure applicable to such an application, including the enforcement of any order made, shall be the procedure of the Court governing applications to and orders made by judges in Chambers:

section 34, Succession Duty Act, Cap. 244, R.S.B.C. 1924. Therefore it is clear that the succession duty as imposed by the Act created a personal liability by statute upon the executor or administrator when he takes up the duties of executor or administrator and naturally the executor or administrator being personally liable for the succession duty would expect to be recouped for the payment thereof out of the estate. Lord Thankerton who delivered the judgment of their Lordships in *Provincial Treasurer of Alberta* v. *Kerr, supra,* at p. 142, is reported to have said:

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> If the executor is not personally liable for the duties, then the tax is truly imposed on the beneficiaries and the taxation is direct.

At p. 143 Lord Thankerton calls attention to the fact that in Quebec there was amending legislation and there also has been similar legislation in Alberta, following the decision in *Provincial Treasurer* v. *Kerr, supra,* declaring that the executor or administrator shall not be personally liable but no such legislation has been passed in British Columbia. What Lord Thankerton said at p. 143 was this:

> The Alberta Succession Duties Act contains no similar clause excluding personal liability of an executor, etc., and, in their Lordships' opinion, it is clear, under ss. 11 and 12 of the Act, that an executor who applies for probate becomes personally liable for the amount of the duties determined by the Provincial Treasurer, and must either pay them or give security for their payment by a bond in the statutory form, and, further, that under the terms of the bond the executor is personally liable for payment of the duties in respect of any of the property coming into his hands. It follows that the taxation is indirect and beyond the competency of the Province.

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Now in this particular case as a matter of fact a bond has been given and it reads as follows: [After setting out the bond the learned judge continued].

And upon a question being put by me during the argument to Mr. *Bull,* counsel for the respondent in this appeal, he admitted that his client the respondent was not under the bond personally liable. I then took the point that apparently the matter was purely academic and my view was that neither the Court below nor was this Court called upon in this case to pass upon the validity or invalidity of the Act and that was my opinion. However the majority of the Court were not so advised and the argument continued. I may say that the solicitor for the Attorney-General in the notice of appeal to this Court took the point

6. That the petitioner having (with a surety) entered into a bond with His Majesty the King to pay such duty as, under the Succession Duty Act, as enacted, should be payable to His Majesty, cannot be heard to contend that the said Act is invalid.

MCPHILLIPS, J.A.

Counsel for the Attorney-General did not argue the point and in accordance with the decisions of this Court grounds of appeal not argued are deemed to be abandoned. I still think with great respect to all contrary opinion that *ex mero motu* the objection was open to the Court to take and could have been acted upon had the Court been so minded. However, passing upon the Act then as to its validity or invalidity, I am of the opinion that their Lordships' judgment in *Provincial Treasurer of Alberta* v. *Kerr, supra,* is applicable to this case and following this case it is my opinion that the taxation imposed by the Succession Duty Act upon the executor or administrator is not direct but indirect and being indirect is beyond the constitutional authority of the Legislature of British Columbia.

I would, therefore, dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: We have to decide whether or not sections 22, 23 and 24 of the Succession Duty Act (R.S.B.C. 1924, Cap. 244) are similar in intent to sections 11, 12 and 13 of the Alberta Act (R.S.A. 1922, Cap. 28 as amended) considered by the Judicial Committee in *Provincial Treasurer of Alberta* v. *Kerr* (1933), A.C. 710.

In *Re Doe* (1914), 19 B.C. 536 and *In re Succession Duty Act and Inverarity, Deceased* (1924), 33 B.C. 318 the validity of the British Columbia Act was upheld. Have these decisions followed for many years been overruled? This depends upon comparison and interpretation viewed in the light of the *Kerr* decision.

Under the Alberta Act by the judgment referred to the duty is "demanded from one person [the executor] in the expectation and intention that he shall indemnify himself at the expense of another." That must, I assume, mean that an obligation is imposed on the executor and that he can only discharge it by payment or by providing a bond to which he is a party. Have we in the structure of our Act a scheme or policy under which the executor is not obliged to pay in the first instance a tax intended to be collected from another?

While *Cotton* v. *Regem* (1913), 83 L.J., P.C. 105 is not altogether in point, as it dealt with property beyond the Province, and in so far as it can be said to be applicable depended upon the wording of the Quebec Act where the right to recover by action against the declarant was explicitly given—the collector could sue for recovery—the following observations by Lord Moulton, at p. 115, are pertinent, *viz.*:

> Indeed the whole structure of the scheme of these succession duties [under the Act considered] depends on a system of making one person pay duties which he is not intended to bear, but to obtain from other persons.

I refer to this extract because Lord Thankerton in the *Kerr* case, *supra,* in dealing with the only point we are concerned with does not state underlying principles. We have not the benefit of a judgment containing a detailed analysis of the sections of the Alberta Act shewing whether or not in their Lordships' view there is in their opinion, as in the *Cotton* case, a right of action against the executor. It would appear to me that the executor in the *Kerr* case could successfully resist an action. He might renounce or refuse to apply for probate. It may therefore be that by analogy it is held that, although the right to sue is not given, the executor in the opinion of the Judicial Committee is placed in such a position that he must pay if he carries out as he should, the trust reposed in him. I suggest this as a possible ground for the decision referred to. The absence of a clearer

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statement makes the task of distinguishing our Act from the Alberta Act artificial and mechanical.

The relevant part of the judgment of the Judicial Committee follows (pp. 722-3):

> There remains the question of "direct taxation." The principle to be applied in such cases is now well settled. Is the duty imposed on the very person whom the Legislature intended or desired should pay it, without any expectation or intention that he should indemnify himself at the expense of some other person? Under the Alberta Succession Duties Act the duties in question were imposed on the executors on their application for probate, and letters probate could not be issued without the consent of the Provincial Treasurer, whose duty was to secure payment of the duties or obtain security therefor by a statutory bond before giving such consent. There can be no doubt that normally the application for probate will be by executors, and the issue is whether the Legislature intended or desired that an executor should pay the duties without any expectation that such executor should indemnify himself at the expense of some other person. In their Lordships' opinion the determination of this issue depends on the answer to a simple test, which was applied in the cases of *Cotton* (1914), A.C. 176 and *Alleyn* (1922), 1 A.C. 215, already referred to—namely, whether the executor is personally liable for the duties. If the executor is so liable, then the tax is imposed on the executor, with the obvious intention that he should indemnify himself out of the beneficiaries' estate, and the taxation is indirect. If the executor is not personally liable for the duties, then the tax is truly imposed on the beneficiaries and the taxation is direct.

It is here stated that under the Alberta Act the executor is personally liable for the duties, and I take it cannot evade payment. Then after referring to the *Cotton, Burland* and *Alleyn* cases, and pointing out that the decision in the latter case was due to an amendment to the Quebec Act providing that the executor should not be personally liable, Lord Thankerton said (p. 725):

> The Alberta Succession Duties Act contains no similar clause excluding personal liability of an executor, etc., and, in their Lordships' opinion, it is clear, under ss. 11 and 12 of the Act, that an executor who applies for probate becomes personally liable for the amount of the duties determined by the Provincial Treasurer, and must either pay them or give security for their payment by a bond in the statutory form, and, further, that under the terms of the bond the executor is personally liable for payment of the duties in respect of any of the property coming into his hands. It follows that the taxation is indirect and beyond the competency of the Province.

The deduction is that under the Alberta Act "an executor who applies for probate becomes personally liable for the amount

of the duties" and that "under the terms of the bond the executor is personally liable . . . in respect of any property coming into his hands." I should think that a tax being determinate and enforcible the condition under which the executor becomes liable (*viz.*, only when he "applies for probate") would be a material part of the inquiry. Is he bound to apply? Can he renounce or evade payment without transgressing the Act? The same considerations apply to the phrase "in respect of any of the property coming into his hands." Again the words "require immediate payment" in section 12 of the Alberta Act without stating from whom payment is required or the source from which it may be obtained (*e.g.*, the estate) appears to fall far short of the imperative language directed by the statute to the declarant in the *Cotton* case (83 L.J., P.C. at p. 115, first column).

By section 11 of the Alberta Act the applicant for probate must file affidavits of value and relationship and by section 12 the clerk on receipt thereof forwards a copy to the Provincial treasurer who determines the amount of succession duty "the property or any part thereof" is subject to after which he shall "require immediate payment" or a bond in a penal sum (section 13) equal to ten per cent. of the sworn value of the property liable, or which may become liable to succession duty or in such further sum as the Provincial treasurer may deem sufficient conditioned for due payment of the duty to which the property of the deceased "coming into the hands of the said applicant" is or may be found liable. By 13 (2) "every such bond shall be executed by the applicant" and a guaranty company as security "and the parties executing the bond shall be bound jointly and severally in the whole amount of the penalty thereof." The structure of the British Columbia Act is not substantially different. It is in fact more strongly emphasized in section 12 of the Alberta Act, that it is the "property" that is subject to the tax.

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Then a proviso to 13 (2) enacts that if it appears to the Provincial treasurer that the applicant cannot secure an approved guaranty company as surety other security may be given in such a form as the Provincial treasurer may direct. This proviso is

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important because stress was laid on the last clause of section 24 (1) of the British Columbia Act which, it was submitted, differed materially from the Alberta Act. In my opinion, without discussing it in detail, the Provincial treasurer of Alberta under the proviso in 13 (2) could, if the applicant was not able to secure the ordinary bond, accept the same form of security as that referred to in the final clause of 24 (1) in our Act. It is conceivable that in both cases the applicant might not be required to be a party to this special security. This view may throw doubt on the decision in the *Kerr* case but it does not enable us to distinguish it. The *ratio decidendi* must be at least an extension, if not a departure from the decision in the *Cotton* case. It appears to be based upon the view that it is enough that the applicant is bound either to pay personally, or to make provision to do so by a bond; in other words an *impasse* is reached in the administration of the estate unless the applicant pays or arranges to pay. I do not think, viewing it in this light, that any assistance is derived from a comparison of the form of the bonds under the two Acts.

I must confess inability, doubtless due to my own limitations, to apprehend with certainty the real basis of the judgment in the *Kerr* case. I can only say that without fuller elucidation it is impossible to say the structure or wording of our Act is so different that it falls outside that decision. I cannot reverse a judgment without placing my grounds for interference upon a substantial basis and I am unable to do so in this case.

I would therefore dismiss the appeal.

MCQUARRIE, J.A.

MCQUARRIE, J.A.: I agree in dismissing the appeal.

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellant: *Griffin, Montgomery & Smith.*

Solicitors for respondent: *Walsh, Bull, Housser, Tupper & Ray.*

SCHUMAN v. CITY OF VANCOUVER.

MURPHY, J.

1934

March 21.

SCHUMAN v. CITY OF VANCOUVER

Negligence — Damages — Notice within sixty days—Reasonable excuse for non-compliance—Prejudice to defendant—B.C. Stats. 1921 (Second Session), Cap. 55, Sec. 320—B.C. Stats. 1928, Cap. 58, Sec. 38.

Section 320 of the Vancouver Incorporation Act (as amended in 1928) provides, *inter alia*, as follows: "(1) Every public street, road, . . . , in the city shall, save as aforesaid, be kept in reasonable repair by the city. (2) The city shall not be liable in any action for damages arising under subsection (1) hereof, unless notice in writing, setting forth the time, place, and manner in which such damage has been sustained, shall be left and filed with the city clerk within sixty (60) days from and after the date on which such damage was first sustained; . . . The want or insufficiency of the notice required by this subsection shall not be a bar to the maintenance of any action if the Court . . . is of opinion that there was reasonable excuse for such want or insufficiency, and that the defendant has not been prejudiced in its defence."

The plaintiff fell on the street and broke her leg in two places. In an action against the city to recover damages for injuries sustained by reason of non-repair of a highway, the notice required under the above section was not given, but the plaintiff claimed reasonable excuse for want of notice in that her pain, suffering and worry were so great that she had no opportunity of thinking of sending the notice, that she consulted a solicitor within the 60 days, who advised her she had one year in which to bring action and that the city was not prejudiced as her daughter on the day of the accident told a health inspector of the city particulars of the accident, who made a report of it to the city relief officer. On motion for non-suit:—

Held, that there was no proper notice as contemplated by section 320 of the Act as amended in 1928, that there was no excuse proven that would take the case out of the operation of the section and that the city was seriously prejudiced by the lack of such notice in adducing evidence in connection with the trial.

ACTION for injuries resulting from a fall on a roadway in Vancouver owing to its being in a state of disrepair. Tried by MURPHY, J. at Vancouver on the 21st of March, 1934. The wooden paving blocks near the corner of Hamilton and Robson Streets were loose and raised in mounds by reason of the same not being properly tarred and free from water. Some of the blocks were floating in water and were raised from two to four inches, the surface of the road being a succession of heights and

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hollows: The plaintiff admitted seeing the condition of the road, but in crossing she stepped on a loose block, slipped and broke her leg in two places. The accident occurred on the 23rd of March, 1932, and the plaintiff wrote the city solicitor setting out her claim, her injuries and the cause thereof, on the 11th of November following. The defence was general denial, an allegation of contributory negligence, and that the plaintiff failed to give notice to the city as required by section 320 of the Vancouver Incorporation Act, 1921, as amended in 1928 which requires the filing of a notice in writing with the city clerk setting out the time, place and manner in which the damage was sustained within 60 days from the date on which such damage was sustained. The plaintiff sought to shew there was reasonable excuse for want of notice and that the defendant had not been prejudiced in its defence by want of such notice. She sought to shew there was reasonable excuse because of being incapacitated and that her pain and suffering and worry were so great that she had no opportunity of thinking of sending a notice. She further alleged that she consulted a solicitor who told her she had one year within which she could bring action. She further alleged that the city was not prejudiced because the plaintiff's daughter, on the afternoon of the day in which the plaintiff's injuries were sustained, reported verbally to one Joseph Hynes, a health inspector of the city, particulars of the manner in which the plaintiff's injuries were sustained and Hynes swore he made a report to the city relief officer, which included particulars of the accident, but he had not reported to any other department of the city. At the close of the plaintiff's case the defendant moved for non-suit, argument on which was reserved until after the defence was put in. The jury brought in a verdict against the defendant. The defendant then moved for non-suit.

Statement

McCrossan, K.C. (*Lord,* with him), for the motion, on the question of negligence and the duty of the city, referred to *Belling* v. *City of Hamilton* (1902), 3 O.L.R. 318; *Jones* v. *Swift Current* (1915), 8 W.W.R. 1100; *Foley* v. *Township of East Flamborough* (1898), 29 Ont. 139; *Cranston* v. *Town of Oakville* (1916), 10 O.W.N. 315; *Clark* v. *City of Winnipeg*

Argument

(1918), 2 W.W.R. 457; *Keachie* v. *Toronto* (1895), 22 A.R. 371. [On the question of notice he referred to *Carlton* v. *Municipality of Sherwood* (1915), 9 W.W.R. 611; *O'Connor* v. *City of Hamilton* (1904), 8 O.L.R. 391; (1905), 10 O.L.R. 529; *Egan* v. *Township of Saltfleet* (1913), 29 O.L.R. 116; *Wallace* v. *City of Windsor* (1915), 36 O.L.R. 62; *Fuller* v. *City of Niagara Falls* (1920), 48 O.L.R. 332; *Giovinazzo* v. *Canadian Pacific R.W. Co.* (1908), 19 O.L.R. 325; *Bissell* v. *Township of Rochester* (1930), 65 O.L.R. 314; *In re McCrae and Village of Brussels* (1904), 8 O.L.R. 156; *Carmichael* v. *City of Edmonton* (1933), S.C.R. 650; *Anderson* v. *Toronto* (1908), 15 O.L.R. 643; *Howard* v. *South Vancouver* (1924), 4 D.L.R. 257].

Argument

McKenna (*J. Edward Bird,* with him), *contra,* referred to *Hayward* v. *Westleigh Colliery Company, Limited* (1915), A.C. 540; *Cummings* v. *Vancouver* (1911), 16 B.C. 494; *Pipher* v. *Township of Whitchurch* (1917), 39 O.L.R. 244; *Lever* v. *McArthur* (1902), 9 B.C. 417.

MURPHY, J.: I have had occasion within the last two weeks to make an intensive study of a similar section to this, one that involves a great many of the same points—a section in the School Act. As the authorities quoted here this morning shew, it is not so much what is the law but what are the facts. The law is set out in the language of the statute and it is clear. In the first place the statute requires notice in writing. It is asserted here a notice in writing was given because an employee —Hynes of the relief department or health department—comes here and says he had written a memorandum which he read apparently, from what he says, to the health officer, in which he stated this lady had fallen on the street and the street was not in a proper state of repair. Then there was a letter written to the relief department which apparently did not go so far as to give any particulars. If the reading alleged to have been made to the health officer by Hynes should be of any significance at all that sort of thing, surely, is not written notice to the city. That a minor employee should write a memorandum of facts and read it to the health officer, who has nothing to do with the streets, cannot, in my opinion, amount to a compliance with the

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requirements of the statute. That that should be held to be written notice is something I am unable to hold. So that no notice was given within the time limit of 60 days. Now, unless that is done, the Legislature has said that the city shall not be liable in any action for damages based on non-repair to the streets; but it has safeguarded the rights of the people by putting in provisoes. The first proviso is that there may be excuse, reasonable excuse, for not giving the notice. Now, I think the *onus* is on the plaintiff to establish that, and instead of its being established here, I think the defence has established a want of reasonable excuse. The plaintiff was not only capable of attending to business, but actually sent for a lawyer; had in contemplation, apparently, the bringing of an action against the city and spoke to a lawyer about it. Under those circumstances, I do not see how it can be said that the *onus* on the plaintiff to shew there was reasonable excuse has been complied with. To my mind there is a much more important matter, however, and that is prejudice to the city even if an excuse for not giving written notice was established. If the further proposition that there was no prejudice to the city is not established—and I think the *onus* is on the plaintiff to establish that—then the existence of excuse would not take the matter out of the operation of the statute. Now, instead of that *onus* being complied with here, I think it is clear that the city has established that it was prejudiced. Anyone who was present at the view taken by the jury would have seen, I think, how the city was prejudiced in meeting the claim. It did not hear anything of it until eight months after the accident. If the city had had notice within 60 days, it would, in my opinion, based on the street view, have been able to adduce evidence here which would have precluded the possibility of a verdict being given against it. As to the contention that the city had notice because its workmen made repairs on the north side of the street in May following the accident, my opinion is that assuming the city could get notice in that way so as to take the matter out of the statute—to my mind a very doubtful proposition—the workmen did not see the alleged defect in the street because in fact there was no such upheaving of the wooden blocks as would break the bond and

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require their resetting. There may have been, and doubtless was, some swelling of the blocks resulting in possibly a sloping surface in places but this would disappear with the coming of dry weather.

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I hold there was no proper notice as contemplated by section 320 as amended by section 38, 1928—notice in writing—and I further hold that there was no excuse proven that would take the case out of the operation of the section; and I hold finally that the city was seriously prejudiced by the lack of such notice in adducing evidence in connection with this accident.

Judgment

The action is therefore dismissed with costs.

Action dismissed.

HOWES v. CITY OF VANCOUVER.

MCDONALD, J. (In Chambers)
1934
April 11.
HOWES v. CITY OF VANCOUVER

Practice—Action against corporation—Examination for discovery—Officer or servant of corporation—Inspector of traffic for corporation—Subject to examination—Rule 370c (1).

The inspector of traffic in and for the City of Vancouver, being a police officer employed and paid by the police commission of the city, the commission receiving the money from the city with which to pay its officers, is, in an action against the city, subject to examination for discovery within rule 370c (1).

APPLICATION for an order that one Mortimer, inspector of traffic for the City of Vancouver, do submit himself for examination for discovery as an officer or servant of the corporation, within the provisions of rule 370c (1). Heard by MCDONALD, J. in Chambers at Vancouver on the 10th of April, 1934.

Statement

Maitland, K.C., for the application.
Lord, contra.

MCDONALD, J. (In Chambers)

1934

April 11.

HOWES v. CITY OF VANCOUVER

11th April, 1934.

MCDONALD, J.: Application by the plaintiff to examine one Mortimer who is known as the inspector of traffic in and for the City of Vancouver. Mortimer is a police officer employed and paid by the police commission which commission receives the money from the city with which to pay its officers.

It is objected that Mortimer is not an officer or servant of the corporation within rule 370c (1) and the matter is one of considerable difficulty to decide. Several cases have been cited by counsel who have gone into the matter fully and while I do not feel entirely satisfied with the conclusion I have reached, in view of the fact that the trial is set for next week, I think I ought not to delay my decision. Upon the best consideration which I have been able to give the matter I have concluded that none of the authorities cited is exactly in point but that Mr. *Maitland's* argument is sound. The city by its charter took unto itself the power to regulate traffic, signal-lights and so forth on the streets and bridges within the city. The only way in which the city has attempted to regulate that traffic is through a standing committee of the city council and through inspector Mortimer who has taken full charge of the matter of traffic. In that capacity, in my view, he is not acting as a public officer employed by the police commission but as a servant of the corporation in carrying out a function which it is the duty of the corporation and not of the police commission to carry out. The defendant has offered its city engineer for examination but he has not been able to answer the questions as fully as Inspector Mortimer should do and as the plaintiff is entitled to discovery from some officer or servant I think it may also be said that the merits as well as the legal right are with the plaintiff.

Judgment

The order will go as asked with costs to the plaintiff in the cause.

Application granted.

EASTMAN v. PACIFIC FORWARDING COMPANY LIMITED.

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Jan. 10.

EASTMAN v. PACIFIC FORWARDING CO. LTD.

Practice—Pleadings—No reasonable cause of action—Striking out statement of claim—Inherent jurisdiction of Court—Frivolous and vexatious—Rule 284.

The defendant company, carrying on business in Vancouver, entered into an agreement with the plaintiff who resides in St. Louis, Missouri, U.S.A., to sell him 325 cases of merchantable Bourbon whisky for $13,000. The whisky was delivered to the plaintiff who paid the defendant company $13,000. The plaintiff later found the whisky was bad and unmerchantable. He then repudiated the purchase, notified the defendant, and the defendant took back delivery of the goods. The plaintiff brought action to recover the purchase price paid. On an application by the defendant that the statement of claim be struck out and that the action be dismissed on the grounds that the statement of claim disclosed no reasonable cause of action and that it is based upon an alleged contract not valid in law, the affidavit of one Sokol was allowed to be read in support of the application and an order was made that the defendant be at liberty to cross-examine Sokol on his affidavit, that all proceedings in the action be stayed until this application be disposed of and that the application stand over for further hearing.

Held, on appeal, reversing the order of MCDONALD, J. (MCQUARRIE, J.A. dissenting), that the learned judge must be justified on the evidence before him, when he admitted the affidavit, in saying that the action could not possibly succeed, but it is admitted that the evidence does not cover all the factors that would enable him to come to that conclusion. He should not have made the order for admission of the affidavit nor should he have granted a stay. The application to strike out the pleading as disclosing no reasonable cause of action should be dismissed as there is no doubt that it does disclose a cause of action.

APPEAL by plaintiff from the order of MCDONALD, J. of the 30th of November, 1933. The action is for the recovery of the sum of $13,000 in American money. It was alleged in the statement of claim that in January, 1932, the defendant company agreed to sell to the plaintiff, who resides in St. Louis, State of Missouri, 325 cases of merchantable Bourbon whisky for $13,000. The whisky was sent to the plaintiff who then paid the defendant company $13,000. It was then found by the plaintiff that the whisky sent him was bad and unmerchantable and he repudiated the said purchase

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and the defendant took back delivery of the goods. The defendant refused to repay the $13,000 to the plaintiff. The defendant moved that the action be dismissed on the ground that the statement of claim disclosed no reasonable cause of action and that the claim was based on an alleged contract not valid in law. An affidavit of one Sokol with exhibits therein referred to was read, after objection by the plaintiff, setting out the facts as to the alleged contract of sale. An order was made that the application do stand over *sine die* and that said Sokol do submit himself for cross-examination by the defendant on his affidavit, and that all proceedings in the action be stayed until this application be disposed of.

The appeal was argued at Victoria on the 9th and 10th of January, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Argument

Soskin, for appellant: The learned judge should not have allowed Sokol's affidavit to be read. That the contract was not enforcible was not raised in the defence and evidence of this should not have been allowed: see *North Western Salt Company, Limited* v. *Electrolytic Alkali Company, Limited* (1914), A.C. 461 at p. 464; *Bain* v. *Maddison* (1930), S.C.R. 299 at p. 302. It must be shewn on the face of the pleadings that there was no reasonable cause of action: see *Clark* v. *Hagar* (1893), 22 S.C.R. 510 at p. 528; *Lipton* v. *Powell* (1921), 2 K.B. 51. On applying for leave to read an affidavit he cannot then cross-examine on it. Extrinsic evidence cannot be used to strike out pleadings: see *Attorney-General of Duchy of Lancaster* v. *London and North Western Railway Co.* (1892), 3 Ch. 274 at p. 278. The defence is a general denial only. The learned judge erred in ordering a stay.

Griffin, K.C., for respondents: You may move under rule 284 and you may move under the inherent jurisdiction of the Court. The contract is illegal here and also in the United States: see *Foster* v. *Driscoll* (1929), 1 K.B. 470. The agreement was contrary to public policy and void. The affidavit is by the plaintiff's agent and shews the pleadings are a sham. The application can be supported by affidavit: see *Willis* v. *Earl*

Howe (1893), 2 Ch. 545 at p. 551; *Humphrys* v. *Polak* (1901), 2 K.B. 385; *Wright* v. *Prescot Urban Council* (1916), 86 L.J., Ch. 221 at p. 222; *Goodson* v. *Grierson* (1908), 1 K.B. 761; *Brickell* v. *Hulse* (1837), 7 A. & E. 454; *Ex parte Hall. In re Cooper* (1882), 19 Ch. D. 580; *Long* v. *Winnipeg Jewelry Co.* (1893), 9 Man. L.R. 159; *In re Margetson and Jones* (1897), 2 Ch. 314; *Sturgis* v. *Morse* (*No. 2*) (1859), 26 Beav. 562; Phipson on Evidence, 7th Ed., 244. Affidavits on behalf of the plaintiff on an interlocutory application can be used on a subsequent application: see *Campbell* v. *Rothwell* (1877), 38 L.T. 33; *Pritchard* v. *Bagshawe* (1851), 11 C.B. 459; *Richards* v. *Morgan* (1863), 4 B. & S. 641; *Evans* v. *Merthyr Tydfil Urban District Council* (1899), 1 Ch. 241. The defendant may be cross-examined on the affidavit: see *Clarke* v. *Law* (1855), 2 K. & J. 28; *In re Quartz Hill, &c., Company. Ex parte Young* (1882), 21 Ch. D. 642; *Strauss* v. *Goldschmidt* (1892), 8 T.L.R. 239.

Argument

Soskin, in reply: This affidavit was not filed on behalf of the plaintiff.

MACDONALD, C.J.B.C.: In this case it is conceded by Mr. *Griffin* that the statement of claim discloses a good cause of action on its face. That bears out that the application to the learned Chambers judge must be decided in that way, that the statement of claim did disclose a good cause of action. That disposes of that portion of it.

Then it was said that that was the only thing raised in the summons, and that the question of whether the action is one which could be dealt with under the inherent jurisdiction of the Court as being frivolous and vexatious is not raised in the summons at all, and therefore is not open now. I am not so sure of that; but I am not so much concerned about that as I am about another: you see subclause (b) of paragraph 1 at p. 7 of the appeal book is "That the statement of claim is based upon an alleged contract not valid in law." That is really the thing that Mr. *Griffin* has devoted a great deal of his argument to. He claims that under that he can raise the question of the inherent jurisdiction of the Court; and if it is not valid in law

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then it is frivolous and vexatious; that is, that the action must fail, and that he is entitled to take that position. He has not taken it very clearly of course in this subclause (b), and I do not say much more than this to it, that I quite agree that it is important to keep to the strict Rules of Court; if we keep to the strict rules we are conforming with the idea of the rule makers and the legislators of the country, and of the judges, that those rules make for justice. And I do not think that we should depart very easily, and except in exceptional cases, from the rules. Therefore if we come to the conclusion that the defendants were not entitled to raise this question of inherent jurisdiction at all under the summons, then the learned judge went wrong in admitting the affidavit. But the thing that I pay most attention to is this, it may be that where there is a cause of an action brought on a contract which is clearly illegal and there is no reasonable doubt about it and the evidence shews the same at the opening of the argument in Chambers, then the learned judge undoubtedly has authority to say "I will dismiss this action, it is an action which ought not to be allowed to go on." It is a pretrial of the action in Chambers and should be dealt with with great caution. The usual method of disposing of disputes between parties is an action in the Courts, and it is only in exceptional cases that an action can be disposed of otherwise than by a trial. In this case what the learned trial judge is apparently contemplating is dismissing the action in Chambers without giving the parties an opportunity to try it. Now I am opposed to anything that deprives the subject of his right to a trial. Of course, if the statement of claim discloses no cause of action that is a good reason for dismissing it, because it would only be incurring useless costs to proceed with an action which could not possibly succeed in the end; or if, on the other hand, it is vexatious and frivolous it ought to be dismissed, because there, again, would be putting the parties to an unnecessary expense to go to a trial when it is made to appear in Chambers that that trial could not possibly succeed. In this case when the evidence came before the learned judge upon which he admitted the affidavit, it was not apparent by that evidence that the action must fail. There was a factor in it which had not

been covered by the evidence which was before him, that is to say, the law both of the United States and of Canada with regard to that contract. It might appear on the trial of the action that the contract was a perfectly good one, that the purchaser of the whisky in the United States purchased it for distribution amongst those who were entitled under the laws of that country to receive it, for instance, druggists and physicians and hospitals. That was a matter that would have to be disposed of and affirmed in the trial itself after each party had their opportunity to produce evidence. Then again it might be that the laws of Canada do not prohibit the shipping of liquor to the United States unless it is clear that it was shipped for illegal purposes. Now the question is, was the learned judge justified on the evidence before him at the time of the argument when he admitted the affidavit, in saying that the action could not possibly succeed; that in law it was an action founded on an illegal contract? If he was he might admit this evidence. But it is admitted by Mr. *Griffin* that the evidence does not cover all the factors that would enable him to come to that conclusion, but that he, Mr. *Griffin,* thinks that he would be entitled to raise by evidence the other questions before actual decision. Well, I do not think so; I think that is the object of a trial. Neither party is sure when they commence which one will succeed; but they have the opportunity of bringing to the attention of the Court all matters which bear upon the question; and it is finally decided one way or the other then. It ought not to be decided in Chambers by a motion of this kind unless the facts are so clear that it is an illegal contract that it would be absurd to permit the case to proceed. Now the learned judge has admitted the affidavit on the evidence that was before him at that time; and I think he has admitted it wrongly. I do not think it was a clear case for holding that the contract was illegal. The result of a trial might be very different from that; and therefore he ought not to have admitted the affidavit until all the factors which would shew to him that the trial could not succeed had been brought before him. It was not intended that he should postpone a decision and give the defendant the opportunity of coming in later on with additional evidence. There

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are therefore two reasons for reversing the judgment and allowing the appeal. The learned judge had not disposed of the matter before him, but had granted a postponement of the hearing. Now the counsel for the appellant in this case could not prevent that. He could have argued, I suppose, that the judge ought to have disposed of the whole matter before him before an appeal was taken; but he was bound to take the appeal, otherwise his action was stayed. That was a matter which was not the fault of counsel engaged in the appeal, but, I say so with great respect, it was perhaps the fault of the judge—and again perhaps not his fault, because the matter was not argued before him, the point was not taken, it was not brought to his attention, and therefore his mistake in that respect can very well be excused. But the law is that where a matter is before a Court for decision the Court is not justified, and counsel are not justified in appealing from an interlocutory order made during the trial. For instance, a case is tried, objection is taken to evidence and the judge rules upon it, counsel may think he is wrong, and want to appeal from that ruling, but this Court has said, and other Courts have said also, that that course ought not to be pursued, that the whole case should be disposed of, so that when it comes up on appeal the whole matter is before the Court. Now this is a breach of that rule. And as I say, it is not a breach for which the counsel for the appellant is responsible, because he had no way of guarding himself against what was done, except by an appeal from the stay. Then I say that two grounds, very serious grounds, arise here; first as to whether the case which the respondent now relies upon was raised in the summons or not. I am not positive about that ground, having regard to paragraph 2. Now as I say I am not deciding that question because of subclause (b), but I am deciding that a clear case of illegality of the contract has not been presented to the judge before he made his order for the admission of the affidavit; and before he dealt with any part of the evidence, or entertained the question at all, he should have been satisfied on the evidence that it was a case for trial in Chambers rather than a case for trial in the ordinary way in the Courts of the Province; and in my judgment he had not such evidence before him,

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and he ought not to have made the order for the admission of the affidavit, and he ought not to have granted a stay. And counsel for the appellant is quite right in coming here in order to get rid of that stay. It is most important, since the practice of the Courts which has existed from time immemorial is that trials should not be lightly interfered with. The right of the subject to go into his Majesty's Courts and have his trial has been recognized for a very long time. And while there are exceptional cases unquestionably, that is to say cases where the pleadings shew no cause of action, or where the cause of action is frivolous and vexatious, the exceptional procedure may be taken; but only where it is clear that that is the case should the party be deprived of his right to a trial in the Courts of the Province.

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In that view of the case I would allow the appeal and set aside the order of the trial judge.

MARTIN, J.A.: Several questions arise upon this appeal, but if the first one be decided in favour of the appellant it becomes unnecessary to consider the remainder. And that first one is that the application, by summons, before the learned judge below was launched and framed upon one ground, and one ground only, that is to say, the first ground under rule 284, asking for an order that the statement of claim be struck out and the action be dismissed as disclosing no reasonable cause of action, which are the very words used in that rule. And the summons goes on to say something that was not necessary to say, *viz.*, it sets up another ground upon which that order to strike out was asked for, but no reference is made to the second branch of the rule dealing with actions "shewn by the pleadings to be frivolous and vexatious," and there was not only no departure from that position, but it was affirmed in the order appealed from, which says that on the application of the defendant that this action be dismissed upon the grounds set out in the summons; and there is a further and significant recital in the order saying that the affidavit which is now sought to be retained and that was permitted to be introduced below, was objected to by the appellant's counsel.

MARTIN, J.A.

Now if that be so that is an end of this appeal unless it can

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be satisfactorily established that in some way the defendant changed his position and asked for another order, apart from that asked in his summons, either doing so formally, or by some form of tacit consent, whatever you like to call it, by his opponent, then this matter can only be entertained by us upon the record.

It was submitted by respondent's counsel that the circumstances were such that we ought to infer that the learned judge did depart from that position and had listened to and dealt with the application in the exercise of the inherent jurisdiction of the Court. The appellant's counsel challenged that position and said that he was instructed to the contrary, and relies, as he is entitled to rely, upon the record, as satisfactorily, from his point of view, disposing of it; and I think that he is right in that objection and that it must be held that this application was launched and framed upon that branch only, and therefore that puts an end to the case because, under such circumstances, it is perfectly apparent, as decided by the Court of Appeal in *Goodson* v. *Grierson* (1908), 1 K.B. 761, at 764, that applications made under that rule are based and based only upon the facts that appear in the pleading itself, the pleading sought to be impugned. Such being the case, it is improper, as has been repeatedly held, to introduce any affidavits at all to justify the consideration of the matter apart from the pleading.

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I shall only refer, in addition, to *Johnston* v. *Johnston* (1884), 32 W.R. 1016, affirmed in (1885), 33 W.R. 239; *Blair* v. *Cordner* (1887), 36 W.R. 64; *The Republic of Peru* v. *The Peruvian Guano Co. Lim.* (1887), 57 L.T. 337; *Wright* v. *Prescot Urban Council* (1916), 86 L.J., Ch. 221; *Kershaw* v. *Sievier*, another decision of the Court of Appeal (1904), 21 T.L.R. 40; *Dreyfus* v. *Peruvian Guano Company* (1889), 41 Ch. D. 151.

These cases shew the three positions which might have been properly adopted on an application of this general description, *viz.*, first, under said rule, that the pleading attacked disclosed no reasonable cause of action: upon that one it is settled that you cannot read any affidavits, for it was said in *Johnston* v. *Johnston* that you must assume the grounds to be true as for-

merly on demurrer. The second position would be where in a proper case the second branch of the rule could also have been invoked (*i.e.*, relating to "frivolous or vexatious" pleadings) in the summons and if that branch was also to be invoked it should be so stated in an alternative way, as was done in every one of the cases I have consulted, not only in those cases I have cited, but in numerous others where it was intended to take advantage of that alternative position; and I have found no case in which there has been a departure from the application and its nature changed as was done below.

I really think it is unnecessary to pursue the matter further than to say that, as the *Blair* v. *Cordner* case disclosed and the *Peruvian* case affirmed, there is the third position outside said rule, *i.e.*, the invocation of inherent jurisdiction apart therefrom, and while no doubt that exists there is also no doubt that if you propose to invoke it you must make a motion which shews clearly and unequivocally that that is a ground you found your proceeding upon. In some of said cases it will be seen that they embrace and deal with the three avenues of approach to which I have alluded, but in no one of them can be found any encouragement, but on the contrary, as in the *Wright* case, much discouragement to the suggestion that you can, so to speak, shift your ground and change your application, without at least first obtaining leave to amend it.

MARTIN, J.A.

Now I can only say that we must deal with this matter as we find it, and it is unfortunate that it has resulted as it has. That the learned judge changed the motion is at least a matter of controversy, and it certainly is not clear that in some way or other, it did slide into this third position of inherent jurisdiction; all I can say is I find nothing in the conduct of appellant's counsel below to justify us in inferring that there had been any change that would be contrary to the position taken on the record, so as to warrant us in saying that there had been any departure from the case he was called upon to meet when the motion was launched and framed in its original state in the summons, and no application was made to amend the proceedings below, and no application has been made to us here.

Therefore it follows that the only proper thing for us to do is

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to give judgment on the record as we find it, which is that the appeal should be allowed and the order set aside, and the application to strike out this pleading as disclosing no reasonable cause of action dismissed, because, as the Chief Justice has pointed out, *ex facie* there is no doubt it does disclose one.

MCPHILLIPS, J.A.: In approaching this matter this Court is the final Court on matters of practice. We have our own Rules of Court, and the Supreme Court of Canada never interferes at all in the matter of questions of practice. And when we look at the rule 284, it says:

> The Court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shewn by the pleadings to be frivolous or vexatious, the Court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.

Admittedly in this case the pleadings do not exhibit that the action is frivolous or vexatious; and admittedly the pleadings are sufficient in terms. When we turn to the rule in England, our rule 541, we find that the English rule is in the same terms:

MCPHILLIPS, J.A.

> All affidavits which have been previously made and read in Court upon any proceeding in a cause or matter may be used before the judge in Chambers.

My brother MCQUARRIE first brought it to my notice that in using the words "in Court" it indicated at once that the proceedings had to be in the Court. Now this affidavit was not filed in the Court. And the rule in England has a notation below:

> This rule is taken from C.O. 35, r. 28. In the C.D. the affidavit must, in all cases, be filed, and office copies used in Chambers.

Now as a matter of practice here, as I understand it, this affidavit was not as a matter of fact filed on the application. And there might be some difficulty there. But what I lay particular stress upon is that rule 284 confines the matter to the pleadings; and if you say they are frivolous and vexatious that must be shewn to be so in the pleadings. As I said, admittedly that is not present here.

We are not necessarily bound by the decisions of the Court of Appeal in England in regard to matters of practice, and I prefer to follow the case that I referred to, of *Long* v. *Winnipeg*

Jewelry Co. (1893), 9 Man. L.R. 159. There we have Mr. Justice Killam, a very distinguished Canadian judge, able in every way in the discharge of his judicial duties, and a counsel of note before ascending the Bench; he refers to what he deemed to be the practice then in England. At p. 162 he says:

> Both in England and in Ontario it is the settled practice to allow cross-examination on an affidavit only during the pendency of a claim, motion or other proceeding on which the affidavit is to be used. *The Catholic Publishing Co.* v. *Wyman* [(1863)], 11 W.R. 399; *Hooper* v. *Campbell* [(1865)], 13 W.R. 1003; *Clindinning* v. *Varcoe* [(1876)], 7 Pr. 61; *Felan* v. *McGill* [(1870)], 3 Ch. Ch. 56; *McMurray* v. *G.T. Railway Co.* [(1870)], 3 Ch. Ch. 130; *Stovel* v. *Coles* [(1871)], 3 Ch. Ch. 362.

And I do not consider that this Court is in any way bound by any amplification of the matter as a matter of practice. When we have the concrete language of a rule which is statutory why turn to anything else? Rule 541, "All affidavits which have been previously made and read in Court"—capital "C" to indicate it was not a word used just in passing—but "in Court." It must be something that was used in Court. Therefore it is reasonable perhaps to say that if the material was used in Court it might be available and could be used in Chambers. But we have not that here. We have an affidavit that was used in Chambers; the rule absolutely prevents it being used because the affidavit was not used in Court. Mr. *Griffin* in his able and industrious examination of the matter has travelled over a long line of cases, and many of them are of early date, much earlier in fact than the judgment and these cases that Mr. Justice Killam referred to. Therefore I think that it is a patent case that this cannot be done under our rules. And if it cannot be done, the learned trial judge was in error, with great respect, when he made the order for the cross-examination. The order should, in my opinion, be reversed, and the appeal allowed.

MCPHILLIPS, J.A.

MACDONALD, J.A.: I agree that the appeal should be allowed on this ground. There was no substantive application to have the action dismissed as frivolous and vexatious, under the second part of the rule, or under the inherent jurisdiction of the Court; and because of that the affidavit in question could not be used at all. True the order under appeal is merely a preliminary step towards the ultimate object in view, *viz.*, the dismissal of the

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action; but if the affidavit cannot be used on the main motion for dismissal it cannot be used in this preliminary step to secure a stay of the action.

MCQUARRIE, J.A.: As I see it, we have not before us the question of whether the learned trial judge should have allowed or dismissed the application which was made by the defendant. That will come on for disposal later on. The learned trial judge expressed no opinion on that; he did not say what he intended to do, but Mr. *Griffin* says it is quite possible that he will eventually dismiss the application. I do not see that we are concerned with that at all.

In this particular matter that is before us now we are considering an order made by the trial judge. Now that order is, as I read it, merely one giving the defendant liberty to cross-examine one Harry Sokol upon his affidavit sworn on the 22nd of November, 1933. It is said that that affidavit cannot be used by the defendant on this application. Well, as a matter of fact the trial judge gave leave for the use of that affidavit. It seems to me that was a matter in his discretion, and I do not think that I would care to differ from him.

MCQUARRIE, J.A.

The order for leave having been granted, then all we have left is whether the learned trial judge had the right to order the cross-examination of the maker of that affidavit. That is what this appeal boils down to. I cannot see it in any other way. Did he have the right to make this particular order or not? In my opinion he had that right. And I must say that the authorities cited by counsel for the defendant respondent have convinced me that the learned judge had the right to allow that affidavit to be used.

I would dismiss the appeal.

Appeal allowed, McQuarrie, J.A. dissenting.

Solicitors for appellant: *Soskin & Levin.*
Solicitor for respondent: *W. F. Brougham.*

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Company law—Managing director—Powers—Misfeasance—Breach of trust —Release—Effect of—B.C. Stats. 1929, Cap. 11, Sec. 107.

The defendant was a director and general manager of the plaintiff company, which carried on a publishing business and published the "B.C. Lumberman," the chief profits from which was in its advertising. The defendant was also managing director of and a majority shareholder in the "Gordon Black Publications Limited," a publishing company that issued two publications known as the "Municipal News" and the "Miner." Both companies carried on their business on the same premises, employed the same staff and shared office expenses. In 1925 the plaintiff company issued a publication called "Lumberman's Atlas 1925" containing the location of all timber limits and sawmills within the Province. With the approval of the directors of the plaintiff company, the "Gordon Black Publications Limited" published a new issue of the "Lumberman's Atlas" in 1930, and when it was ready for sale the defendant used advertising space in nine publications of the "B.C. Lumberman" to advertise the 1930 Atlas, without making any charge for advertising on the books of the plaintiff company. The defendant claimed that in return for the free advertising he distributed 500 copies of the new Atlas gratis amongst the subscribers for the "B.C. Lumberman." In 1933 the defendant admitted he had wrongfully taken $3,500 from the plaintiff company. He was dismissed, and on leaving paid $4,500 in restitution. A release was then given him by the company on his representation that the accounts were true and correct. The sum now claimed for advertising was not discovered at that time. It was held on the trial that the defendant had acted reasonably in all the circumstances and the action was dismissed.

Held, on appeal, reversing the decision of LENNOX, Co. J. (MCPHILLIPS and MCQUARRIE, JJ.A. dissenting), that a managing director of a company acting in a way whereby he derives an improper advantage to himself financially or otherwise cannot justify what he has done by shewing that his action was of benefit to the company. The release given by the plaintiff did not embrace more than those items the parties had in contemplation at the time it was given, and as this particular item in respect of advertising was not known at that time, the release is not a bar to the action. The plaintiff is therefore entitled to judgment for the amount claimed.

APPEAL by plaintiff from the decision of LENNOX, Co. J. of the 6th of October, 1933, in an action for damages for misfeasance and breach of trust while the defendant was director and Statement

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Statement

general manager of the plaintiff company. The plaintiff company carried on a publishing, advertising and publicity business and published the "B.C. Lumberman," the profits from which being chiefly advertising. In 1925 they issued a publication called "Lumberman's Atlas 1925" giving the location of all the timber limits and timber industries in the Province. The defendant was also the managing director of the "Gordon Black Publications Limited" a publishing company which issued two publications known as the "Municipal News" and the "Miner." Both companies carried on their business on the same premises, employed the same staff and shared in the office expenses. In 1930, with the approval of the directors of the plaintiff company, the Gordon Black Publications Limited undertook to publish a new issue of the "Lumberman's Atlas." When the new Atlas was ready for sale the defendant used advertising space in nine publications of the "B.C. Lumberman" for the benefit of the "Atlas 1930," and did not make any charge on the books of the plaintiff company for this advertising. Black was subsequently dismissed as general manager of the plaintiff company and the plaintiff claimed it was entitled to $560, being the usual price charged for advertising of this nature.

The appeal was argued at Victoria on the 17th, 18th and 19th of January, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Argument

A. B. Macdonald, K.C., for appellant: The company gave Black leave to issue "Atlas 1930" but they knew nothing of his advertising nine times in the "B.C. Lumberman." Black wrote in the plaintiff's books "space only" which means "no charge" when making an entry of the space so used. The proper charge was $560. In 1933 it was found, and he admitted, that he took $3,500 wrongfully and, when leaving the company, he made a settlement by paying $4,500 in restitution. A release was then given by the company to Black but given on the representation by Black that the accounts as shewn in the report of the auditors of December, 1932, were true and correct. The sum in question due for advertising had not been discovered at that time. The release as worded does not relieve the defendant from this claim. A delinquent director has no right of set-off:

see Palmer's Company Law, 15th Ed., 212. When there is a breach of trust they cannot rely on a general release: see *In re Anglo-French Co-operative Society* (1882), 21 Ch. D. 492; *Re Joint Stock Trust and Finance Corporation Lim.* (1912), 56 Sol. Jo. 272; *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1.

A. J. Cowan, for respondent: The release disposes of the matter. Consideration must be given to the conditions under which the release was given. It was given on a basis of his paying $4,500. This was more than he had actually overdrawn and the balance was to cover any other claim that might arise. There was no breach of trust, as he had authority and exercised it properly and reasonably and it was so found by the learned trial judge. He had the widest powers and if he exercises his judgment for the benefit of the company the Court will not interfere. They claim not that he acted beyond his powers but that he acted improperly within his powers, and the learned trial judge said he acted reasonably. In return for the free advertising he gave 500 copies of "Atlas 1930" gratis to subscribers for the "B.C. Lumberman." It is admitted that he did not keep any advertising out of the "B.C. Lumberman" in order to insert his advertisement for the "Atlas 1930" as the space would not have been filled if he had not used it. Even where interests conflict if there is a *bona fide* exercise of judgment by a director the Court will not interfere: see *Lagunas Nitrate Company* v. *Lagunas Syndicate* (1899), 2 Ch. 392; *Jacobus Marler Estates, Lim.* v. *Marler* (1913), 85 L.J., P.C. 167; *Nemetz* v. *Telford* (1930), 43 B.C. 281; *Edinburgh Life Assurance Co.* v. *Y.* (1911), 1 I.R. 306. Argument

Macdonald, in reply, referred to *Parker* v. *Lewis* (1873), 28 L.T. 91 at p. 99; *Madden* v. *Dimond* (1906), 12 B.C. 80.

Cur. adv. vult.

6th March, 1934.

MACDONALD, C.J.B.C.: I would allow the appeal on the ground that the reservation in the general release, and particularly the representation in the statutory declaration sustain the claim of the plaintiff now put forward, which was not heretofore settled. I would therefore allow the appeal. I would assess the damages at the amount claimed. MACDONALD, C.J.B.C.

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MARTIN, J.A.: I agree that this appeal should be allowed and judgment entered for the plaintiff for $560.50: upon the facts the case is one of constructive fraud and as the alleged "benefit" that the plaintiff derived from the publication of the Atlas advertisements was admitted by defendant to be merely "in prestige," that is not of such substance as to warrant any reduction or set-off from plaintiff's usual advertising rates; and after "taking into consideration all the circumstances of the case" it is not, in my opinion, one for relief under section 107 of the Companies Act, Cap. 11 of 1929.

MCPHILLIPS, J.A.: The appeal in this case has relation to an action for damages for misfeasance and breach of trust by the defendant while a director and general manager of the plaintiff company.

The facts disclose that the defendant was allowed by the other directors and shareholders to really exercise the powers of the company and to determine upon the business policy of the company and in discharge of the powers conferred upon him as general manager, he, having unfilled space in the publication of the plaintiff company, filled that space by an advertisement of the Gordon Black Publications Limited having relation to logging and lumbering operations. The space, as is well known, in all publications must be filled, that is, it is to be kept up to the standard size. Now it was the judgment of the defendant that to do this without receipt of any remuneration therefor was good business and in my opinion it was and in any case was well within his powers and was a business discretion that no Court could review. Besides we have it in evidence that the plaintiff company's subscribers to its publication, to the extent of some 500 in number, were supplied free with the publication. At the outset I may say that I find no act of misfeasance or breach of duty whatever and the action should have been, and was, dismissed. However, I think it well to advert to some points that shew that my conclusion is fully warranted. Differences having arisen between the plaintiff company and the defendant as to moneys payable by the defendant or to be accounted for by him, a release in the words and figures following was entered into by the plaintiff company under seal:

MCPHILLIPS, J.A.

KNOW ALL MEN BY THESE PRESENTS that B.C. Timber Industries Journal Limited, of 837 Hastings Street West, in the City of Vancouver, in the Province of British Columbia, hereby release Gordon B. Black, of 3287 37th Avenue West, in the City of Vancouver aforesaid, from all sums of money, accounts, actions, proceedings, claims and demands whatsoever which it at any time had or have up to the date of these presents against the said Gordon B. Black for or by reason or in respect of any act, cause, matter or thing done by the said Gordon B. Black while a director and manager of the B.C. Timber Industries Journal Limited, it being clearly understood that this release is given on the representation of the said Gordon B. Black that the accounts of the said B.C. Timber Industries Journal Limited up to the 31st day of December, 1932, as shewn in the report of Messrs. Foster and Barrett-Lennard, the company's auditors, bearing date the 31st day of December, 1932, are true and correct.

At the hearing and before the Court it was admitted and could not be controverted that not only did the amount paid by the defendant meet any shewn amounts due by the defendant to the plaintiff company but that some $500 in excess thereof was received and is still retained by the plaintiff company although no such sum or even any part thereof is due or owing, yet we find this action brought. It is argued that there should be judgment for that which would be the usual amount chargeable for the challenged advertising that was taken to fill the space that would be otherwise blank. In truth it was a business necessity to get something to fill the space and it is a matter well known in the trade and it is idle to say that it should be paid for. It is never paid for—it is a necessity to the publication that all space be filled. In *Lagunas Nitrate Co.* v. *Lagunas Nitrate Syndicate* (1899), 68 L.J., Ch. 699, in the head-note we find this stated, *per* Lindley, M.R. and Collins, L.J.:

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> If directors act within their powers and with such care as is reasonably to be expected from them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company which they represent, they discharge both their legal and equitable duty to the company, and will not be liable for mistakes or errors of judgment committed, even though such mistakes or errors affect the relations of their company to another company of which they are also members, and though the interests of the two companies may conflict.

In the present case there were close business relations between the plaintiff company and the Gordon Black Publications Limited and both companies were interested in and devoted attention to the lumbering industry and the defendant was really the directing spirit of both companies and what he did he did

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honestly and for the benefit of the plaintiff company and no doubt it was honestly thought that it was of reciprocal benefit. It is true the plaintiff company was not paid for the space, but otherwise it would be vacant. But then, there was the receipt by its subscribers of copies free of the valuable publication of the Gordon Black Publications Limited, a very authoritative Atlas, giving a description of where lumbering operations were being carried on throughout the Province with a most useful and valuable amount of data set out thereon. It was defendant's duty to direct the policy of the plaintiff company and his judgment in my opinion is unassailable. The Court cannot interpose when it was a matter of discretion in the discharge of his duty. I think it well to here set out the judgment of the learned trial judge His Honour Judge LENNOX. It reads as follows:

In this action the plaintiff claims damages against the defendant for improperly, fraudulently, and in breach of his duty, using his position as director and general manager of the plaintiff company. I have taken some time to consider the evidence and arguments advanced and have come to the conclusion that there was no fraud or breach of trust and that while it might have been better practice both for the defendant and the accountant to have made further book-keeping entries, there was no actual impropriety in the defendant's conduct. I find that the defendant was given the power to compromise accounts and indeed the very terms of the declaration (Exhibit 5) paragraph 2, shew that compromising of accounts by the defendant was recognized. There was no concealment in the books of original entries, and, as the accountant (Smith) stated, it (the space book) should have been audited; that it was not audited and this transaction brought out at the time of settlement, was no fault of the defendant's. I find that the defendant acted in good faith, honestly and reasonably looking to all the circumstances. The "Atlas" was first issued (in 1925) by the plaintiff company without any doubt (outside possible monetary profit) to assist the members of the industry to which the plaintiff company catered and consequently to enhance its publication, the "B.C. Lumberman." The defendant was responsible for that issue. The next issue of the "Atlas" was not until five years after, it being then published by the Gordon Black Publications Limited, the defendant being again responsible. The defendant had the full control of both companies and could not be said to be unreasonable in his conclusion that the plaintiff's journal, the "Lumberman" should carry a free advertisement of the Atlas which was devoted solely to assisting and interesting the trade for which the plaintiff's publication was issued: more especially as he saw to it that that trade received 500 free copies of the Atlas. He was quite reasonable in his belief that the Atlas would be of benefit to the plaintiff company. If I am wrong in finding no breach of trust then I find that the defendant acted honestly and reasonably and ought to be excused from such breach and

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relieved from liability (the Companies Act (1929) Sec. 107). The action is therefore dismissed with costs.

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Here we have the learned judge who saw the witnesses holding that the defendant was not guilty of any breach of duty. Note his language:

> I find that the defendant acted in good faith, honestly and reasonably looking to all the circumstances.

In the face of such a holding it is indeed asking, I would say, this Court to do the impossible, as I view all the relevant authorities, and the special facts of this case. In my opinion it is not a case for the disturbance of the judgment but the affirmance of it. Then further it is not to be lost sight of that the plaintiff company has something over $500 to cover any unforeseen deficits and so far that amount is withheld from the defendant and it would appear to be the determination to appropriate that money and never account to the defendant therefor. In my opinion the action in every phase of it is devoid of merit, especially when here a release of all demands was given. Further in my opinion judgment should not be disturbed, for the reasons given by Lord Sumner in *S.S. Hontestroom* v. *S.S. Sagaporack* (1927), A.C. 37 at pp. 47-8.

MCPHILLIPS, J.A.

Certainly the present case was peculiarly one for disposition by the trial judge and he absolutely absolved the defendant of any act of misfeasance or breach of duty and with that view I agree. I would dismiss the appeal.

MACDONALD, J.A.: The appellant, plaintiff, claimed damages from the respondent Black for misfeasance and breach of trust (the action was dismissed) based upon the following facts:

Appellant company is the publisher of the "B.C. Lumberman" the official organ of the lumber industry. It obtains its revenue from the publication of this trade journal, particularly from advertisements appearing therein. The respondent Black was the general manager of the appellant company and one of its directors. It was his duty to promote the interests of the company and to refrain from advancing his own personal interests at the company's expense. In 1925 the appellant company in addition to issuing the "B.C. Lumberman" published an "annual" known as the "Lumberman's Atlas" to give publicity

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to supply houses and to lumbermen's equipment. It earned a profit.

The respondent Black while manager and director of the appellant company at a salary of $450 a month (later reduced to some extent) was also, with the knowledge and consent of appellant, the manager of and principal stockholder in another company known as the "Gordon Black Publications Limited." In 1930 by mutual arrangement (it was discontinued in the meantime) the "Atlas" was published as an annual by the Gordon Black Publications Limited and solely for its benefit.

To increase the circulation of the Atlas and add to its general usefulness the respondent, manager of Gordon Black Publications Limited, while still manager for appellant, advertised it in appellant's publication the "B.C. Lumberman" in nine monthly issues from August, 1930, to April, 1931, both inclusive. As it is submitted by way of defence that these advertisements, although inserted free of cost, were of value to appellant company (dealt with later) it is of some importance to notice what they contained. The advertisements point out the value, not of the "B.C. Lumberman" but of the "Atlas" in answering questions of interest to those engaged in logging and milling operations setting out in detail the information contained therein. The appellant's publication is not mentioned; on the contrary each advertisement contains a form for interested subscribers to secure by subscription at $1 each copies of the Atlas from the Gordon Black Publications Limited. *Ex facie* the sole purpose to be served by the advertisement was to extol the usefulness of the Atlas and to call attention to its publishers—the Gordon Black Publications Limited.

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As stated the principal source of revenue of appellant company was derived from advertising. Respondent Black, however, as its managing director, gave instructions to appellant's book-keeper to insert these advertisements of the Atlas in each issue of the "B.C. Lumberman" between the dates referrd to, free of cost instead of making the usual charge against the advertiser—the Gordon Black Publications Limited. Black made an entry in appellant's book "Atlas space only" meaning that there should be no charge for the advertising. Thus appel-

lant was not only robbed of part of its ordinary revenue but in addition supplied the material and bore the loss of production costs for the benefit of the respondent. He held 60 per cent. of the stock in the Gordon Black Publications Limited.

This is the breach of trust alleged, *viz.*, that the respondent Black used appellant's journal to advertise therein free of cost one of his own publications, *viz.*, the Atlas. He was paid by appellant (and obliged by law) to promote its interests. Instead of selling space he gave it away and the offence was more blameworthy because he did so for his own personal profit. The principle involved is elementary. As MARTIN, J. stated in *Madden* v. *Dimond* (1906), 12 B.C. 80 at 87:

> Though I am not at all prepared to hold that a director may not adopt a certain course simply because an incidental advantage may accrue to him, yet on the other hand, if he act in a certain way with the primary object of deriving an improper personal advantage, financial or otherwise, he cannot save himself by shewing that it was also of benefit to the company. If the circumstances are such that his action is equivocal, and open to two constructions, he must, seeing that he is in a fiduciary capacity, be prepared to shew beyond all reasonable doubt the single-mindedness of his intentions.

In his dispute note he pleads (par. 9):

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> . . . that in the month of February, 1933, when he left the plaintiff company, all accounts were settled between him, the plaintiff company and the then shareholders thereof. In the settlement of the said accounts the defendant turned over to the then shareholders of the plaintiff company his shares in the said company and paid to the plaintiff company the further sum of $1,500 in cash, and received therefrom a general release, which release the defendant will refer to at the trial of this action.

This plea of release and settlement necessitates a reference to the facts. Defrauding appellant of advertising revenue was not his only misconduct. It was discovered that for some years, although in receipt of a good salary for part time work he had been abstracting $50 each month (from 1928 to 1933) of appellant company's funds by an arrangement in the way of a bribe or gift from the printer. In addition he falsified the printing account for his own gain by shewing an extra charge of $40 a month. Later he received a further reduction of $25 a month on the printing bill which he took personally, instead of giving the benefit of it to his employer. From another source a further $40 a month was obtained by falsifying the printing bill. There is no denial of these peculations.

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After an investigation revealed these facts the respondent paid appellant by way of restitution $1,500 in cash and in addition turned over his shares in the company valued for the purposes of settlement at $3,000. Appellant then signed a document by which it released Black

> from all sums of money, accounts, actions, proceedings, claims and demands whatsoever which it at any time had or have up to the date of these presents . . . for or by reason of any act, cause, matter or thing done by the said Gordon B. Black

subject, however, to this condition:

> . . . it being clearly understood that this release is given on the representation of the said Gordon B. Black that the accounts of the said B.C. Timber Industries Journal Limited up to the 31st day of December, 1932, as shewn in the report of Messrs. Foster and Barrett-Lennard, the company's auditors, bearing date the 31st day of December, 1932, are true and correct.

The purpose of the condition is self-explanatory. The auditors' report did not of course shew a charge against the Gordon Black Publishers Limited for advertising. They would simply report the financial position of the company as shewn by the books. The entry "Atlas space only" would not necessarily excite suspicion. It might have been authorized. But obviously it was not "true and correct." To be true and correct a charge should have been inserted against Gordon Black Publishers Limited. The condition therefore upon which the release was executed was broken and appellant is not bound thereby.

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Again as an additional precaution against inability to claim for any wrong-doing not revealed at that time a statutory declaration was procured by appellant from Black (contemporaneous with the release and forming with it one transaction) in which he declared:

> 2. That I have not compromised any of the accounts of the said company nor made any adjustments of the debts owing, except as shewn in the said books.

When the conditional release was executed and this declaration taken it was not known that he had in fact compromised to the full extent thereof the account of appellant company with the Black Publications Limited for the advertising referred to. He admitted in cross-examination that "it should have been entered," *i.e.*, as a charge against the Gordon Black Publishers Limited. It was of course the fear that other peculations might

be disclosed later that led appellant to insert a condition in the release and to procure the declaration. Even if not conditional but general in its terms the release would not embrace more than those items the parties had in contemplation at the time and this particular item in respect to advertising was then unknown. (*Re Joint Stock Trust and Finance Corporation Lim.* (1912), 56 Sol. Jo. 272). In follows, therefore, that the release is not a bar to this action.

It was submitted, however, that the respondent in paying $1,500 in cash and in handing over his shares in appellant company by way of restitution paid $400 more than his peculations amounted to and that this sum should be set off against any damages arising from breach of trust in giving free advertising for his own benefit. This defence is not pleaded in the dispute note. The release is pleaded but is not alleged that when executed $400 or any sum was paid to cover future claims or that if respondent was liable in damages, a set-off should be allowed. But even if a right of set-off exists and $400 more than the amount abstracted from the company's funds at that time was paid by way of restitution it could not be recovered. The $3,000 in shares and $1,500 in cash was paid in settlement of the claims then under consideration. Black admits that he paid it (he says $500) not to cover future claims but "to make absolutely certain of good measure," *i.e.*, in respect to the liquidation of the claims then considered.

Further it is not established that an over-payment was made by Black. There is no finding on this point by the trial judge and we must be guided to a conclusion by an independent examination of the evidence. Black's record too would not suggest that he should be readily believed. It is clear that the $1,500 in cash and $3,000 in shares was paid as restitution. Mr. Cox testified that "there was no amount of any nature provided in that settlement for a contingency whatsoever: the slate was wiped clean as at that date." It would be remarkable if appellant knowing the defalcations so far revealed amount to $4,500 would accept $400 to cover any future claims that might arise. Again if that was so why should the release be conditional? Why too should a declaration be taken if no future claims were

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contemplated? They had difficulty in arriving at the exact amount in respect to the items then under consideration. Black had a loan of $500 from the company and they "waived Mr. Black's debt" as a witness testified and made the settlement at the figure represented by the shares and the $1,500. Besides it was impossible to estimate the exact value of the shares. They were given a valuation of $3,000 to cover the amounts involved in the settlement. The suggestion of a set-off is largely based on the evidence of one of appellant's witnesses on discovery which however was elucidated and explained at the trial. It ought to be conclusive on this point that Black or any other witness does not say that the parties to the settlement discussed the question of undiscovered peculations except in one aspect, *viz.*, to make it a condition that the release would not be binding if further fraudulent transactions were discovered or if in other respects the books were not true and correct. No one suggested that a further sum should be added for such contingencies. The written documents negative that suggestion.

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The respondent submitted two further defences. He asserted that in using space in appellant's publication to advertise the Atlas he was conferring a benefit on that company. The suggestion, I assume is, that without any evidence, except conjecture, we should place a monetary value on that alleged benefit and set it off against the claim for damages for breach of trust. Just how appellant was benefited is difficult to understand. I have already referred in part to this claim. If it was suggested that it would be beneficial to appellant to give free advertising and thereby secure a larger circulation it would be as reasonable as the suggestion put forward. The respondent finally said that by having these advertisements inserted in appellant's journal it added in some way to the latter's "prestige." He said "I feel that it helped the 'B. C. Lumberman.'" He sent out 500 copies free to appellant's subscribers. That he said was beneficial to it. Yet there is not the slightest reference in the advertisements to appellant's publication. But even if appellant received in some subtle way any benefit from this fraud practised upon it the respondent is not relieved. He admits that the Gordon Black Publications Limited were benefited. I would say they received the sole benefit but even if incidentally

it was of some value to appellant he cannot "save himself by shewing that it was also of benefit to the company" as pointed out by MARTIN, J.A. in the case referred to.

Respondent puts forward another plea. If benefit to appellant company was a complete answer and clearly shewed that respondent, in using appellant's publication for the free advertising of his own wares, *viz.*, the Atlas, was fully discharging his fiduciary duties to that company no other plea should be necessary. He states, however, that he had a contra account against appellant company that wiped the slate clean. This too is not pleaded. If it was an honest submission we would expect that a charge for the usual sum for advertising would have been entered in appellant's books against Gordon Black Publishers Limited and contra charges entered against it. If it was to be liquidated by a cross-account the amounts would be stated and shewn to be equal. He admits that not a single item of this alleged contra account is entered in the books. When asked: "There is no account such as that" his answer is: "It should have been done," and adds: "I was lax in the matter." The alleged contra account is spurious. To give credence to it would be to over-tax credulity.

The trial judge found "that there was no fraud or breach of trust" nor "actual impropriety in the defendant's conduct." He limits this observation to the alleged breach of trust, the subject of the action. With great respect in view of the facts outlined I cannot understand that point of view. It is clearly wrong. He says:

> I find that the defendant was given the power to compromise accounts and indeed the very terms of the declaration (Exhibit 15) paragraph 2, shew that compromising of accounts by the defendant was recognized.

This means that respondent had authority not to charge his own company for advertising in the appellant's journal. I do not understand how a declaration by the respondent stating that he had not compromised any of the accounts of the company can be cited as proof that he had authority to do so. He finds that the defendant acted honestly and was entitled to the benefit of section 107 of the Companies Act (B.C. Stats. 1929, Cap. 11). That section is not a cloak for dishonesty. It is in my opinion clearly wrong to say from all the facts as outlined here-

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in that the respondent acted "honestly and reasonably." The appeal should be allowed.

As to the *quantum* of damages I agree that $560.50 should be allowed. Appellant was deprived of revenues to that extent by the fraud of the respondent. It is true that ordinarily the cost of production would be deducted but under the circumstances the full amount is appropriate as damages actual and exemplary for the tortious wrong committed.

MCQUARRIE, J.A.

MCQUARRIE, J.A.: I would dismiss the appeal. The findings of fact of the learned trial judge go so far in the defendant's favour that it is impossible to sustain the allegations of misfeasance, breach of trust, and fraud against the defendant set out in the plaint herein without reversing those findings, which I am not prepared to do.

The learned trial judge in his reasons for judgment makes the following findings [already set out in the judgment of MCPHILLIPS, J.A.]

There is also the further fact that the defendant made a settlement with the plaintiff, and in connection with that settlement paid to the plaintiff a sum to cover his total defalcations, and the extra sum of $500 to take care of any additional claims which might arise.

Then I am inclined to agree with the contention of the defendant that there was some value to the plaintiff in the distribution by the defendant of the 500 free copies of the "Atlas" delivered to subscribers and advertisers in the plaintiff's journal. The defendant was manager of both companies involved in this action. It appears to me that the action which he took of inserting the "Atlas" advertisement in the plaintiff's journal free of charge was justified unless there was fraud, which, in the face of the findings of the learned trial judge, cannot be said to have existed.

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

Solicitors for appellant: *Macdonald & Prenter.*
Solicitors for respondent: *Cowan & Cowan.*

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Criminal law—Advocacy of use of force to accomplish governmental, industrial or economic change—Evidence—Charge—Criminal Code, Sec. 98, Subsec. 8.

On a charge under section 98, subsection 8 of the Criminal Code, the evidence disclosed that accused spoke at several meetings at one of which he said the object of the communist party was to overthrow the capitalist governments and replace them by proletarian controlled governments, and the change could not be made by the ballot box but only by force. At another meeting he said he did not advocate the destruction of property, but when it occurred it was due to the brutality of the police, that the workers would rather take the places over, intact, and have them for their own use. Again he said that they would demonstrate for adequate relief from the State and if the State did not give it to them they would take over the blinking State and run it for themselves. On the trial the jury found the accused guilty and he was sentenced to one year's imprisonment.

Held, on appeal, affirming the decision of MACDONALD, J., that if accused "in any manner" taught or advocated the use of force or "physical injury to person or property or threats of such injury" as a method of securing industrial, economic or governmental changes, an offence was committed. Properly interpreted in their setting with the aid of surrounding facts there is no doubt that the accused taught and advocated the use of force as a means of obtaining the changes referred to in the section.

Even indirect language carefully selected in the hope of avoiding a breach of the Act may in their fair interpretation be regarded as an advocacy of force.

APPEAL by accused from his conviction by MACDONALD, J. and a jury at the Fall Assizes at Vernon, on the 12th of September, 1933, when charged with violation of section 98, subsection 8 of the Criminal Code. The charge was divided into three counts: First, that the accused at Princeton, B.C., in November and December, 1932, did unlawfully teach, advocate, advise and defend the use, without authority of law, of force as a means of accomplishing governmental change within Canada. The second reads the same except that after the word "accomplishing" the words "industrial change within Canada," are substituted and the third the same except that after the word

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"accomplishing" the words "economic change within Canada" are substituted. The accused was convicted on all counts and sentenced to one year's imprisonment.

The appeal was argued at Victoria on the 2nd and 5th of February, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Gordon M. Grant, for appellant: The words alleged by the Crown as being uttered by the accused do not bring the case within section 98, subsection 8 of the Code under which the charge is laid. No case on the facts disclosed is made out. The evidence does not constitute advocacy of using force. These were casual incidental remarks and were only used incidentally in the course of many speeches on several days. He disassociated himself from the advocacy of force. There was misdirection as the learned judge dealt with communism in his charge as a crime. The learned judge should have instructed the jury that what can be interpreted in an innocent way should be given such interpretation.

Argument

Bullock-Webster, for the Crown: Accused addressed several meetings in the mining centre of Princeton. *Rex* v. *Buck* (1932), 57 Can. C.C. 290 does not apply here at all. The accused on several occasions advocated the use of force. He said "To hell with the King," which is advocating the use of force. "Force" is defined in the Oxford Dictionary, Vol. 4, p. 419. Communism has nothing to do with this case. Notwithstanding the learned judge's remarks on communism no substantial wrong has been done the accused as there is ample evidence upon which the verdict can be supported: see *Rex* v. *Miller* (1923), 32 B.C. 298 at p. 302; *Rex* v. *De Bortoli* (1927), 38 B.C. 388 at p. 391; *Rex* v. *Stroud* (1911), 7 Cr. App. R. 38; *Rex* v. *Morgan* (1911), *ib.* 63 at p. 64; *Rex* v. *Monk* (1912), *ib.* 119 at p. 124; *Rex* v. *Wann* (1912), *ib.* 135 at p. 139; *Rex* v. *Beecham* (1921), 16 Cr. App. R. 26.

Grant, in reply: Accused addressed audiences to consider communism in obtaining relief. Did not the references by the learned judge to the word "communism" becloud the issue as it had no reference to the charge?

Cur. adv. vult.

6th March, 1934.

MACDONALD, C.J.B.C.: I have read the evidence with care. Mr. *Grant*, counsel for the accused, did the best he was able with his client's case. Mr. *Bullock-Webster* for the prosecution went carefully over the balance of the evidence and made a strong case against the appellant. The prosecution took place under section 98 of the Criminal Code, subsection 8. Here are some of the statements made by the appellant at half a score meetings held at and about Princeton where a strike was impending. Thomson, a corporal of the British Columbia police, stationed at Vernon, gave the evidence. He said:

Among other things, he [appellant] said that the communist party had been declared an illegal organization in Canada, and he wanted to say he was not a member of that party, but that did not prevent him speaking about it and its work, which was to overthrow the capitalist governments, through the world, and replace them by proletarian-controlled governments, and that no other party were of any use to the workers—neither the social democrats nor anyone else, but only the communist party.

He said, at that time, that the change could not be done by the ballot box; but only by force, and a united front on the part of the workers.

At a second meeting on the 18th of November, 1932, the accused had been speaking about demonstrations in Vancouver and that he was going to organize for demonstrations in Princeton. Thomson in his evidence said:

. . . he said that they did not advocate the destruction of property, but it almost always occurred, when these demonstrations took place, due to the brutality of the police. He said the workers would rather take the places over, intact, and have them for their own use. He also said, at that meeting, that it was remarkable, with conditions as they were, and people only separated by glass from the things that they needed, that they did not take them from the stores.

And again witness said that the appellant

. . . was speaking of the camps, and referred to them as "slave camps," and said that it was quite certain they would not go to the lousy slave camps, and they would demand and demonstrate for relief, and if they did not get it, he was quite sure they would purloin it from the stores. . . .

What did he say at that meeting? He followed on the lines of his previous meetings, and said that the streets in the principal cities in the capitalist world, were smeared with the blood of the workers, and he fully expected the blood of the workers would be smeared on the streets of Princeton.

And again:

Another man in the audience, asked "Can socialism be obtained without communism?" He said "No; socialism cannot be obtained without communism; we have got to have communism, and we are going to have it here." . . .

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He spoke of the possibility of the Tulameen mine closing down, and then he said, "Then we shall have to demand more relief, and we shall get it by militant demonstration. We must not be afraid to fight."

And again:

They would demonstrate for adequate relief from the State, and if the State didn't give them it, they would take over the blinking State, and run it for themselves.

There is much more on this line proven in the evidence but I shall content myself with what I have already quoted which shews the drift of the appellant's propaganda.

The appellant did not take advantage of the opportunity given him to give evidence on his own behalf but an affidavit which he had made was put in by the Crown as admissions on his part. Several objections were taken by appellant's counsel of a legal nature to this course, but as the statements therein were repetitions of those made by him as above no miscarriage of justice occurred.

MACDONALD, C.J.B.C.

The charge of the learned trial judge to the jury was as usual very fair to the prisoner and no just objection can be taken to it. The jury found him guilty and since there is no ground for interfering with the trial the only thing left to us is to dismiss the appeal, which I would do.

MARTIN, J.A.: After a very careful, indeed I may say, anxious consideration of this appeal I can only reach the conclusion that though there was a certain amount of misdirection by the learned judge below in his charge to the jury, yet taking the case as a whole, as it is our duty to do, and in the light of its circumstances, and the way it was conducted by both the prisoner and his counsel, by the special permission of the presiding judge, in an unusual manner, I find myself impelled to say, in the words of the statute, section 1014, subsection 2 that I am "of the opinion that no substantial wrong or miscarriage of justice has actually occurred," and therefore the appeal should be dismissed.

MARTIN, J.A.

The result is largely occasioned by the adoption by the learned judge, at appellant's request, made by his counsel, of what the judge describes in his report to us as "a novel procedure in Canadian Courts," which novelty he introduced, he says, "in a proper desire to give the accused a fair trial," though it is not

apparent in what respect the procedure prescribed by Parliament in the Code, Sec. 944, to attain that object was insufficient; and, speaking with all due respect and as a trial judge for many years, the grave responsibility for altering the usual procedure is something that I would not have assumed, even if I had the discretionary power to do so, because the consequences could not have been foreseen, and furthermore such experimental departures are contrary to the safe rule laid down by the Privy Council in the great case of *Reg.* v. *Bertrand* (1867), L.R. 1 P.C. 520, at 530, wherein it was declared that:

> It is the inherent prerogative right, and, on all proper occasions, the duty, of the Queen in Council to exercise an appellate jurisdiction, with a view not only to ensure, so far as may be, the due administration of justice in the individual case, but also to preserve the due course of procedure generally . . . and also where . . . the due and orderly administration of the law [has been] interrupted, or diverted into a new course, which might create a precedent for the future.

And the same tribunal later in *Ibrahim* v. *Regem* (1914), A.C. 599, at 615, affirmed that language and deprecated "new courses which may be drawn into an evil precedent in future": *cf.* also *The Bishop of Victoria* v. *The City of Victoria* (1933), 47 B.C. 264 at 275, and other cases there cited.

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But while unusual, or indiscreet, the course adopted may not be illegal and some authority to support it under the practice of former days may be found in the three cases noted in Archbold's Criminal Pleading, 25th Ed., p. 196, *viz.*, *Rex* v. *Redhead* (*Yorke*) (1795), 25 St. Tri. 1003, 1021; *Rex* v. *White* (1911), 3 Camp. 98; and *Rex* v. *Parkins* (1824), 1 Car. & P. 548; R. & M. 166, explaining it, though it is difficult to apply satisfactorily those cases which were on misdemeanours (Russell on Crimes, 8th Ed., 2144 *n.*), and therefore governed by a special forensic practice, to prosecutions under our Code, which by section 14 provides that

> The distinction between felony and misdemeanour is abolished, and proceedings in respect of all indictable offences, except so far as they are herein varied, shall be conducted in the same manner.

The "manner" in which they "shall be conducted" as regards the present question is set out in said section 944 (2):

> 2. Upon every trial for an indictable offence, the counsel for the accused, or the accused if he is not defended by counsel, shall be allowed, if he thinks fit, to open the case for the defence, and after the conclusion of such

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opening to examine such witnesses as he thinks fit, and when all the evidence is concluded to sum up the evidence.

Does "defended by counsel" mean that the accused is so defended if counsel takes an active part in the trial to any substantial extent? If so, then the disjunctive word "or" would point to the conclusion that Parliament did not intend that the defence should any longer be conducted in part by two different persons, and there are many obvious reasons in practice why that should be the intention in Canada, and the more so because since the said decisions a fundamental change has taken place in that the accused can give evidence himself, and it is also the law of Canada that since he has that right he cannot make a statement at his trial except under oath: *Rex* v. *Campbell,* 14 Alta. L.R. 583; (1919), 1 W.W.R. 1076; 33 Can. C.C. 364; and *Rex* v. *Frederick,* 44 B.C. 547; (1931), 3 W.W.R. 747; 57 Can. C.C. 340.

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In the present case counsel did take a substantial part in defending the accused not only by advising him in conducting his defence and suggesting questions to witnesses and arguing points of law as they arose but at the close of the Crown's case he made a motion for its dismissal and supported it ably at considerable length, and therefore it must be held that the accused was in fact "defended by counsel" within the meaning of the section to a very substantial and beneficial degree, and under such circumstances at least it would, I feel, as at present advised, be difficult to hold, if it were necessary to do so, that the accused could also participate in "defending" his case which he had so largely entrusted to counsel; but I refrain from a final expression on this interesting and important point, reserving it for further consideration after argument thereupon, because it is not necessary to decide it now in the view I take of the matter. That view is that even though the learned judge had no authority to adopt the course he did, or if he had, but wrongly exercised it, yet the misdirection and incorrect observations respecting communism made by him in his charge and during the trial arose out of statements made by the accused himself during his examination of witnesses and in his address to the jury, which were unfortunately adopted by the judge as being correct, though they were in any event foreign to the case

in common with many other matters that, as could only have been expected, were wrongly brought into it owing to the special liberty that had been given to the accused who naturally availed himself of the opportunity that had been given him to bring in anything, however irrelevant, that he might deem to be to his advantage with the jury.

The resort to these manœuvres in the conduct of the trial (in which the learned judge truly said he was "allowing the greatest latitude" to the accused) brought about many departures from the relatively simple issue on which the accused was charged, and many irrelevant, and sometimes sharp, disputes and discussions arose between him and the learned judge in which unproved statements were made, both of fact and law relating to communism in general, and otherwise, that were foreign to the issue, and should have been excluded, particularly in a case of this rare political nature, and these departures and disputes were carried to such length that the learned judge, after saying "I have the reputation of being the most patient judge on the Bench in British Columbia, but I am beginning to feel that I am giving way," thus appealed to the accused's counsel:

THE COURT: Now, Mr. *Grant*, as an officer of this Court, I am going to ask if you have any control of your client, and ask him to defer anything further that has not to do with this trial. If you say you have no control that is an end to it.

Grant: I haven't any control of the examination of this witness.

THE COURT: All right.

It may be observed in fairness to Mr. *Grant* that it is not apparent why an officer of the Court should be called upon to remedy a situation which had been brought about by the special leave of the Court itself; and it is also due to the Crown counsel to note that he respectfully and wisely declined at the beginning of the trial to consent to the adoption of the "novel procedure," and later repeatedly did his best to keep the real question before the jury, *e.g.*, saying:

This man is not charged with communism, at all; he is [not] charged with being a member of an unlawful association. He is charged under subsection 8 of section 98, for advocating, teaching or defending the use of force. I don't know why my learned friend harps on the question of communism. We are not charging him with being a member of an unlawful association.

It is necessary to give these references to what occurred at the

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trial because they shew that it was no ordinary one, and therefore I have experienced great difficulty in deciding the crucial question as to whether any "substantial wrong or miscarriage of justice has actually occurred" so as to justify the new trial that the accused asks for. I am free to admit that if the trial had been conducted in the usual and proper manner and confined to the real issue instead of "going very far afield" as the judge said to the jury, and, particularly, kept free from unproved and illegal statements made by the accused and adopted as correct by the judge, then a new trial should have been granted for misdirection, but the matter must be viewed from quite a different standpoint when what is complained of is brought about by the action of the accused himself, which is well illustrated by the case of *Rex* v. *Collins* (1917), 13 Cr. App. R. 6, wherein even evidence which "must have seriously prejudiced the appellant" was admitted at his instigation, but the Court refused to interfere with the verdict saying:

> That, however, was entirely his own fault, and, in any event, all we can do now is to consider whether there was sufficient evidence to support the conviction.

MARTIN, J.A.

The case at Bar is stronger for refusal, because at the accused's request he was "allowed the greatest latitude" in pursuing to the utmost limit a course of conduct which he must have expected would benefit his case otherwise he would not have asked for such an indulgence, and persisted in it to great lengths in excess thereof. It may be that the jury took a view of his conduct and unfounded statements that was contrary to his expectations, but he has only himself to blame if the Court and jury accepted his statements as true and acted on them, and it is impossible, legally or otherwise, for us to attempt to retry the case, particularly so because of the special forensic "atmosphere" that he deliberately created: he got, indeed, the sort of trial he asked for, and must abide the consequences, because it is clear beyond question to me, at least, that there was "sufficient evidence to support the conviction."

As to the other objections, to the admission of evidence, I agree with my learned brothers that they are not of sufficient substance to require consideration in detail, and therefore, upon the whole case, the verdict should be sustained because under

the special circumstances no "substantial wrong or miscarriage of justice has actually occurred."

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

MACDONALD, J.A.: Appeal on a question of law only. Assuming, as we must from the jury's finding, that the accused uttered the words detailed by Crown witnesses is an offence disclosed under section 98, subsection 8 of the Criminal Code, reading in so far as it is relevant as follows:

8. Any person who . . . shall in any manner teach, advocate, or advise or defend the use, without authority of law, of force, violence, terrorism, or physical injury to person or property, or threats of such injury, as a means of accomplishing any governmental, industrial or economic change, or otherwise, shall be guilty of an offence and liable to imprisonment for not more than twenty years.

The purport of the words used in addressing assemblies of workingmen is shewn by the following extracts:

"He [accused] said he was there and would remain about ten days, to organize the miners for a strike, and also the unemployed, to protest against the conditions and demonstrate for more relief.

Yes? Among other things, he said that the communist party had been declared an illegal organization in Canada, and he wanted to say he was not a member of that party, but that did not prevent him speaking about it and its work,—which was to overthrow the capitalist governments, through the world, and replace them by proletarian-controlled governments, and that no other party were of any use to the workers—neither the social democrats nor anyone else, but only the communist party.

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Did he say whether or not this could be done by ballots? He said, at that time, that the change could not be done by the ballot box; but only by force, and a united front on the part of the workers.

And again:

He had been speaking about demonstrations in Vancouver, and was going to organize for demonstrations in Princeton; and he said that they did not advocate the destruction of property, but it almost always occurred, when these demonstrations took place, due to the brutality of the police. He said the workers would rather take the places over, intact, and have them for their own use. He also said, at that meeting, that it was remarkable, with conditions as they were, and people only separated by glass from the things that they needed, that they did not take them from the stores.

Also:

He was referring to strikes, and he particularly mentioned the strike at Estevan; and he said three workers had been shot down, in cold blood, by the dirty skunks, the R.C.M.P., and said that if he could, of his own volition, spit in the face of any one of these men, he would do so,—walk

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up the street, of his own volition, and spit in the face of any he met. He was speaking of the camps, and referred to them as "slave camps," and said that it was quite certain they would not go to the lousy slave camps, and they would demand and demonstrate for relief, and if they did not get it, he was quite sure they would purloin it from the stores.

Also:

He vituperated the police, at the beginning of the meeting, and then went on to say that they need not be afraid of any scabs coming in to break the strike, because, for every scab who came in, they would get two men down from the lousy slave camp, or from the slave camp, on the road to help to picket, and they would demonstrate for adequate relief from the State, and if the State didn't give them it, they would take over the blinking State, and run it for themselves.

Comment is not necessary. If "in any manner" he taught or advocated the use of force or "physical injury to person or property or threats of such injury" as a method of securing industrial, economic or governmental changes an offence is committed.

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Society to function without confusion must have an organization in the form of a government. That organization may be changed by the will of the people expressed in an orderly way. To preserve order in social development Parliament enacted by section 98 that any person who shall advocate or teach force as a means of effecting governmental economic or industrial changes shall be guilty of an offence. With the wisdom or otherwise of enacting such a section Courts are not concerned. It is not our function to express opinions on questions of policy. We have only to decide whether the words used by the accused as a question of law on their fair interpretation constitute an offence within the section. Properly interpreted in their setting with the aid of surrounding facts there is to my mind no doubt that the accused taught and advocated the use of force as a means of obtaining the changes referred to in the section. Even indirect language carefully selected in the hope of avoiding a breach of the Act may on their fair interpretation be regarded as an advocacy of force. I only add in regard to errors assigned in respect to the charge and during the trial that no substantial wrong occurred.

I would dismiss the appeal.

MCQUARRIE, J.A.

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

I think the words used by appellant clearly come within section 98, subsection 8 of the Criminal Code and that the case against the appellant was adequately proved. I am also of opinion that the charge of the learned trial judge was sufficient and that there was no misdirection.

Appeal dismissed.

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Damages—Negligence—Death of alleged wrongdoer—Action against estate—"Actio personalis moritur cum persona"—R.S.B.C. 1924, Cap. 5, Sec. 71.

At the request of the plaintiff Kirk, one Fraser drove Mrs. Kirk, her child and niece from Arrowhead to Revelstoke, but as he was driving them back from Revelstoke he drove the car through a safety barrier railing over an embankment about 75 feet high. Fraser and the child were killed, and Mrs. Kirk badly injured. She lost certain personal belongings including purse (with $100 in it), teeth, overcoat and stockings. In an action for damages against the administrator of the Fraser estate a jury found in favour of the plaintiffs, and on motion for judgment it was held that there was a contract for carriage and judgment was given for $1,500 general damages and $182 loss of personal effects of Mrs. Kirk.

Held, on appeal, reversing the decision of MORRISON, C.J.S.C., that the evidence does not disclose a contract of carriage and the action is substantially based on a tort. The alleged wrongdoer died and no action based on tort can be maintained against his estate under the rule of law "*Actio personalis moritur cum persona.*" Mrs. Kirk is entitled to judgment for $182 for the loss of her personal chattels by virtue of section 71 of the Administration Act.

APPEAL by defendant from the decision of MORRISON, C.J.S.C. of the 6th of June, 1933, in an action by Clarence L. M. Kirk and Mrs. Kirk under the Families' Compensation Act in respect of the death of their infant child Norma, and for injuries sustained by Mrs. Kirk through the negligent driving of an automobile by William J. Fraser, deceased. The plaintiffs lived at Arrowhead, about 25 miles south of Revelstoke on

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the Columbia River. On the morning of the 10th of November, 1932, Mr. Kirk asked Fraser to drive his wife and niece with their child to Revelstoke and back. He drove them to Revelstoke, and after staying there for about two hours, they started back and arrived at a point about two and a half miles south of Revelstoke at about two o'clock in the afternoon, when Fraser drove the car through a wooden fence constituting a safety barrier, and over an embankment, approximately 75 feet in height. Fraser and the child were killed, Mrs. Kirk was badly hurt, but the niece Miss Trotter, was able to get back on to the road and go for assistance. The plaintiffs claimed $215 for loss of property, $1,500 for loss of their child, $10,000 for injuries to Mrs. Kirk, $220 for medical and hospital expenses and $250 damages for loss of services of Mrs. Kirk. The jury found in favour of the plaintiffs in the sum of $7,500. The learned judge found there was contract for carriage and gave judgment for $1,682.

The appeal was argued at Vancouver on the 2nd and 3rd of November, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Argument

Bull, K.C., for appellant: The amended statement of claim raises a question of contract for carriage. No contract was proved, but even if the evidence of the male plaintiff indicated an implied contract there was no corroboration as required by the Evidence Act (section 11). The learned judge gave $1,500 general damages, and $182 special damages. We say there is no right of action at all. Assuming there was an implied contract, this action rests on a breach of duty, and is an action in tort: See *Lyles* v. *Southend-on-Sea Corporation* (1905), 74 L.J., K.B. 484; *Donoghue* v. *Stevenson* (1932), A.C. 562. The driver was killed and the action does not survive. If there was no contract, then, on the authority of *Phillips* v. *Homfray* (1883), 24 Ch.D. 439, a remedy for a wrongful act done by a deceased person cannot be pursued against his estate unless property or the proceeds or value of property belonging to another have been appropriated by the deceased person and added to his estate: *Taylor* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (1895), 1 Q.B. 134; *Fleming* v. *Man-*

chester and Sheffield Railway Co. (1878), 4 Q.B.D. 81; *Pontifex* v. *Midland Railway Co.* (1877), 3 Q.B.D. 23.

Killam, for respondents: There was an express or at least an implied contract of carriage: see *Bradshaw* v. *Lancashire and Yorkshire Railway Co.* (1875), L.R. 10 C.P. 189; *Quirk* v. *Thomas* (1915), 31 T.L.R. 237; *Loach* v. *B.C. Electric Ry. Co.* (1914), 19 B.C. 177.

Bull, in reply, referred to Pollock on Torts, 13th Ed., p. 72.

Cur. adv. vult.

19th January, 1934.

MACDONALD, C.J.B.C.: In my opinion the appeal should be allowed except the item in the judgment awarding the plaintiff Nellie Kirk $182 for the destruction of her personal chattels consisting of false teeth, purse (containing money), overcoat and stockings, which should be affirmed. The other items of the claim of each of the plaintiffs should be disallowed. They fall within the meaning of the rule of law *Actio personalis moritur cum persona.*

The action was brought for damages for injuries suffered by the plaintiff arising out of an automobile accident near the City of Revelstoke. The female plaintiff and her baby 12 months old were being carried as gratuitous passengers by the deceased Fraser. The jury found that Fraser was driving to the common danger. The consequence of that negligence was that his car went over an embankment killing Fraser, the driver, and the baby above mentioned, and very seriously injuring the plaintiff Nellie Kirk. The husband claimed for the hospital and medical costs of her treatment and the sum of $2,000 for the death of the child. Neither of these items contributed anything to the estate of the deceased. *Phillips* v. *Homfray* (1883), 24 Ch.D. 439.

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The jury also found the wife entitled to the said $182 and to $5,000 which apparently by oversight is not adjudged to her in the final order and no application to amend that order has been made to us. In any event she could not claim for personal injury in this action because of the rule of law above mentioned. She is entitled to claim the $182 by virtue of the Administra-

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tion Act, R.S.B.C. 1924, Cap. 5, Sec. 71, the relevant part of which, dealing with actions of trespass, or trespass on the case against personal representatives of the deceased, reads as follows:

> . . . and an action of trespass, or in the nature of trespass on the case, may be maintained against any executor or administrator for any injury done by the deceased in his lifetime to another in respect of the latter's property, real or personal, . . .

The action was brought within the time specified in the section. Therefore the only question for consideration is—was this an action of "trespass or trespass on the case," or of that nature. This old form of procedure is commented on by Sir John Salmond in his work on Torts, 7th Ed., 229-30. He says in section 2 at those pages:

> Omitting certain special remedies of minor importance, we may say that under the old practice the ordinary remedies for torts were two in number —namely, the action of trespass and that of trespass on the case (commonly called by way of abbreviation case simply). Trespass was the remedy for all forcible and direct injuries, whether to person, land, or chattels. Case, on the other hand, was a supplementary form of action, provided for all injuries not amounting to trespasses—that is to say, for all injuries which were either not forcible or not direct, but merely consequential.

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He goes on to say:

> In *Leame* v. *Bray* (1803), 3 East, at p. 602, the distinction is thus expressed and illustrated by Le Blanc, J.: "In all the books the invariable principle to be collected is that where the injury is immediate on the act done, there trespass lies; but where it is not immediate on the act done, but consequential, there the remedy is in case. And the distinction is well instanced by the example put of a man's throwing a log into the highway; if at the time of its being thrown, it hit any person, it is trespass; but if after it be thrown, any person going along the road receive an injury by falling over it as it lies there, it is case. . . . Trespass is the proper remedy for an immediate injury done by one to another, but where the injury is only consequential from the act done, there it is case." . . .

Under our statute the plaintiff may recover in trespass or in case against the executor or administrator for any injury done by the deceased in his lifetime to another in respect of the latter's property real or personal. The plaintiff Nellie Kirk's remedy in this action is against the administrator for an injury done to her personal property and therefore outside the rule of law above quoted. All other injuries claimed in the said action are within that rule of law.

An attempt was made to prove a contract to carry the injured persons safely, but that attempt signally failed.

A number of cases have been cited by counsel for the respondent, but, in my opinion, no assistance is to be gained from these.

The female plaintiff is entitled to her general costs of the action below and to the costs of the issue upon which she has succeeded in this Court; and the defendant is entitled to the general costs of appeal and of the issues upon which he has succeeded in the Court below against both plaintiffs.

MACDONALD, C.J.B.C.

The appeal is allowed except as aforesaid.

MARTIN, J.A.: In this matter, there was in my opinion, no contract express or implied, and so the judgment can only be sustained to the extent of the wife's claim for her loss of her personal property to the extent of $182; otherwise the judgment should be set aside.

MARTIN, J.A.

MCPHILLIPS, J.A.: The appeal relates to a judgment recovered in respect to a motor accident whereby the plaintiffs were not carried safely by one William James Fraser, now deceased, and damages were claimed in respect thereof, by the plaintiffs. The trial was had before MORRISON, C.J.S.C. with a jury. In my opinion the learned trial judge was right in entering the judgment he did, following the verdict of the jury, the jury answering specific questions. The questions put to the jury and the answers thereto were as follow:

The Foreman: The first question: Was the deceased Fraser guilty of any negligence causing the accident in question? Yes.

2. If so, in what did such negligence consist? Driving to the common danger.

3. If the plaintiffs are entitled to any damages by reason of the negligence of the deceased, how much is Mr. Kirk entitled to?

(a) For hospital bills and medical expenses? For full amount claimed.

(b) For the loss of his child? $2,000.

4. How much is Mrs. Kirk entitled to?

(a) For the loss of purse, teeth, overcoat and stockings? $182.

(b) For her injuries? $5,000.

Following the verdict of the jury, the learned judge took time to consider his judgment and found as follows:

I find there was a contract for carriage as claimed—there will be judgment for $1,500 and $182—or $1,682 in all.

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The formal judgment as taken out reads as follows: [The learned judge after setting out the order continued].

The appeal taken was from this judgment in favour of Mrs. Kirk for $182 and in favour of Mr. Kirk for $1,500.

The evidence as adduced at the trial satisfied me that there was a good contract in law whereby the late William James Fraser agreed to carry the plaintiff's wife Nellie Kirk and child from Arrowhead to the City of Revelstoke and that on the 10th of November, 1931, the motor owned and operated by the said deceased when proceeding in the direction of Arrowhead bearing as passengers the plaintiff's wife Nellie Kirk and the infant Norma Kirk, and when at a point approximately two and one half miles south of the City of Revelstoke it was so wrongfully and negligently driven by the said deceased William James Fraser that it was driven through the safety barrier on the highway and over an embankment of approximately 75 feet in height, as a result of which the said Norma Kirk was killed and Nellie Kirk suffered injury and damages. Now as to the item of $182 in the judgment, unquestionably that can be supported under section 71 of the Administration Act, R.S.B.C. 1924, Cap. 5, which reads as follows:

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> 71. An action for trespass, or in the nature of trespass on the case, may be maintained by an executor or administrator for any injury done to the real estate of the deceased in his lifetime, provided that such injury shall have been done within six calendar months before the death of the deceased, and also that such action be brought within one year after the death of such deceased person; and the damages, when recovered, shall be part of the personal estate of the deceased; and an action of trespass, or in the nature of trespass on the case, may be maintained against any executor or administrator for any injury done by the deceased in his lifetime to another in respect of the latter's property, real or personal, provided that such injury shall have been done within six calendar months before the death of such deceased, and that such action is brought within six calendar months after such executor or administrator shall have undertaken the administration of the estate of the deceased; and the damages to be recovered shall be payable in like order of administration as the simple-contract debts of the deceased.

Then as to the $1,500 item of the judgment, this is also supportable, in my opinion, under the terms of the above-quoted section. It has been strongly advanced at this Bar that the statute only extends to pecuniary interest. With that submission I cannot agree and I would refer to what Ritchie, C.J. said

at p. 426 in *The St. Lawrence & Ottawa Railway* v. *Lett* (1885), 11 S.C.R. 422:

> I cannot think the injury contemplated by the Legislature ought to be confined to a pecuniary interest in a sense so limited as only to embrace loss of money or property, but that, as in the case of a husband in reference to the loss of a wife, so, in the case of children, the loss of a mother may involve many things which may be regarded as of a pecuniary character. The term pecuniary is not used by the Legislature, and this, of itself, I think, affords a good reason for saying that that term should not be introduced in a narrow confined sense as applicable only to an immediate loss of money or property. In several of the United States of America, where the word pecuniary is introduced into a statute, it is not construed in a strict sense, and is held not to exclude the loss of maintenance or of the intellectual, moral and physical training which a mother only can give to her children. Therefore, *a fortiori*, the word should not be judicially introduced into our statute with a view to a narrow and strict construction.

The learned Chief Justice of the Supreme Court of Canada dealt with the point here requiring consideration. In respect to the item of $1,500, the jury found $2,000 but the learned judge reduced it to $1,500 the amount claimed in the statement of claim. It is true that the Supreme Court of Canada was dealing with a different statute to that here to be considered but in principle the *ratio decidendi* is very helpful in this case. Then it is not to be lost sight of that if there has been a breach of contract here different considerations arise and my view is that the case is one of breach of contract to carry with safety, that is, with reasonable safety. Here we have the case of palpable gross negligence of the most reprehensible character (*Bradshaw* v. *Lancashire and Yorkshire Railway Co.* (1875), L.R. 10 C.P. 189; 44 L.J., C.P. 148; *Jackson* v. *Watson* (1909), 78 L.J., K.B. 587). Even if it could be said that it was a case of gratuitous carriage here there was a failure of the ordinary care due from one who undertakes the carriage of another gratuitously (*Harris* v. *Perry & Co.* (1903), 72 L.J., K.B. 725; *Grand Trunk Railway of Canada* v. *Barnett* (1911), A.C. 361; *Lyles* v. *Southend-on-Sea Corporation* (1905), 2 K.B. 1; 74 L.J., K.B. 484).

MCPHILLIPS, J.A.

I am disposed in this case in view of the special facts to uphold the judgment *in toto*. I have no hesitancy as to the $182 item but as to the $1,500 item I cannot but admit that it is with some hesitancy that I decide that that item as to the amount should also stand. I therefore would dismiss the appeal.

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MACDONALD, J.A.: This action was misconceived. The alleged wrongdoer died and no action based on tort could be maintained against his estate—*Actio personalis moritur cum persona*. It was attempted to hold a verdict for part of the jury's findings based upon contract. In my opinion, the evidence does not disclose a contract of carriage as claimed nor did the jury so find. In any event the action is based substantially upon a tort.

Part of the claim (*viz.*, $182) is in respect to the loss of personal property. This is maintainable under section 71 of the Administration Act, R.S.B.C. 1924, Cap. 5.

With this variation I would allow the appeal.

MCQUARRIE, J.A.

MCQUARRIE, J.A.: I do not agree with the learned trial judge that there was a contract for carriage and consequently I would allow the appeal, except as to the claim for $182, which is maintainable under the Administration Act.

Appeal allowed in part.

Solicitor for appellant: *E. A. Boyle.*
Solicitor for respondents: *A. M. Grimmett.*

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Contract—Amalgamation of two companies—Goodwill—Subsequent agreement in breach of the contract — Fraud on company — Knowledge—Evidence—New trial.

Prior to the incorporation of the plaintiff company one Ridgway R. Wilson carried on a wood and coal business on Granville Island under the name of Fernie Coal Company, and the Jeffries Macfarlane Coal Company Limited also carried on a similar business on Granville Island, both companies occupying the same offices. The latter company was owned by one Macfarlane and one Jeffries. Jeffries was manager of both companies, each contributing equally to his salary. Macfarlane was manager of a sawmill at Eburne. In the Fall of 1927 the question of merging the two businesses for their mutual advantage was discussed by these three men and in March, 1928, they agreed to terms and the plaintiff company was incorporated. The new company became possessed of all the property including the goodwill of both the Jeffries Macfarlane Company and the Fernie Coal Company. Wilson was president of the new company, Macfarlane vice-president and director and Jeffries manager and secretary at an increased salary with bonus based on profits. In the Fall of 1927 Wilson and Jeffries discussed the question of obtaining a supply of wood fuel in their business, this being apparent from the correspondence, and Wilson asked Jeffries to get Macfarlane's opinion on the question. Wilson further stated that the obtaining of a wood-fuel contract was discussed at two meetings when Macfarlane was present, but this is denied by Macfarlane. Jeffries and Macfarlane discussed obtaining a wood-fuel contract with the president and secretary of the Vancouver Lumber Company in February, 1928, and letters on the subject were exchanged between the Jeffries Macfarlane Company and the Vancouver Lumber Co. Limited, and a formal contract was finally entered into on the 1st of June, 1928, whereby the Jeffries Macfarlane Company obtained all the wood fuel production of the Vancouver Lumber Company. On the 21st of June, 1928, the Jeffries Macfarlane Company changed its name to the Big Chief Woodyard Limited. In the meantime, after Wilson had discussed the wood fuel project with Jeffries and Macfarlane, he went north on his own business as an engineer and left the business of the plaintiff company in the hands of Jeffries. Upon the wood-fuel contract being entered into on June 1st, Jeffries, with the approval of Macfarlane, looked after this business for the Big Chief Woodyard and the company made a profit of about $20,000 in the two years following. In the meantime the business of the plaintiff company, without any wood-fuel contract, languished. In an action for a declaration that the profits and benefits of the defendant company

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under its contract with the Vancouver Lumber Company for the supply of wood fuel are the property of the plaintiff company and that Jeffries and Macfarlane entered into the contract in breach of trust as officers and directors of the plaintiff company, the plaintiff company obtained judgment for $20,000.

Held, on appeal, reversing the decision of MACDONALD, J. (MACDONALD, C.J.B.C. and MCPHILLIPS, J.A. dissenting), that it was improper to admit as evidence affecting Macfarlane's credibility statements by Jeffries and others unless the trial judge satisfied himself that a *prima facie* case of fraudulent concerted action was established on the part of Jeffries and Macfarlane to defraud the company, but this course was not followed. It was essential to find on the trial that on the incorporation of the plaintiff company it was agreed by its directors Wilson, Jeffries and Macfarlane that it should enlarge its activities by securing a wood-fuel contract with some mill. There was an assertion by Wilson that the company so decided with Macfarlane's approval, and a denial equally emphatic by Macfarlane. It is necessary to make a finding on conflicting evidence unaffected by inadmissible evidence and extraneous matters. This was not done and it is impossible for this Court to make such a finding and there should be a new trial.

APPEAL by defendants from the decision of MACDONALD, J. in an action tried by him at Vancouver on the 24th to the 30th of March, 1933, for a declaration that the profits made by the Big Chief Woodyard Limited under a contract made between the Vancouver Lumber Co. Limited and the Jeffries Macfarlane Coal Company Limited (subsequently changed in name to the Big Chief Woodyard Limited) for the supply of wood fuel, are the property of and belong to the plaintiff, and that the defendants Jeffries and Macfarlane entered into the contract and enjoyed the profits and benefits thereof in breach of trust as directors and officers of the plaintiff company. In the alternative for $30,000 against the defendants for moneys had and received by the defendants and in the alternative for $30,000 against the defendants being the amount of secret profits received by the defendants for the use of the plaintiff. Prior to March, 1928, two companies known as the Fernie Coal Company and the Jeffries Macfarlane Coal Company, carried on a coal and wood business on Granville Island in Vancouver. One Ridgway R. Wilson was president of the Fernie Coal Company and Jeffries and Macfarlane owned and operated the latter company. These men discussed a merger of the two companies in the Fall of 1927 and finally on March 27th, 1928, an agree-

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ment was entered into between Jeffries and Macfarlane for their company and Ridgway R. Wilson for the Fernie Company whereby they agreed to transfer the assets of both companies to a new company to be incorporated as the Consolidated Coal Company Limited. It was completed by way of bill of sale from the two companies to the new company on the 23rd of April, 1928, and the new company took over the business on the 1st of May following. Wilson was president of the new company and Jeffries was manager. The amalgamation of the two companies included the entire undertakings, goodwill, assets, liabilities and obligations of the old companies. Wilson desiring to include a wood-fuel branch instructed Jeffries to endeavour to arrange for a supply by way of a mill-fuel contract with a lumber mill. In February, 1928, Jeffries and Macfarlane came in touch with the Vancouver Lumber Co. Limited regarding such a contract and the plaintiff claims that such a contract was concluded before the merger, but the contract bears date the 1st of June, 1928. On the 23rd of June, 1928, the Jeffries Macfarlane Company changed its name to the Big Chief Woodyard Limited. Wilson, of the Consolidated company knew nothing of the contract with the Vancouver company. The contract with the Vancouver company was operated under the name of the Big Chief Woodyard Limited and Jeffries was hired at a salary of $250 per month plus bonus, and it appeared the profits were $10,000 for the first year and the same amount for the second year. This company operated two years and about three months when the Vancouver company went into liquidation. Subsequently Jeffries was discharged as manager of the Consolidated company on an investigation revealing the above facts. It was held on the trial that Jeffries and Macfarlane, through the Big Chief Woodyard Limited fraudulently appropriated the contract with the Vancouver Lumber Company and the plaintiff was entitled to judgment for $20,000 against them.

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McCrossan, K.C., and *J. A. Campbell*, for plaintiff.
J. W. deB. Farris, K.C., and *E. J. Grant*, for defendants.
J. W. deB. Farris, K.C., and *Bayfield*, for defendant Jeffries.

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10th May, 1933.

MACDONALD, J.: Plaintiff was incorporated as a private company in March, 1928, and thereafter carried on a wood and coal business on Granville Island, Vancouver, B.C.

Defendant company had been originally incorporated as a private company under the name of Jeffries Macfarlane Coal Company Limited, but the name was duly changed on the 21st of June, 1928, to that of the Big Chief Woodyard Limited. Shortly after the incorporation of the plaintiff company, Ridgway R. Wilson, at the organization meeting, was appointed president of the company and the defendant Macfarlane, a director and vice-president thereof, while the defendant Jeffries was appointed as the third director of the company and given active management as secretary and manager. Prior to such incorporation the said Wilson had been carrying on business upon said Granville Island, under the firm name of Fernie Coal Company and the defendant the Big Chief Woodyard Limited then, as I have mentioned, known as the Jeffries Macfarlane Coal Company Limited also carried on business at the same place and occupied the same office. The only parties prior to such incorporation of plaintiff company, who were interested in the said Jeffries Macfarlane Coal Company Limited were the defendants Macfarlane and Jeffries and also one W. G. Wallace, who had a small share holding, as well as being an employee. Defendant Jeffries was manager of both these companies who equally contributed to his salary of $125 per month. He had complete control of the local operations of the two companies though presumably subject, in matters of policy, at least, to the views of his associates, the defendant Macfarlane who was manager of a sawmill at Eburne, B.C. He was required to observe any instructions which might be given by said Wilson, who was solely interested in the said Fernie Coal Company. In the Fall of 1927, with the situation thus shortly outlined, the question of merging these two businesses for the mutual advantage of all concerned was discussed and pursued to such a length that in March of 1928, Wilson and the defendants Macfarlane and Jeffries agreed upon the terms of amalgamation. The correspondence shews that all parties were dealing at arm's length.

The defendant Macfarlane now contends that he was forced into amalgamation. As I understand him he complained that he was unduly influenced by Wilson and dissatisfied therewith. In view of his asserted business capacity and wide experience in that connection, I did not think that there was any compulsion nor undue influence used to bring about the merger. It was then considered as beneficial to all parties concerned. Upon the amalgamation and formation of the new company it became possessed of all the property including the goodwill of both the Jeffries Macfarlane Coal Company Limited and the Fernie Coal Company.

After defendant Jeffries was appointed manager and secretary of the plaintiff company he immediately entered upon his duties and was assisted by the employees of the two businesses thus combined. I have no doubt it was intended, at the time, that with an increased salary he should give his full time and attention to the business of the plaintiff as his employer and that there was no reservation in this respect. This conclusion is borne out by the correspondence, during the negotiations for amalgamation. Wilson in his letter of February 25th, 1928 (Exhibit 17), referred to the division of both preferred and common shares. Then, after defining the proportions, according to his view of the proposed merger, shewing that he would be a majority shareholder, he added that Jeffries would "receive an increased salary and a substantial bonus based on profits as well as own an interest in a constantly increasing investment." I am quite satisfied that in his negotiations both Jeffries and Macfarlane kept in touch with one another so that each of them had knowledge of the propositions made by Wilson. I am referring to the question of the defendant Jeffries being required to give his whole time and attention to the business of the plaintiff company, because, later on, he used a substantial portion of the time and attention which should be given to the plaintiff, in connection with the carrying on of the business of the defendant company. This improper course resulted from an agreement between the defendant Macfarlane and Jeffries. To my surprise, at the trial, while the defendant Jeffries did not give evidence and thus did not take the opportunity of excusing or explaining this unusual course of conduct the defendant Mac-

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farlane offered no excuse for his actions in this connection although a director and vice-president of the plaintiff company.

In fact, if I understood his evidence aright, he did not see anything wrong, even aside from his position with the plaintiff company, in thus utilizing the services of an employee in another company, without the knowledge or consent of Wilson who was so largely interested in the welfare of the plaintiff company.

It is contended that the business ethics adopted as to utilizing the services of Jeffries, to the detriment of the plaintiff prevailed. It was submitted that defendants Macfarlane and Jeffries combined to deprive the plaintiff of large profits, to which it was entitled under a wood-fuel contract with the Vancouver Lumber Company.

To determine this question I must discuss the situation both before and after the amalgamation. While the major portion of the business which had been carried on by Wilson under the name of the Fernie Coal Company pertained to selling coal for fuel purposes, still in the Fall of 1927, while the defendant Jeffries was acting as joint manager of the Jeffries Macfarlane Company and the Fernie Coal Company, the question of obtaining a supply of wood fuel, in their business, was discussed between Wilson and Jeffries. This is apparent from the correspondence. Then on the 10th of February, 1928, when the amalgamation had practically been agreed upon, between the parties, and certain details only required to be arranged, Jeffries wrote Wilson, referring to the incorporation and mentioned the woodyard situation as follows:

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> We have checked over the woodyard situation pretty thoroughly and cannot find any mill that is not already tied up with a contract at a ruinous price for the dealer. We found one woodyard whose business looked particularly attractive. From the writer's estimate they were probably earning a profit of $1,000 per month. Their turnover was about equal to the Rat Portage and Hanbury combined.

This attractive prospect of a wood supply could have, at that time, referred to the Vancouver Lumber Company Limited but such an application is denied. At any rate the letter shews a knowledge as to the position of the matter and that some party was obtaining a supply of wood from which he was earning considerable profit. This question of a wood contract was then present to the minds of both Jeffries and Macfarlane. Wilson

had written Jeffries to get an opinion on 13th February from Macfarlane—*vide* Exhibit 21. The latter says that, consequently upon a conversation in the Vancouver Club with Mr. Myer, president of the Vancouver Lumber Company, as to wood fuel, he, with Jeffries, went to the office of the latter company and met L. C. Thomas, secretary of such company, and then interviewed the said Myer. There was then an outstanding contract, with reference to the output of wood from the Vancouver company's mill and no definite arrangement could be arrived at between the parties while this contract remained in force. It was apparently not considered impossible to have a new contract, if terms could be agreed upon, at the expiration or cancellation of the existing wood contract. So, on the 18th of February, 1928 (Exhibit 8), the Jeffries Macfarlane Coal Company Limited wrote the Vancouver Lumber Co. Limited a letter, desiring that it should have the attention of Mr. L. C. Thomas, and submitted prices for different grades of wood in the bunkers. These prices are not important except that they were identical with those referred to in the formal contract subsequently entered into under date 1st June, 1928, which will require further reference. In this letter, Jeffries stated that his company was also interested in a sawdust and hog-fuel contract and added in conclusion "we have had 10 years' experience in the wood business and feel we were in a position to handle your wood output in a manner that will be satisfactory to you." This offer to purchase wood brought a formal answer from the Vancouver Lumber Company, under date February 20th, 1928 (Exhibit 7), stating that the communication of February 18th "requesting the attention of L. C. Thomas" had been referred to Mr. Myer for reply and that they were interested in the proposition. It requested that something further should be stated, as to the Jeffries Macfarlane Coal Company taking care of the total output of wood from the plant and then concluded, expressing a desire that a reply should be delivered by messenger to the office before noon of next day. There was no copy produced by Thomas shewing the nature of the reply sent to this communication. He stated that Mr. Myer had taken the file with him to Mexico, where he was killed in an automobile accident and the Vancouver Lumber Company's papers,

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relating to the matter, have never been recovered. Neither Jeffries nor Macfarlane produced a copy of the reply nor of any further correspondence relating to the contract of the 1st of June. Macfarlane stated however that, while he had no distinct recollection of the terms of the reply, still that it was a favourable one. Then, although presumably interested in what he admittedly knew was a profitable undertaking, he states that he heard nothing about the matter until the end of May when the Jeffries Macfarlane Company was suddenly called upon to execute a contract (Exhibit 1). This statement as to a lapse of communication between the parties, seems odd, to say the least, in view of several circumstances. In the first place the contract was evidently quite carefully prepared and, as to price, complied with the offer made by Jeffries and Macfarlane in the name of Jeffries Macfarlane Company. In the second place it was common knowledge that no formal contract could be entered into, until the expiry of the then existing contract with Dick Bros. carrying on business under the name of Vancouver Woodyard Limited. A 60 days' notice of cancellation had been served upon them but it would not expire until the 1st of June. In the meantime after amalgamation of the two companies, and under the sole management of Jeffries, the coal business had been actively pursued, but the supply of wood fuel was in an unsatisfactory condition. Wilson, who had gone north in pursuit of his calling as an engineer, had left the extension of the business in the hands of Jeffries, doubtless with the expectation that Macfarlane would assist to some extent. At any rate they were both interested and held a position of trust with respect to the plaintiff company. This would redound to the benefit of Wilson. They could not do otherwise than admit, that their duty was to explore all sources of profit in the fuel business which might be for the benefit of the plaintiff company. This was one of the objects of the merger and presumably the basis upon which Wilson invested so extensively in the undertaking not only in cash, but through entering into obligations for the company. Then, as supporting a strong presumption that the entering into the formal contract with the Vancouver Lumber Company, had been present to the minds of Jeffries and Macfarlane, they, about the 20th of May, 1932, obtained a report from

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R. G. Dun & Co. as to the business standing of the said Dick Bros. and the extent of their business. The report was a favourable one and doubtless encouraging to Macfarlane, who, at the request of Jeffries, had obtained it. Then there was some evidence adduced by the plaintiff, through employees, shewing actions and statements made by Jeffries, during this period, which, if accepted, would shew that he considered the obtaining of the wood-fuel contract merely a question of time, dependent upon the cancellation of the then existing contract. Before however referring to these witnesses more particularly and the actions of Jeffries, before and after the 1st of June, 1928, I deem it advisable to determine whether the actions, statements, and admissions of Jeffries are binding upon, or in any way affect the question of liability, with reference to Macfarlane.

It was contended by defendant Macfarlane that in the action, as framed, admissions or statements of Jeffries did not affect him. It was submitted they might create an atmosphere of suspicion, but this was not sufficient. Generally speaking,—

> The admissions of co-defendants, merely as such, are not receivable against each other, for there is no issue joined between them, and no opportunity for cross-examination; besides which the plaintiff might, by joining a friend as defendant, gain an unfair advantage (Tay., s. 754):
> Phipson on Evidence, 7th Ed., p. 236.

It is quite clear however that in this case, both Jeffries and Macfarlane are endeavouring to uphold a transaction in which they are jointly interested. They are subject to the same attack by the plaintiff. Notwithstanding the efforts made, to emphasize the importance of Macfarlane's connection with the Vancouver Lumber Company contract, it was beyond question entered into between that company and these defendants under the name of a company, which they utilized for the purpose. It was a joint undertaking on their part, for the purpose of acquiring an output of wood fuel—a business in which they had ostensibly ceased to be engaged when the amalgamation took place and their interests in the coal and wood business became vested in and was thereafter represented in the stock of the plaintiff company. They were, as to the contract, so obtained, virtually partners. The admission of one would thus be binding upon the others. They were clearly joint contractors and after eliminat-

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ing Wallace had all the stock of the Jeffries Macfarlane Company and so were in reality sole contractors. Phipson, p. 235, referring to an admission being binding in that event, says as follows:

> An admission by one of several joint contractors concerning the joint-contract, is evidence against the rest, whether sued or suing jointly or severally. Tay., ss. 598-601 . . . Ros. Civ. Ev. 65-6; Steph., art. 71.

The principle supporting this proposition is there referred to upon the same page in this language:

> The identity of interest rendering such evidence receivable arises from the principle that persons seised jointly are seised of the whole, and, being seised of the whole, the admission of each is deemed the admission of the other. *Re Whiteley* (1891), 1 Ch. 558.

Then 22 C.J. deals with the matter somewhat at length at pp. 351-354. At pp. 351-2 it states that,—

> Where several co-parties to the record . . . are jointly interested in the subject-matter of the controversy, the admissions of one are competent against all, where no fraud or collusion appears, except for the purpose of proving the joint interest.

Several cases are cited in support of this proposition. Then the American case of *Gifford* v. *Gifford* (1914), 58 Ind. App. 665; 107 N.E. 308 at 313, seems to fully cover the question, as follows:

> Where parties are jointly interested, or have a privity of design, and act together in a transaction for their benefit or the accomplishment of some purpose, or where they are jointly liable on some contract or obligation, the declarations or admissions of one of such parties relating to such transaction or obligation, made out of the presence of the other, are competent against all the parties so interested or obligated.

Best, C.J., in *Perham* v. *Raynal* (1824), 2 Bing. 306 at 308-9, in this connection, refers to the application of this principle by Lord Ellenborough, in cases of traspass as follows:

> "Evidence of an admission made by one of several defendants in trespass, will not it is true establish the others to be co-trespassers; but if they be established to be co-trespassers by other competent evidence, the declaration of the one, as to the motives and circumstances of the trespass, will be evidence against all who are proved to have combined together for the common object."

Here, there is no doubt whatever that Jeffries and Macfarlane combined together to obtain the contract in question and they thus had a common object, in securing the benefits to be derived from the contract, as well as resisting the attempt of the plaintiff to subsequently obtain a share in the profits of such contract. Notwithstanding the effort of Macfarlane to minimize the posi-

tion of Jeffries with reference to this contract, it is quite evident that he was jointly interested in obtaining the contract coupled with its preformance and attendant benefit. He, at the instigation of Macfarlane managed the business which accrued from the contract while Macfarlane attended to the business of the Eburne Sawmills Limited of which he was manager. The result was that the contract produced profits to Macfarlane and Jeffries of approximately $20,000 for two years. I might add that during this period the business of the plaintiff, in which both these defendants were interested, languished and under the management of Jeffries was devoid of prosperity. Under the circumstances I have come to the conclusion that any admissions, statements or actions of Jeffries, with respect to the said Vancouver Company contract, are binding upon Macfarlane. I put it thus clearly as it has an important bearing upon the question of liability.

It is difficult to determine when Macfarlane and Jeffries definitely decided to appropriate the Vancouver wood contract for their own benefit and exclude Wilson, through the plaintiff company from any interest therein. After the amalgamation took place, there is no doubt that, for a considerable period, the question of obtaining a supply of wood fuel was discussed quite openly between Jeffries and the employees of the plaintiff. The negotiations for the obtaining of a contract for that purpose looked quite favourable. I accept the statement of John W. Wallace, the yard superintendent of the plaintiff, that Jeffries mentioned to him that, in March, 1928, they were getting such a contract and in April following informed him that they had secured the contract. Further that they would be getting a supply of wood fuel, on the 1st of June, as it was necessary that a 60-day notice should be given before the supply could actually be received under the contract. These statements of Wallace were not contradicted. Then Jeffries had conversations with A. W. Lang one of the salesmen for the plaintiff company as to a wood-fuel contract. He informed Lang shortly after the merger had taken place that he (Lang) would now be happy as they would have wood fuel to sell. He, Lang, under instructions telephoned to customers with a view of supplying them with wood fuel. Then on the 11th of June, Lang, under instructions

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from Jeffries, wrote the B.C. Electric Ry. Co. (Exhibit 36) confirming a conversation, as to quoting prices for coal and wood for delivery. He quoted prices for both commodities and then added, with respect to wood, the following:

> Our wood is from the Vancouver Lumber Co.'s mills and has the reputation of being the best in town. We handle their entire output.

It was thus apparent that at that time Jeffries was not at any rate deceiving Lang or separating the coal from the wood business. Then John Stirrett had before the amalgamation, been in the employ of the Jeffries Macfarlane Company as an accountant and book-keeper and remained thereafter in such position. He stated that in the latter part of March or the beginning of April, 1928, he had a conversation with Jeffries in which he (Jeffries) mentioned that a deal had been made with the Vancouver Lumber Company for a supply of wood fuel and that they would have to get busy and obtain orders for sale. He acted under instructions to that end. Later on, he heard Jeffries telephoning to Macfarlane, to get a financial report as to the Vancouver Woodyard business. In June following he attended to the installation of the telephone and furnishing of an office at the Vancouver Woodyard to facilitate the carrying on of the wood-fuel business. Jeffries was examined at length for discovery and some of his admissions not only affect himself, but upon acceptance militate against Macfarlane. On the 23rd of August, 1928, the wood-fuel contract had apparently been in operation for sufficient time to satisfy both Jeffries and Macfarlane that a considerable profit would be earned thereunder. Wilson had been away for the greater portion of the summer and was only in the habit of coming to Vancouver from Victoria at uncertain periods. On that date Jeffries deemed it advisable (see Exhibits 25 and 25a) to write Wilson, as to what settlement he made with Macfarlane as to $2,000 still due him, and asking if he would give his personal cheque for the amount. He also enclosed copy of a letter, purporting to come from Eburne Sawmills, giving quotations on fuel-oil. This letter, of which a copy was also enclosed, is an enigma. I am not satisfied whether it was originally intended to be a camouflage, to deceive Wilson or not. The copy was unsigned but the original, referred to in the letter to Wilson, was signed by Macfarlane. You

might say it was a letter written by a person to himself. A discussion of the letter would not bring about any satisfactory conclusion as to its means or intent. It is capable of so many different interpretations and in a sense is contradictory in its terms. I think however that by this time, if not before, both Jeffries and Macfarlane had definitely decided secretly to appropriate the benefits of the Vancouver Coal Company contract to themselves, with the exclusion to which I have already referred. This was a fraud upon the plaintiff and defendants should pay the plaintiff the amount of profits they thereby obtained. In so finding I am not unmindful of where the burden of proof ordinarily rests, but it differs here, on account of the relationship of the parties.

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As to the amount of their profits so to be accounted for and paid over to the plaintiff, Jeffries admitted that they amounted to approximately $20,000. If this sum is not satisfactory or an amount cannot be agreed upon, then the plaintiff is entitled to a reference. The plaintiff is also entitled to a declaratory judgment as to such profits in apt terms.

I might add that even if I had not held the defendants liable for all the profits made under the Vancouver Lumber Company fuel contract they would in my opinion, on account of their position as directors and trustees, been answerable for the profits which were made out of sales of wood by defendant company to the plaintiff.

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Notwithstanding the assertion by Macfarlane that he believed Wilson knew the true state of the transaction, I accept the positive statement of Wilson as to a lack of such knowledge. In fact one of the employees of plaintiff said that Jeffries told him, in effect, to keep Wilson in ignorance of his absence from plaintiff's place of business, being caused through attendance at the Big Chief Woodyard. Both Jeffries and Macfarlane made a secret profit out of the sales of wood by them in the name of defendant company to the plaintiff company of which they were directors and consequently agents. Sir Henry Buckley in his work on Company Law, 9th Ed., p. 627, refers to the position of directors with respect to a company as follows:

> The directors of a company fill a double character. They are (1) Agents of the company,

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(2) Trustees for the shareholders of the powers committed to them.

In *Lagunas Nitrate Company* v. *Lagunas Syndicate* (1899), 2 Ch. 392 at p. 442, Rigby, L.J., refers to the responsibility of a fiduciary agent as follows:

> It is an equitable rule, which has always been guarded and enforced with the utmost jealousy, that no fiduciary agent shall, under pain of consequences thoroughly well known and noticed below, intentionally place himself in a position in which his interest may conflict with his duty. This rule was plainly violated in the present case, and I can hardly imagine a case in which the violation could be more flagrant. This violation of the rule was a distinct misfeasance and breach of duty to the company on the part of each promoter, and I see no reason why each should not be liable for all the consequences of the misfeasance and breach. The rule is not a mere arbitrary or technical rule of equity, but is based upon high grounds of morality, and Courts of Equity have always held any departure from it to be a very serious wrongdoing. The equitable rule referred to does not in any way depend upon fraud or any presumption of advantage actually taken; indeed, it applies equally, even though it be shewn that no advantage has been taken. The rule is made general in order to prevent the danger arising from the difficulty of disproving in particular cases that duty has given way to interest; see *per* Lord Eldon in the leading case of *Ex parte Lacey* (1802), 6 Ves. 625.

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Then again, as outlined the liability of these defendants through making a profit without the knowledge of the plaintiff, a citation from the oft-cited case of *Parker* v. *McKenna* (1874), 10 Chy. App. 96 at p. 118 is appropriate as follows:

> Now, the rule of this Court, as I understand it, as to agents, is not a technical or arbitrary rule. It is a rule founded upon the highest and truest principles of morality. No man can in this Court, acting as an agent, be allowed to put himself into a position in which his interest and his duty will be in conflict. If Stock had bought these shares and paid for them, and become the absolute owner of them, the directors were as free as any person in the market to go to Stock and to become the purchasers from him of those shares. The agency in that case would have been over, and there would have been no longer any conflict between interest and duty. Here the agency had not terminated. The Court will not inquire and is not in a position to ascertain, whether the bank has lost or not lost by the acts of the directors. All that the Court has to do is to examine whether a profit has been made by an agent, without the knowledge of his principal, in the course and execution of his agency, and the Court finds, in my opinion, that these agents in the course of their agency have made a profit, and for that profit they must, in my opinion, account to their principal.

Then the following extracts from Palmer's Company Precedents, 14th Ed., Pt. I., p. 119, are as pertinent:

> Where a person standing in a fiduciary relation obtains a secret benefit, the Court does not enter into the question whether the party at whose expense the benefit was obtained has or has not lost. All that the Court

has to do is to examine whether a secret profit has, in fact, been made; and if it has, that profit must be accounted for. See *Parker* v. *McKenna* [(1874)], 10 Chy. App. 118; *Aberdeen Rail. Co.* v. *Blaikie, Bros.* [(1854)], 1 Macq. H.L. 461; and *Emma Silver Mining Company* v. *Grant* [(1879)], 11 Ch. D. 938. Even if the profit was made by selling shares which were invalidly issued, and were in fact worthless. See *Jubilee Cotton Mills, Ld.* v. *Lewis* (1924), A.C. 958.

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There will be judgment for the plaintiff against the defendants for $20,000 or such amount as may be determined along the lines indicated, with costs—also a proper declaratory judgment.

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From this decision the defendants appealed. The appeal was argued at Vancouver on the 6th to the 9th of November, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

J. W. deB. Farris, K.C. (*E. J. Grant,* with him), for appellants: The rights that the Consolidated company obtained under the bill of sale of April 23rd, 1928, did not include the agreement of the 1st of June, 1928, between the Big Chief Woodyard and the Vancouver Lumber Company. The business under the subsequent agreement is not within the definition of "goodwill" in the bill of sale of April 23rd, 1928: see *Churton* v. *Douglas* (1859), Johns. 174 at p. 188; *Trego* v. *Hunt* (1895), 65 L.J., Ch. 1 at pp. 6 and 8; *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine, Lim.* (1901), 70 L.J., K.B. 677. The evidence of Thomas, the secretary of the Vancouver company in respect to the contract of June 1st, 1928, is largely hearsay and should have been disallowed: see *B.C. Ironworks* v. *Buse* (1896), 4 B.C. 419 at p. 429; 22 C.J. pp. 397-8. Even if "goodwill" be included in the contract of April 23rd, Macfarlane's action on June 1st does not come within it: see *Jacobus Marler Estates, Lim.* v. *Marler* (1913), 85 L.J., P.C. 167.

Argument

McCrossan, K.C. (*R. W. Kennedy,* with him), for respondent: Ownership of the contract passed with the bill of sale. There was misfeasance and breach of trust. Macfarlane and the Big Chief are responsible in damages for taking Jeffries on at a salary when he was to be in our exclusive employ. Macfarlane obtained secret profits under the contract with the Van-

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couver company. Wilson's evidence was accepted by the trial judge and he found they appropriated part of the contract. The merger agreement was really on May 1st, 1928. The right of ownership of the contract belonged to the plaintiff. Inception of the wood-fuel contract came from Wilson. The evidence of acquiring of this business with the Vancouver company by Jeffries and Macfarlane comes within the principle of *Cook* v. *Deeks* (1916), 1 A.C. 554. The underhand dealing is accentuated by the bribery of Jeffries by Macfarlane. We suffered real damages as our wood business suffered and we lost $5,900 in two years. The transfer includes "goodwill": see Halsbury's Laws of England, Vol. 27, p. 594, sec. 1133. Macfarlane has committed a breach of trust as he was in a fiduciary position: see *Cook* v. *Deeks* (1916), 1 A.C. 554; *Aberdeen Rail Co.* v. *Blaikie, Bros.* (1854), 1 Macq. H.L. 461 at pp. 471-3; *Hay's Case* (1875), 10 Chy. App. 593; Halsbury's Laws of England, Vol. 5, p. 319, sec. 534; Palmer's Company Law, 15th Ed., pp. 196-7; *Transvaal Lands Company* v. *New Belgium (Transvaal) Land and Development Company* (1914), 2 Ch. 488 at p. 503; *Liquidations of Imperial Mercantile Credit Association* v. *Coleman* (1873), L.R. 6 H.L. 189; Halsbury's Laws of England, Vol. 28, p. 119; *Panama and South Pacific Telegraph Company* v. *India Rubber, Gutta Percha, and Telegraph Works Co.* (1875), 10 Chy. App. 515 at pp. 526-7; *Hovenden and Sons* v. *Millhoff* (1900), 83 L.T. 41. A director who aids in a breach of duty is liable: see Halsbury's Laws of England, Vol. 5, pp. 327 and 329. Thomas knew the facts and his evidence was properly accepted: see Phipson on Evidence, 7th Ed., pp. 235 and 237; Taylor on Evidence, 12th Ed., 475, secs. 743 and 750; *Pritchard* v. *Draper* (1830), 1 Russ. & M. 191; *In re Whiteley and Roberts' Arbitration* (1891), 1 Ch. 558 at p. 563. On the basis of collusion, the evidence is admissible: see Phipson on Evidence, 7th Ed., 90; *Rex* v. *Kelly* (1916), 27 Man. L.R. 105, and on appeal 54 S.C.R. 220; *Regina* v. *Connolly and McGreevy* (1894), 25 Ont. 151.

Farris, in reply: The case of *Cook* v. *Deeks* (1916), 1 A.C. 554 does not apply to the facts in this case.

Cur. adv. vult.

19th January, 1934.

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MACDONALD, C.J.B.C.: The defendant is the appellant. The case, I think, depends very largely, if not wholly, upon questions of law. The facts are very voluminous and the case was very exhaustively argued on both sides. The objection was taken that much of the evidence was inadmissible but if I am right in the view I take any inadmissible evidence may be eliminated without affecting the decisive questions in the case. The plaintiff company was formed for the purpose of carrying on a coal and wood business at the City of Vancouver. As a part of the scheme two coal and wood companies then doing business in Vancouver were taken over by the respondent. The one concerned in this litigation was known as the Jeffries Macfarlane Coal Company Limited, the name of which was afterwards changed to that of the Big Chief Woodyard Limited. The Jeffries Macfarlane Coal Company Limited was the *alter ego* of one Jeffries and one Macfarlane who owned practically the whole of the capital shares of the company—all but a few given to a book-keeper for the purpose of organization. The Jeffries Macfarlane Coal Company also carried on business as a wood company. It was in reality a coal and wood company and when it sold out its business to the respondent it sold all its assets including the goodwill of the company, retaining only the unissued shares of the company, that is to say it retained nothing but the naked shares. I may also mention that another coal and wood company known as the Fernie Coal Company which had been doing business in association with the Jeffries Macfarlane Coal Company Limited and which together with the latter was managed by Jeffries was also acquired by the respondent. On the organization then of the respondent company, Wilson who brought about the consolidation, became president, Macfarlane became vice-president and Jeffries manager of the respondent company. These three men comprised the board of directors and it was well known to them that it was desirable to obtain a supply of wood fuel to assist them in carrying on the business of the company. Wilson in his evidence says that he discussed this matter not only with Jeffries on many occasions but with Macfarlane on, I think, more than one occasion and pressed upon them the respondent's desire to obtain a wood contract

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which at that time it was difficult to get. Now at the time of the transfer of the Jeffries Macfarlane Coal Company Limited to the respondent that company was in negotiation with the Vancouver Lumber Company for a contract by which the Jeffries Macfarlane Coal Company Limited should be given the exclusive purchase of wood fuel from the lumber company. This negotiation had proceeded up to a certain point before the transfer to the respondent but not to the point of a formal contract. I have considered in this connection the question of whether or not these negotiations passed to the respondent as part of the contract and particularly of the goodwill between respondent and appellants. On the cases which I have examined, I am unable to say that these negotiations formed part of the goodwill of the Jeffries Macfarlane Coal Company Limited, although I think those facts have an important bearing on the question of defendant's subsequent duty to the respondent.

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I have then to enquire whether or not Jeffries and Macfarlane could, without breach of duty, after the transfer of their business to the respondent, have completed the negotiations with the Vancouver Lumber Company by a contract entitling them to take the wood fuel of the lumber company, in the name of Jeffries Macfarlane Coal Company Limited, which name they used for the purpose and afterwards changed to the name of the Big Chief Woodyard Limited, and by means of which they are alleged to have made a profit of $20,000 for which the learned trial judge has found they must account to the respondent. At the time that this contract was executed, namely, about the 1st of June, 1928, Macfarlane was vice-president of the respondent company and Jeffries was the secretary and manager, whose whole time was to be given to the respondent company. The second question to my mind, therefore, arises on this state of facts, which are not in dispute—were these two men Jeffries and Macfarlane under a duty to the respondent to refrain from the course which they pursued? They virtually took the contract in their own names using the name of the Jeffries Macfarlane Coal Company Limited, and of the Big Chief Woodyard Limited as a blind and if they took the contract, which it was their duty to take to the company of which they were

officers, namely, the respondent company, the conclusion arrived at by the trial judge would appear to me to be just. The question, therefore, arises, whether or not these two officers committed a breach of duty to the respondent in taking to themselves a contract which to their knowledge their own company was desirous of obtaining.

I think it is clear that Jeffries and Macfarlane were aware that the principal object of Wilson in taking over the Jeffries Macfarlane Coal Company Limited and the Fernie Coal Company which were managed by Jeffries was to obtain a wood-fuel contract for the respondent and thus enlarge and increase the business which the respondent intended to carry on. During the negotiations for the taking over of the said companies Wilson made it apparent to Jeffries that the wood-fuel business was one which would become of great importance to the respondent. That matter was discussed by Wilson with Jeffries, and Macfarlane as well, during the said negotiations and up to the time of the merger. Wilson was asked:

Now, Mr. Wilson, in regard to the question of developing the wood branch of the business, was that discussed during the negotiations leading to the merger? Yes it was.

If so, with whom and when? With both Mr. Jeffries and Mr. Macfarlane.

What was the substance of the discussion? That we would continue to do our utmost to arrange a contract with a mill.

And continuing further on he was asked:

Was the subject-matter brought up after the merger, and if so what was discussed and decided upon? It was discussed again at the first meeting of directors after the incorporation of the company [this meeting was held on the 23rd of April, 1928].

What was discussed, what was said and who was present? I requested Mr. Jeffries to continue his efforts to arrange a contract on behalf of the Consolidated company and to get Mr. Macfarlane's co-operation. Mr. Macfarlane was there at the time.

The discussions with regard to the Consolidated company has reference to their getting a contract? With a lumber company, for timber or wood fuel.

In other words for the output of the mill? Yes. . . .

What passed between you and Macfarlane in regard to this subject-matter? I requested Macfarlane to co-operate with Jeffries in regard to the matter, and help me, and he said he would.

Asked as to previous discussions he said:

Jeffries stated to me on one occasion that he was in touch with the Vancouver Lumber Company, negotiating for a contract.

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For such a contract? Yes, and he thought there was a good chance to arrange it.

This discussion took place in February or March prior to the merger. Then again he said:

What definite instructions then were given at the meeting to the manager Jeffries on April the 23rd, 1928? To continue his efforts to arrange a contract on behalf of the Consolidated company.

And further on in his evidence we find:

. . . What then, from the point of view of the amalgamation, was the principal factor of value in acquiring the Jeffries Macfarlane business? Principally to have Jeffries to devote all his time and energies to the management of one company. They had a certain list of customers.

It further appears from the evidence that both Jeffries and Macfarlane and particularly Jeffries were well aware of all the circumstances which entered into the amalgamation of the company into the Consolidated Coal Company Ltd., and that when at the first meeting of the aforesaid company they were appointed directors and Jeffries was appointed secretary and manager with instructions to continue his negotiations for the wood-fuel contract, these two directors were not justified in taking to themselves, which they virtually did, a contract which they knew it was their duty to obtain for the company of which they were directors. This branch of the appeal presents some unusual features. There is a great deal of authority of very high character dealing with cases where directors have disposed of the property of the company in breach of trust but the question here is was there a breach of duty in surreptitiously taking a contract which if they had been loyal to the respondent they would have taken for the benefit of the respondent? In this case it is not so much a breach of trust they are accused of as a breach of their duty as agents for the company. While the case I am about to cite is not on its facts applicable to the case at this Bar yet the statement of law made by Romilly, M.R. in that case—*The York and North Midland Railway Company* v. *Hudson* (1853), 16 Beav. 485 at p. 491—is of value:

The directors are persons selected to manage the affairs of the company, for the benefit of the shareholders; it is an office of trust, which, if they undertake, it is their duty to perform fully and entirely.

Can it be said in this case that when these two men accepted the office of directors in the respondent company they were not bound to carry out the clearly expressed desire of the respondent

to obtain a wood-fuel contract; and was their conduct, in taking such a contract for themselves, in circumstances where such a contract was not easily obtained as the evidence shews, not a breach of their duty as agents of the company? There can, I think, be no doubt that Jeffries as manager of the respondent was guilty of a breach of duty. I think there was a conspiracy between Jeffries and Macfarlane to commit that breach of duty. They took the contract in the name of their old company which was merely their *alter ego,* and they concealed the fact from the respondent and as a result carried on a business obtained by that contract in the name of the Big Chief Woodyard Limited, which was done, I think, as part of their scheme of concealment because had they done business as Jeffries Macfarlane Coal Company Limited, their conduct would have become exposed.

There is some evidence in the case which may be regarded as inadmissible. Some of it is the evidence of Macfarlane's complicity in the wrong and some of it shews concealment of that wrong, but on the admissible evidence it is quite clear that there was concealment and that Macfarlane was just as guilty in the transaction as was Jeffries. They both signed the agreement of purchase as officers of the Jeffries Macfarlane Coal Company Limited.

I have not overlooked the difficulties which present themselves on this branch of the case, but I cannot conceive of men holding an office of trust, that is to say men who were agents of the respondent company, with the knowledge of all the circumstances surrounding the transactions which it has been shewn they possessed, acting as they did, otherwise than dishonestly. In a Court of Equity what would be the conclusion to which the Court would come with regard to their honesty and loyalty to their company? They have been enabled to make a profit out of this contract which if they had performed their duty faithfully would have gone to the respondent, and I can find no insurmountable principle of law or equity which would prevent the respondent from recovering from them that profit.

I am therefore of opinion that the learned trial judge came to the right conclusion and that this appeal must be dismissed.

MARTIN, J.A. (oral): In coming to the conclusion that the

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judgment of this Court should be that a new trial be ordered, I say now (because I may not have the opportunity, owing to the great pressure of business before this Court, and the large number of judgments that we have had to write, of expressing my views in writing within a reasonable time) that, putting it briefly and at large, my reason for reaching that conclusion is that the case is a very exceptional one indeed, in that *ab initio* the relations of these people, the two principal persons concerned, were in conflict, under the same head of direction, the company direction, and therefore the matter should have been approached with very unusual caution to correspond with that very unusual situation. But on the contrary, I regret to say, with every possible respect for the learned judge below, that in my opinion he approached it from a wrong direction, in that he, by the admission of improper evidence, first arrived at a finding of conspiracy and then attached the defendant Macfarlane to it, instead of first finding that there was a conspiracy in which Macfarlane was participating. That, with all respect, is the fatal error, if I may say so, in the judgment. And from that, from the wrongful reception of evidence, carrying out that mistaken view, the case fell into confusion, and never was, in my opinion, handled in that safe and cautious way, under those peculiar circumstances, which would warrant us in founding a judgment upon it. Consequently, not without considerable reluctance, and after an unsuccessful endeavour to find some solid reason for curing the situation by finding facts ourselves to replace those not founded upon sufficient reason, I hesitated before coming to this conclusion, but unfortunately I see no other way in which justice can be accomplished than by ordering a new trial.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal. The trial would appear to have extended over four days and the learned trial judge, Mr. Justice W. A. MACDONALD, in a very painstaking way heard the voluminous evidence led upon both sides and I think the learned trial judge is well entitled to have the commendation that Sir E. Pollock, M.R. addressed to Romer, J. (now Romer, L.J.) in *In re City Equitable Fire Insurance Co., Lim.* (1924), 94 L.J., Ch. 445 at p. 487:

I do not propose to restate all the facts. Romer, J., in a judgment which deserves more than a passing word of appreciation for its grasp of the details of a long and complicated case, and its co-ordination of the facts, as well as its application of the law to them, has fully presented the facts. . . . I shall not, therefore, endeavour to recapitulate the facts, but I shall refer to such of them as may be necessary.

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In this case though I do not deal with the facts other than to say that they, in my opinion, fully support the conclusions arrived at by the learned trial judge. My reason for so refraining is because the majority opinion is that a new trial be had between the parties. With that judgment I am not in agreement. It would seem to me that the governing principle of the case of *Cook* v. *Deeks* (1916), 1 A.C. 554, as defined in the judgment of their Lordships of the Privy Council—the judgment being delivered by Lord Buckmaster, L.C.—is determinative of this appeal. In the judgment we find the Lord Chancellor saying at p. 563:

Their Lordships think that, in the circumstances, the defendants . . . were guilty of a distinct breach of duty in the course they took to secure the contract, and that they cannot retain the benefit of such contract for themselves, but must be regarded as holding it on behalf of the company.

MCPHILLIPS, J.A.

That is in the present case for the benefit of the Consolidated Coal Company Limited (the respondent). I am in complete agreement with the conclusion of the learned trial judge. Therefore as stated at the outset, in writing this judgment, my opinion is that the judgment should be affirmed and the appeal dismissed.

MACDONALD, J.A.: It may be convenient to first outline briefly my general view of the case indicating why I think a new trial should be ordered. It was essential to find at the trial as a basic fact that on the incorporation of the respondent company it was agreed by its directors Wilson, Jeffries and Macfarlane that it should enlarge its activities by securing, if possible, a wood contract with some mill. If that was decided to the knowledge of Macfarlane it would be a fraud on the company on his part to do what admittedly was done, *viz.*, secure a contract not for the company but for himself (Jeffries associated with him) in the name of the Jeffries Macfarlane Coal Company Limited, afterwards changed to Big Chief Woodyard Limited. As there was an assertion by Wilson that the respondent com-

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pany so decided with Macfarlane's approval and a denial equally emphatic by Macfarlane, it was necessary to make a finding on conflicting evidence unaffected and uninfluenced by inadmissible evidence or extraneous matters. I do not think that occurred, and it is impossible (and improper) for this Court to make such a finding.

In making this finding of fact a trial judge must conclude that either Wilson or Macfarlane wittingly or otherwise did not state the true facts. So far as Macfarlane is concerned, the charge being fraud, it follows that he is charged with a deliberate misstatement. A question therefore of credibility arose. In testing Macfarlane's honesty as a preliminary to such a finding as between the two witnesses, it was proper to review his own conduct and actions but improper to admit as evidence affecting his credibility statements by Jeffries and others concerning which he had no knowledge and acts of Jeffries to which he did not, so far as the evidence shews, assent. Such evidence, as might be given by Jeffries, could only be adduced after the trial judge satisfied himself that a *prima facie* case of fraudulent concerted action was established on the part of Jeffries and Macfarlane to defraud the company by securing for themselves a contract properly belonging to the company. That course was not followed and that point was not reached at the trial. If it had evidence of Jeffries properly received after such a preliminary finding might or might not induce a trial judge to accept Wilson's evidence on this initial and vital point. The rule is stated in 22 C.J. 297-8:

> A mere allegation of the existence of a conspiracy and common design is not sufficient to render an admission competent against parties other than the declarant; it must appear that there existed, at the time when the statement was made, an agreement, express or implied, to carry out the common purpose in a definite way by united efforts. This may be proved by either direct or circumstantial evidence. Declarations of one of the persons alleged to be engaged in the common design are not admissible to prove its existence, but may be received in corroboration if sufficient evidence is produced *aliunde*. The evidence need not be conclusive: *prima facie* proof of the common design is sufficient to admit the statement.

Ordinarily when a new trial is directed the evidence and issues are not discussed in detail. I shall only refer to the record to the extent necessary to shew where, in my opinion,

error is disclosed in the conduct of the trial. The trial judge found fraudulent conspiracy. He said:

> It was submitted that defendants Macfarlane and Jeffries combined to deprive the plaintiff of large profits, to which it was entitled under a wood-fuel contract with the Vancouver Lumber Company.

That is the whole subject of inquiry if it is decided that the question is not concluded by the transfers. Jeffries undoubtedly was guilty of fraudulent double-dealing. That is conceded. Macfarlane either combined with him, having knowledge of the same general facts although with less detail, or acted fraudulently independently of Jeffries. He is not charged with doing so alone. It is alleged in paragraph 17 of the statement of claim that:

> The defendants Jeffries and Macfarlane acting secretly and in collusion, fraudulently, wrongfully and deceitfully, and without the knowledge of the said Wilson, made or negotiated a contract with the Vancouver Lumber Company Limited, the terms of which said contract had been agreed upon on or about the 31st day of March, 1928, immediately prior to the purchase by the plaintiff company of the undertaking, business, assets and goodwill as aforesaid of Jeffries Macfarlane Coal Company Limited.

Acting in collusion is again charged in paragraphs 19 and 20. This plea is maintained throughout. The trial judge, as stated, found conspiracy. He said:

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> Here there is no doubt whatever that Jeffries and Macfarlane combined together to obtain the contract in question and they thus had a common object in securing the benefits to be derived from the contract.

Later he said:

> It is difficult to determine when Macfarlane and Jeffries definitely decided to appropriate the Vancouver wood contract for their own benefit, and exclude Wilson.

It was necessary, however, to determine that point before admitting evidence from Jeffries and others not brought home to Macfarlane.

The wood contract was dated June 1st, 1928, entered into between one of the appellants, Big Chief Woodyard Limited, and the Vancouver Lumber Company Limited, and all profits earned thereunder ($20,000) are claimed as the property of the respondent Consolidated Coal Company Limited. The charge as shewn by the pleadings is that it was fraudulently appropriated by the appellant Macfarlane and Jeffries, through the medium of the Big Chief Company in which they were the only shareholders. Jeffries is not a party to this appeal and is

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treated by Macfarlane as antagonistic to him. We are, therefore, solely concerned with the conduct of Macfarlane. Jeffries' evidence was inadmissible as against him until the point already indicated was reached (if at all).

Prior history will be an element in drawing fair conclusions and in assisting the trial judge to decide where the truth lies. Mr. Ridgway R. Wilson of Victoria, a consulting mining engineer, is the president of the respondent company. For three years before he carried on a coal and fuel business under the trade name "Fernie Coal Company," and at the same time Jeffries and Macfarlane conducted a similar business known finally as the Jeffries Macfarlane Coal Company Limited (herein called "Jeffries Macfarlane Ltd."). Wilson handled Fernie coal: the latter Island coal. Jeffries, while still manager of Jeffries Macfarlane Ltd., strangely enough was employed by Wilson, his competitor, to manage his coal business also, on a salary basis. Thus at the outset all were schooled in the art of acting in dual capacities and in assuming antagonistic roles. Macfarlane at this time and throughout took no active part in the business of Jeffries Macfarlane Ltd. He is a lumberman with large and varied interests, and was always actively engaged elsewhere. Management of both concerns was left to Jeffries throughout by both Wilson and Macfarlane. He acted as part-time manager for both, by mutual consent.

The inevitable occurred; Wilson complained "that we are not getting the results we should get with Fernie coal," and Jeffries after "considerable pressure" suggested that the solution was to merge the two companies so that he could devote all his time to it. The result was a merger by the incorporation of the respondent "The Consolidated Coal Company," in March, 1928, with Jeffries as manager, the assets of both concerns being transferred to it. There is no evidence that Macfarlane knew that Jeffries was to give his whole time to the new company, unless that should be assumed. Before its formation both concerns were handling coal, not wood, with a small exception not worth detailing. Wilson, however, before the merger was planning to secure a wood contract with a mill, and efforts to obtain it were made by Jeffries in his capacity as manager for Wilson

or the Fernie Coal Company. He wrote a letter on February 1st, 1928 (Exhibit 20), and again to Wilson on February 10th, 1928 (Exhibit 14), shewing, whether *bona fide* or not is not material, as we are no longer concerned with his conduct, that he was trying to comply with Wilson's wishes. His knowledge of Wilson's desire to secure a wood contract should not at that stage be imputed to Macfarlane. There is complaint throughout as to inadmissible evidence, the submission being that Macfarlane was convicted of fraud or at all events his credibility affected largely, if not wholly, by the acts and conduct of Jeffries, of which he had no knowledge.

Respondent's interest only begins when it is established that *qua* company a wood contract was sought. It does not follow that if Wilson, while he owned the Fernie Coal Company, wanted to add wood vending to that business and instructed Jeffries to arrange it, that the new entity after merger without a mind to recollect, must be assumed to have the same desire. Certainly Macfarlane without knowledge could not be affected.

Exhibit 21, a letter of February 13th, 1928, written before respondent company was formed, by Wilson of the Fernie Coal Company to his manager Jeffries, was filed, referring to negotiations to secure a certain wood contract and asking Jeffries to "please get an opinion from Macfarlane also." He was then Wilson's competitor. This is not evidence against Macfarlane. There is, too, no proof that Jeffries consulted Macfarlane. Evidence was wrongly admitted as affecting Macfarlane that Wilson instructed Jeffries "to canvass the situation thoroughly to arrange a supply of mill wood for the company and if necessary to buy out an established woodyard dealer." It seemed to be assumed because they were in business together that what was known by one was known by the other. There is no evidence that Jeffries communicated Wilson's desire to him.

Later, however, Wilson links up Macfarlane with knowledge, when discussions occurred leading to the merger. This is not decisive but bears upon the probability of the truth of later statements. Many projects may be discussed before a company is formed that never materialize. However, I refer to it. Wilson gave this evidence:

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McCrossan: Now, Mr. Wilson, in regard to the question of developing the wood branch of the business, was that discussed during the negotiations leading to the merger? Yes, it was.

If so, with whom and when? With both Mr. Jeffries and Mr. Macfarlane.

What was the substance of the discussion? That we would continue to do our utmost to arrange a contract with a mill.

With a mill? Yes.

That is with a lumber mill, of course? For their output of wood.

What was the idea of that? To arrange a supply of wood fuel for the new company, Consolidated Coal Company, at that time. Previous to that we were anxious to arrange a supply for the Fernie Coal Co.

When would that discussion during the negotiations for the merger, have taken place? I should have put it, when actually did it take place? Early in 1928.

Early in 1928? We had discussions before that too, but just before the consolidation of the Consolidated company.

And you say it was discussed with both Mr. Jeffries and Mr. Macfarlane? Yes.

This, as appears, is a discussion not an agreement, but if this evidence is accepted and it is shewn that it was acted upon when the company was formed, the inquiry would be at an end. No details of the conversation were given and it is denied by Macfarlane. Whether or not there is a finding of fact on this point is at least doubtful. The trial judge said at one stage "The question of a wood contract was then present to the minds of both Jeffries and Macfarlane." He based this observation on a letter that does not establish it, and makes no specific finding that it was discussed by Wilson orally with Macfarlane, as stated above. Even if decisive, we would have to be satisfied that he accepted Wilson's statement uninfluenced by inadmissible evidence. It is clear from Wilson's evidence that his references to Macfarlane are somewhat incidental. Macfarlane was a busy man engaged elsewhere. It was Jeffries that Wilson singled out pointedly as the man to act, and he largely confined his entreaties to him, asking him at times to get Macfarlane's opinion, which he did not do. Wilson gave this further evidence:

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Was the subject-matter brought up after the merger, and if so what was discussed and decided upon? It was discussed again at the first meeting of directors after the incorporation of the company.

What was discussed, what was said and who was present? I requested Mr. Jeffries to continue his efforts to arrange a contract on behalf of the Consolidated company and to get Mr. Macfarlane's co-operation. Mr. Macfarlane was there at the time.

The discussions with regard to the Consolidated company has reference to their getting a contract? With a lumber company, for timber or wood fuel.

In other words, for the output of the mill? Yes.

You say that was discussed at a meeting of the directors held on the 23rd of April, 1928? Yes, in Mr. *MacNeill's* office.

Was Mr. Macfarlane present at that discussion? Yes, he was at the meeting.

What passed between you and Macfarlane in regard to this subject-matter? I requested Macfarlane to co-operate with Jeffries in regard to the matter, and help me, and he said he would.

He said he would? Yes.

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The latter part of this extract, where it is stated that Macfarlane agreed to co-operate, is the first decisive evidence offered. Ordinarily a minute should cover a new departure in the company's business, but if the three directors agreed as here outlined, none of them could leave by a side door and secure a contract for himself. Now if the trial judge found the facts as above outlined in an unfettered way a new trial would not be necessary. I cannot hold, however, that there was a clear acceptance of it unaffected by irrelevant testimony. Another question arises. Does this evidence shew a *prima facie* case of concerted action on the part of Jeffries and Macfarlane as a foundation for the admission of acts and statements by the former? I express no opinion on the point. It is a question for the trial judge. He might require additional evidence. He would consider how far negotiations were advanced at that time between Jeffries and Macfarlane with the Vancouver Lumber Company and whether in view of this evidence and the state of the negotiations it might be found (*prima facie*) that afterwards in any action taken to secure the wood contract Jeffries and Macfarlane were acting in concert to defraud the company. If he should come to that conclusion at this or at a later stage in the trial then relevant acts or statements by Jeffries would be admissible as against Macfarlane. I make no finding—that is for the trial judge—but only say that it was not approached in this way at the trial under review.

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The next point is this—did this wood contract pass to respondent company by conveyance? This is determined by the interpretation of the documents, Exhibits 1, 2, and 3 particularly, the latter dated April 23rd, 1928. On that date an agreement

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was executed between the Jeffries Macfarlane Coal Company Limited, as the party of the first part, and the respondent company of the second part, and after reciting that the first-mentioned company had for some years carried on business as coal merchants and that the respondent company was incorporated to acquire the said business "and its stock-in-trade, motor-cars, motor-trucks, buildings, hereditaments, goods, chattels, moneys, credits, debts, bills, notes, goodwill, things in action, contracts, agreements, securities, fixtures and furniture and everything used in and about the said business," provided that

> in pursuance of the said agreement and in consideration of the sum of Fifteen thousand dollars ($15,000) paid by the party of the second part to the party of the first part at or before the sealing and delivery of these presents in the manner above mentioned (the receipt whereof is hereby acknowledged) the party of the first part doth bargain, sell and assign unto the party of the second part, its successors and assigns all the interest and goodwill of the party of the first part in or concerning the said coal and wood business carried on by it at Granville Island in the City of Vancouver in the Province of British Columbia.
>
> AND ALSO all and singular the book debts due or owing to the party of the first part in respect of the said business and all securities for or evidence of indebtedness relating thereto and the benefit of all contracts and engagements entered into with and orders given to the party of the first part in connection with the said business.

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On the same date Wilson by bill of sale (Exhibit 4) transferred to the new company in like manner the business, stock-in-trade, contracts, etc., of the Fernie Coal Company, for the consideration of $55,500 to be satisfied by the allotment of stock, making him the principal shareholder in the respondent company.

If at that time the wood contract with the Vancouver Lumber Company was concluded, its benefits passed by law to the com pany. The wood contract with the Vancouver Lumber Company bears date the 1st of June, 1928, but it was submitted that it was concluded before the 23rd of April. I am not going to review the facts upon which this submission is based. It is obvious that if I thought a concluded contract was arranged before April 23rd I would not direct a new trial. It will, however, be open to the trial judge to form an independent judgment on this point. I say so in order that the respondent may not be deprived of a point which might appeal to the judgment

of a higher Court. On this inquiry a question of admissible evidence arose. I would point out that in a restricted investigation of this nature directed solely to ascertaining when the wood contract was concluded and if it (or its benefits) passed to the respondent company the question of fraud does not arise. The trial judge, therefore, can only admit direct evidence. For example, statements by Myers would not be admissible on this point. Relevant statements by a third party, which throw light upon the conduct of one charged with fraud are admissible on the other branch of the case.

Assuming the wood contract with the Vancouver Lumber Company did not pass by contract, the right, after the respondent company was incorporated and all documents executed, to use the name of the Jeffries Macfarlane Coal Company Limited in securing a wood contract, was questioned. It sold, it was submitted, the goodwill of that business to respondent company, including the use of the name and I assume the benefit of pending negotiations for a wood contract whether considered as an inchoate right or as an element in goodwill. On the other hand it was submitted the name and charter as an empty shell might be retained as a basket for new business wholly unrelated to the old. It will be for the trial judge to find if this inquiry is really material. If the contract was concluded before April 23rd, the case ends. If it was not the trial judge will have to consider whether in any event a case based upon fraud ought to be determined on broader grounds, not on the use, mistakenly or otherwise of an empty charter. He might consider it an element if there was any secretive conduct or breach of an understanding in reference to the use of this charter. He would consider whether or not it was contemplated that the Jeffries Macfarlane Coal Company Limited name and charter should be retained and used. Shares allotted on the transfer were issued to it. Wilson too in his evidence stated that "Macfarlane might want to use that charter for the Eburne—in connection with the Eburne Lumber Company I think" with which he was connected. This evidence might be treated as significant. Use it in what manner? Was it to secure a wood contract, and if so was it contemplated that one might be procured for Jeffries

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Macfarlane Coal Company Limited? Did a potential right pass to respondent? Was it contemplated as an asset bought and paid for? Fraud is a conscious personal dereliction. Should it be founded upon even a mistaken attitude as to doubtful legal positions? These are considerations for the trial judge.

I might refer to Exhibit 23, and the copy sent to Wilson, a letter giving rise to a later contract to supply the respondent company with "Big Chief" wood, and the argument submitted on one side that it afforded proof of concealment and design on Macfarlane's part, and on the other that Wilson had knowledge of the activities of the Big Chief and took no exception to it. Is it open to either suggestion? Letters and trivial incidents should not receive a strained construction. A trial judge might think that this correspondence should lead Wilson to make further inquiries if he were alert and yet not stand in the way of his assertion of the right to claim the benefit of the Vancouver Lumber Company contract if Macfarlane as respondent's director knew it was contemplated to add it to the company's business. On the other hand, on the serious charge of fraud he might conclude that there is nothing in the method employed, the letter-head used, or the surrounding circumstances, to implicate Macfarlane in a charge of deceit. There should always be substantial, as distinguished from a conjectural basis for such a finding. This correspondence therefore may not be regarded as material in the final analysis except on the question of estimating damages if that point should be reached.

Another incident was the fact that Macfarlane was a party to securing the services of Jeffries as manager of the "Big Chief," although as I think the trial judge properly found he should have given his whole time to the respondent company. It was not so stipulated, but ordinary fairness would suggest it. Evidence was admitted shewing that Jeffries wished to conceal his dual occupation from Wilson, but there is no evidence that Macfarlane tried to do so or was aware that Jeffries was doing so and it was not admissible before the finding earlier referred to. He may have thought that there was no serious conflict of

interest and that it would not prevent Jeffries from doing his full duty to the respondent company. He repeated a bad practice that was resorted to in the early history of the two coal companies prior to the amalgamation. That is why early history is important in applying standards. If Wilson said he wanted to get away from that practice which he once approved, there is no evidence that Macfarlane was aware of it. The weight that should be given to it is this—it is an element not conclusive, but of value in considering credibility and in determining with the assistance of a variety of facts the question of a fraudulent design on the part of Jeffries and Macfarlane jointly as charged in the pleadings, to defraud the respondent company. Speaking for myself I would not regard it as proof of bribery of an official. If, *e.g.,* Macfarlane as a director of respondent company was a party to the formation of another company to take, for want of a better example, mine tailings from another corporation either to extract gold or use them for any other purpose, he could do so, and if he secured Jeffries to act in a dual capacity as manager, some remedy might be found, but the remedy would not be a declaration that the proceeds from the new venture belonged to the company first named. No complaint either could be made if later he contracted to sell part of the tailings to the other company. If, however, one of the objects of the original company was to secure such a contract and it was discussed and agreed at a meeting of directors that it should be secured, if possible, it would be a breach of fiduciary duties to engage in this enterprise for his own profit solely. It follows, therefore, that before Macfarlane personally can be held liable in damages on a charge of fraud, it must be shewn that the securing of a wood contract by the respondent company was known to him to be one of its objects. That depends on facts already outlined upon which there is conflict and in respect to which a finding must be made on proper evidence. I am not satisfied that a conclusion might safely be arrived at by an Appellate Court on this question of fact having regard only to the admissible evidence in the record and a new trial is necessary.

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McQUARRIE, J.A.: I agree with my brothers MARTIN and M. A. MACDONALD that there should be a new trial.

New trial ordered, Macdonald, C.J.B.C. and McPhillips, J.A. dissenting.

Solicitor for appellants: *E. J. Grant.*
Solicitor for respondent: *J. A. Campbell.*

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HARRIS INVESTMENTS LIMITED *ET AL.* v. SMITH.

Conflict of laws—Trust deed—Executed in British Columbia—Administration of trusts in State of Oregon—Delegation of authority by one trustee to the other to administer trusts—Breach of trust—Liability of both trustees.

On the 1st of February, 1927, one Langer executed a trust deed in Vancouver, B.C. in favour of the Lumbermen's Trust Company (later named Equitable Trust Company with head office in Portland, Oregon) and Robert E. Smith of Portland in trust to secure a bond issue of $650,000, and at the same time, as security for the bond issue, Langer conveyed to Smith in trust lands in Vancouver upon which the Orpheum Theatre and six suburban theatres were in the course of construction. On their completion the theatres were leased, and under the terms of the trust deed the monthly rentals were paid by the lessees into the Bank of Montreal at Vancouver to the credit of the Equitable Trust Company. From these moneys said company paid the bondholders and other payments in accordance with the terms of the trust deed until the 31st of May, 1932, when the Federal Court in Portland ordered the company to close its doors and transfer to the Commonwealth Trust and Title Company of Portland all trusts of which said company was trustee. Prior to this the Equitable Trust Company used sufficient moneys from what was paid to its credit by the lessees of the theatres to purchase $22,066.12 United States funds, being an investment that was not sanctioned by the trust deed. No part of the securities handed over to the Commonwealth Company were ear-marked as belonging to the trust herein, but were held in a separate general trust fund with other trust moneys. The trusts were administered by the Equitable Trust Company from the beginning, the defendant Smith

having previously by instrument in writing delegated his powers to his co-trustee, which he was entitled to do under the provisions of the trust deed, but the property held as security for the bondholders remained in his name until after the commencement of this action. On the 17th of October, 1931, the said Langer conveyed the properties upon which said theatres are situate to the plaintiff company, subject to the said leases and trust deed. On the 1st of August, 1932, interest on the bonds due and payable on that date and $12,000 of bonds that matured for payment were not paid. The plaintiff company recovered judgment against both trustees for breach of trust.

Held, on appeal, affirming the decision of MACDONALD, J. (MARTIN, J.A. dissenting), that the trustees were not given authority by the trust deed to invest in other securities. Article 3 thereof provides for the disposition of every dollar received, thus as a necessary *sequitur* precluding resort to other investments. It cannot be suggested that because the Equitable Trust Company may, by the laws of the State of Oregon, make certain investments in the conduct of its general business, it may after executing a contract providing that a different course should be followed, ignore its trusts. It follows that if investments *dehors* the contract were made and loss occurred the trustees are liable.

Held, further, that although the defendant Smith delegated his authority as a trustee to the Equitable Trust Company and instructed said company to administer the trusts, which he was authorized to do under article XVI., clause 2A of the trust deed, he is not relieved from responsibility if later, his co-trustee commits a breach of trust.

APPEAL by defendant Smith from the decision of MACDONALD, J. of the 30th of March, 1933, in an action for breach of trust. On the 1st of February, 1927, one Langer executed a trust deed in favour of the Lumbermen's Trust Company (later named Equitable Trust Company) and Robert E. Smith in trust to secure a bond issue of $650,000, of which $502,600 was outstanding at the commencement of this action. At the same time, in order to secure the bond issue, Langer conveyed to the defendant Smith in trust lands in Vancouver upon which the Orpheum Theatre and six suburban theatres were then constructed or were in the course of construction. The Orpheum Theatre was leased in May, 1926, at an annual rental of $70,000, and on the 27th of January, 1927, the six suburban theatres were leased at an annual rental of $50,000, both payable monthly. In October, 1931, Langer conveyed the lands upon which the theatres were situate to the plaintiff Harris Investments Limited, subject to the aforesaid leases and

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the conveyances to the trustees. The Equitable Trust Company had its head office in Portland, Oregon, and was not registered in British Columbia, and the defendant Smith lived in Portland. The defendant Smith only entered a defence, the Equitable Trust Company, although duly served, not submitting to the jurisdiction by entering an appearance. The bonds were serial bonds and interest was payable half-yearly on the 1st days of February and August in each year. Article 3 of the trust deed provided that all rentals be paid by the lessees into the Bank of Montreal in Vancouver to the credit of the trustees, and that the trustees set aside monthly one-sixth of the principal and interest falling due at the next six months maturity period, all monthly payments by the lessees of the theatres being paid to the credit of the Equitable Trust Company, and all payments were made by said company to the bondholders in accordance with the terms of the trust deed until the Federal Court in Portland ordered the company to close its doors on the 31st of May, 1932, and further ordered that all trusts of which said company was trustee be transferred to the Commonwealth Trust and Title Company of Portland. The plaintiffs claim that a large amount of the money paid by the lessees of the theatres was taken by the Equitable Trust Company to Portland and instead of keeping the money in the bank they invested it in certain trust securities and did not earmark it for this trust, but all their trust securities were intermingled, the result being that on the 1st of August, 1932, when a payment of principal and interest fell due in respect of the bonds, the Equitable Trust Company having in the meantime passed into the hands of a receiver, there was no money available to pay these sums. The Equitable Trust Company, it is claimed, was entitled to make these investments under the laws of the State of Oregon. The defendant Smith claims that when he resigned as president of the Equitable Trust Company in January, 1929, he took no further interest in the affairs of this trust, as he had previously delegated his powers to the Equitable Trust to act for him under the deed, relying upon a delegation authority in the deed, that he was fully entitled to exercise his rights of delegation and was not responsible for anything done by the Equitable Trust Company.

The appeal was argued at Victoria from the 6th to the 10th of July, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Burns, K.C., for appellant: The Equitable Trust Company had both a trust charter and a bank charter and under the laws of the State of Oregon it could invest in the existing securities. The evidence shews that in fact Smith was only a trustee for the purpose of holding the title to the land security under the bond issue, and he resigned as president of the Equitable Trust in January, 1929. We say he delegated his authority to the Equitable Trust as the Equitable Trust alone looked after and distributed all moneys coming in from the lessees, and when a receiver was appointed on December 18th, 1931, Smith knew nothing about it. We say that all investments by the Equitable Trust were rightly made under the Oregon law: see Halsbury's Laws of England, 2nd Ed., Vol. 6, pp. 263 to 268; *South African Breweries* v. *King* (1899), 68 L.J., Ch. 530 at pp. 532 and 534, and on appeal (1900), 69 L.J., Ch. 171; *Hamlyn & Co.* v. *Talisker Distillery* (1894), A.C. 202 at p. 212. The bonds were held in the States and were all sold in the States and the trust deed provided for payment of the Federal income tax in the United States and there was no provision for payment of a Canadian tax. Smith knew nothing of the receiving order on December 18th, 1931. There was no breach of trust. There was no prohibition to the Equitable Trust taking the money to Portland and dealing with it there and in fact that was the course of dealing to be assumed would be followed in the circumstances. After the stop order it made no difference whether the $22,000 (invested in securities) was in securities or cash. The whole circumstances are such that the defendant Smith is entitled to relief under section 88 of the Trustee Act. As to the judgment below, they cannot have a lien along with personal judgment: see Godefroi on Trusts, 6th Ed., 368; *In re Salmon, Priest* v. *Uppleby* (1889), 42 Ch. D. 351 at p. 368; *Head* v. *Gould* (1898), 67 L.J., Ch. 480; *In re Turner. Barker* v. *Ivimey* (1897), 1 Ch. 536 at p. 544.

Argument

Harold B. Robertson, K.C., for respondent: The Langer trust could have been paid before the stop order if the terms of

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the trust deed had been complied with. On the question of delegation, no power of delegation can change the trust deed or the duties set out in article 3 thereof which sets out what is to be done with the rentals. Assuming there is power of delegation it does not relieve the trustee from seeing that the trusts are properly carried out: see Halsbury's Laws of England, 2nd Ed., Vol 1, p. 226; *Speight* v. *Gaunt* (1883), 9 App. Cas. 1 at p. 5; *Equity Trustees, Etc., Co.* v. *Fenwick* (1905), V.L.R. 154; *Brice* v. *Stokes* (1805), 11 Ves. 319 at p. 327. If the British Columbia laws apply, the Trustee Act applies and section 13 sets out what trust funds may be invested in. The property was registered in Smith's name and he continued as a trustee: see *Trutch* v. *Lamprell* (1855), 20 Beav. 116 at p. 118; Godefroi on Trusts, 5th Ed., 209; *Rowland* v. *Witherden* (1851), 3 Mac. & G. 568 at p. 574; *Bostock* v. *Floyer* (1865), 35 Beav. 603; *Thompson* v. *Finch* (1856), 22 Beav. 316 at pp. 326-7. The British Columbia law applies: see *British South Africa Company* v. *De Beers Consolidated Mines, Limited* (1910), 1 Ch. 354 at p. 384; *South African Breweries* v. *King* (1900), 69 L.J., Ch. 171; *In re Missouri Steamship Company* (1889), 42 Ch. D. 321 at pp. 326 and 340; *Jacobs* v. *Credit Lyonnais* (1884), 12 Q.B.D. 589 at p. 600; *The Peninsular and Oriental Steam Navigation Company* v. *Shand* (1865), 3 Moore, P.C. (N.S.) 272 at p. 290; *Commercial Corporation Securities Ltd.* v. *Nichols* (1933), 1 W.W.R. 484 at p. 490. We are entitled to a lien on the securities in which the rents were invested: see Snell's Principles of Equity, 20th Ed., 177; *Mant* v. *Leith* (1852), 15 Beav. 524; *Harford* v. *Lloyd* (1855), 20 Beav. 310; *Scales* v. *Baker* (1859), 28 Beav. 91; *Francis* v. *Francis* (1854), 5 De G. M. & G. 108; *In re City Equitable Fire Insurance Co.* (1925), Ch. 407 at pp. 516-7. There was gross negligence here on the part of Smith: see *Giblin* v. *McMullen* (1868), L.R. 2 P.C. 317 at p. 337; *Beal* v. *South Devon Railway Co.* (1864), 3 H. & C. 337 at p. 341; *Trost* v. *Cook* (1920), 48 O.L.R. 278 at p. 283.

Argument

Burns, replied.

Cur. adv. vult.

3rd October, 1933.

MACDONALD, C.J.B.C.: The chief question raised in this case rests upon the conflict of laws. The contract is a deed to secure payment of a bond issue and the trustees under the deed reside abroad. The contract was made in this Province; the property mortgaged is situate in this Province; and the mortgagor was at the time of the entry into the contract a resident of this Province. The trustees were residents of the State of Oregon, one of the United States of America. There appears to be no difficulty about the law on the subject. The question is its application to the facts of this case. It seems to be well established that the Court is to ascertain the intention of the parties and to decide the case with reference to such intention. In Dicey's Conflict of Laws, 5th Ed., rule 161, subrule 3, the law and presumptions applicable to a case of this kind are set out. They do not differ from the decision in *Jacobs* v. *Credit Lyonnais* (1884), 12 Q.B.D. 589, where the law is fully considered. The deed of trust and the obligations arising out of it are to be considered having reference to all the circumstances of the case. Speaking generally, the bulk of the provisions are to be performed in British Columbia. It is also provided in the deed that in default of appointment in accordance with certain provisions of the deed a new trustee shall be appointed under the Trustee Act of British Columbia. The trustees it is true reside in Oregon but there is nothing in the deed to particularly indicate that Oregon law is to be resorted to by the trustees. The mortgagor is bound to apply certain rentals of the mortgaged premises by either himself or the lessees paying the sum into a British Columbia bank which is to be held by it as the agent of appellants. This money is to be used for the purposes of the trust and is to be distributed in the manner (largely clerical) provided in the deed. The terms of the deed and the other circumstances concerning it indicate that the responsibility for effecting these purposes rests almost entirely with the mortgagor and that the trustees' responsibilities are confined to the carrying out of its terms by paying interest coupons when presented and redeeming the bonds from time to time as occasion arises and as the deed provides. The trustees have no authority to purchase other securities with surplus moneys.

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This case is easily distinguishable in its facts from *Chatenay* v. *Brazilian Submarine Telegraph Company* (1891), 1 Q.B. 79, and *Gibbs & Sons* v. *Societe Industrielle et Commerciale des Metaux* (1890), 25 Q.B.D. 399, and is akin to *Lloyd* v. *Quibert* (1865), L.R. 1 Q.B. 115.

There are terms in the agreement enabling a trustee to resign his office and also enabling a trustee to delegate his powers to the other trustees but with these I do not think we are concerned in this action. They are governed by the terms of the deed, which as I understand the facts, have not been conformed to. In any case I think the power to delegate powers are confined to individual instances and do not permit of all the powers and duties of a trustee being delegated to his co-trustee equivalent to resignation. I agree with the learned trial judge that the case is governed by the law of British Columbia and that there is no warrant for saying that the parties intended otherwise nor is there any reason why part of the terms of the contract should be carried out according to the laws of British Columbia and part according to those of the State of Oregon. Had the deed contained a provision that the trustees might buy other securities, as they did, such as railway bonds, the case might be different, but no such authority was given to the trustees nor any of like import.

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The only question which gave me some doubt was the lien created on the $22,066.12. This, I understand, arises out of the purchase of the railway bonds. The cases of *Penn* v. *Lord Baltimore* (1750), 1 Ves. Sen. 444; White & Tudor's Leading Cases in Equity, 9th Ed., Vol. I., p. 638, and the *Marchioness of Huntly* v. *Gaskell* (1905), 2 Ch. 656 throw considerable light on this question. The subject-matter of the lien not being real estate it would appear to be a proper subject on which to impose a lien.

I think the appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A.: With all due respect for contrary opinion this appeal should be allowed, because primarily, and briefly, upon the evidence I can only take the view that the appellant Smith properly exercised the powers of delegation duly con-

ferred upon him by the instrument creating the trusts in question.

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

MACDONALD, J.A.: The trial judge in a lucid manner, though not dealing with all aspects of the case (*e.g.*, the question of delegation) outlined its essential features. While, on all the facts, he relieves appellant from the full penalty that might be imposed he finds—I think properly—that a breach of trust was committed.

We are really not concerned with a controversy as to what system of law prevails in the interpretation of the trust deed where, as here, the contract itself, with meticulous care, outlines the course to be followed by the trustees in carrying out the trust reposed in them. It cannot be suggested that because the Equitable Trust Company may by the laws of the State of Oregon make certain investments in the conduct of its general trust business it may, after executing a contract, providing that a different course should be followed, ignore its terms. In this respect it was in the same position as its co-trustee Smith. Article III. of the trust deed outlines the course to be followed in respect to rentals received. They were not embarrassed by lack of directions as to what should be done with any balances that might be on hand. Balances, not set aside for the various purposes therein outlined, were to be used in the purchase of certain bonds. They were not given authority to invest in other securities, however attractive, commingling these investments with others and securing for itself the benefit of any interest accruing. Article III. provides for the disposition of every dollar received thus as a necessary *sequitur* precluding resort to other investments. It follows that if investments *dehors* the contract were made and loss accrued the trustees are liable.

This, unless I entirely misapprehend the facts, is the simple situation disclosed by the record and it is not affected by the many features, to my mind irrelevant, introduced into the case. Nor are we concerned with the commercial vicissitudes of the Equitable Trust Company—the receiverships, etc. As trustee it was in the same position as its co-trustee Smith to apply

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moneys received in accordance with Article III. and that special trust undertaken was not affected, as was its general trust business, by the receivership or Court orders. The company had sufficient cash in hand when a receiver was appointed to meet maturing obligations under the trust.

The appellant Smith seeks to escape liability because two years after the trust deed was executed he signed the following document:

> IN THE MATTER OF ALL TRUSTS under bond or note issues in which I am now named personally as trustee, or in which, during my connection with the Lumbermen's Trust Company of Portland, Oregon, I shall be so named, I hereby authorize and instruct said Lumbermen's Trust Company to administer the trusts and care for all details in relation thereto.

and thereafter confined his activities to the physical examination of the properties yielding the trust funds for which he received payment. He did not resign as trustee—in fact three years afterwards when pressed to do so at the instance of the respondent he refused to resign—nor was he relieved of his trusteeship in any way authorized by the trust deed. It would be novel to suggest that where two trustees are appointed to carry out trusts in which third parties are concerned one of them may be relieved—apart from any term in the deed—from responsibility by authorizing the other to "administer the trusts and care for all details in relation thereto."

It is submitted however that the deed provides for delegation. The clause reads as follows:

> 2A. It is understood and agreed that the powers conferred upon the trustees hereunder shall be exercisable by either of the trustees acting alone, and in the event of either trustee being disqualified for any reason to act hereunder the other shall have all the powers herein granted to both trustees hereunder. Either trustee is hereby also authorized to delegate to the other trustee all or any of the powers conferred on it or him hereunder.

This is confined to the delegation of powers, not duties. Article XIII. enumerates the duties, powers and rights of the trustees. While one cannot be under a duty to do an act without power to perform it the terms are not synonymous. Many powers are outlined in the trust deed, also duties—but in addition "duties" are imposed by law. If the written delegation of authority by the words employed embrace more than "powers" to that extent it is innocuous. Powers only can be delegated.

That only means, for example, that after delegation it would be lawful for one trustee to perform acts which otherwise required joint action without in any way affecting the obligations of both to see that the trust was properly administered. Smith could not delegate the confidence reposed in him nor can he be exonerated if he leaves administration to his co-trustee and the latter commits a breach of trust. He could only be relieved by resignation or by removal under Article V., clause 2 in respect to acts after that event. Nor is it material that he was, possibly, only appointed to hold the conveyance of property in this Province, his co-trustee from lack of registration being unable to do so. He was a trustee on an equal footing with his co-trustee subject to the same duties and liabilities and wrongfully permitted the latter to invest moneys in opposition to the trust by reason of which loss occurred.

MACDONALD, J.A.

The plea that knowledge, acquired by one Robertson, on behalf of the respondent, as to the course pursued, amounted to ratification is not supported by the evidence. This submission could not be made in respect to the bondholders. I think too the part of the formal judgment objected to giving a lien on the proceedings of securities purchased with trust funds is not open to attack.

I would dismiss the appeal.

Appeal dismissed, Martin, J.A. dissenting.

Solicitor for appellant: *Knox Walkem.*
Solicitor for respondents: *A. H. Douglas.*

MCDONALD, J. (In Chambers)

1933

Dec. 18.

HUTCHINSON AND DOWDING v. BANK OF TORONTO.

Practice—Action against pledgee of broker—Particulars—Application for further and better—Statement of counsel—Effect.

HUTCHINSON v. BANK OF TORONTO

In an action against the pledgee of a broker, a paragraph of the statement of claim recited that the plaintiff deposited with the broker a share certificate in his name for 67 shares of Imperial Oil Limited and the broker orally agreed with the plaintiff that he would not sell or in any way deal with said shares without the consent of the plaintiff, or in the alternative without giving express notice to the plaintiff. On demand for further particulars as to the endorsement on the certificate, the plaintiff replied that the certificate could be seen in the hands of a certain solicitor.

Held, not to be a sufficient compliance with the demand and that the plaintiff should furnish a photostatic copy of the certificate.

In demand for further particulars of the agreement, counsel for the plaintiff stated the certificate was deposited under the oral agreement as set up in the statement of claim and nothing further was said.

Held, that the statement of counsel should be adopted, but on the trial he should not be permitted to offer evidence of any agreement or any particulars relating thereto other than as set up in the statement of claim.

Statement

APPLICATION for further and better particulars of a paragraph in the statement of claim. Heard by MCDONALD, J. in Chambers at Vancouver on the 17th of December, 1933.

W. B. Farris, K.C., for the application.
G. L. Fraser, contra.

18th December, 1933.

Judgment

MCDONALD, J.: Application by defendant, the Bank of Toronto, for an order that the plaintiffs deliver further and better particulars of paragraph 5 of the statement of claim, which paragraph reads as follows:

At or about the date of the employment of the said R. P. Clark & Company (Vancouver) Limited, as his broker the plaintiff Dowding deposited with the said R. P. Clark & Company (Vancouver) Limited a share certificate in his name for 67 shares of Imperial Oil Limited. The said R. P. Clark & Company (Vancouver) Limited thereupon orally agreed with the plaintiff Dowding that it would not sell or in any way deal with the said

shares without the consent of the plaintiff Dowding, or alternatively until after express notice had been given to the plaintiff Dowding.

The first demand is for better particulars as to the endorsement on said certificate. The plaintiffs in their affidavit of documents disclose the said certificate as having been in their possession and being now in the possession of a third party. Upon the demand for particulars being made plaintiffs replied that the certificate could be seen in the hands of Mr. *Buell,* a solicitor of this Court. I think that is not a sufficient compliance with the demand and that the plaintiffs should furnish a photostatic copy of such certificate.

As to the second demand, the defendant requires further particulars as to the agreement referred to. The defendant contends that the agreement as set up does not and cannot disclose the whole agreement alleged to have been made between the plaintiffs and R. P. Clark & Company. It is suggested, for instance, that the deposit must necessarily have been made either by way of loan or for safe-keeping or as collateral security or in some such manner.

Judgment

Counsel for the plaintiff replies:

No such agreement was made as is suggested. The certificate was deposited under the oral agreement set up in the statement of claim; nothing further was said; nothing else was agreed. It is for the Court to say on the trial what legal results flow from that agreement.

When counsel makes a statement such as this I feel bound to accept that statement and therefore I cannot order further particulars which cannot be given. It would seem to me, however, notwithstanding what has been said in some of the cases, which are not exactly similar to the present, that counsel, having made on this argument the statement which he has made and upon which I rely, he ought not at the trial to be permitted to offer evidence of any agreement or of any particulars relating thereto other than as set up in the statement of claim. Success having been divided on this application the costs will be in the cause.

Order accordingly.

MCDONALD, J.

1934

March 19.

REX v. BERU. REX v. DITTO. REX v. SOHAN SINGH.

Criminal law—In possession of morphine—Conviction—Habeas corpus with certiorari in aid—Application dismissed on preliminary objection—Costs—Can. Stats. 1929, Cap. 49, Sec. 4 (d).

REX v. BERU.

REX v. DITTO.

REX v. SOHAN SINGH

The accused were convicted of unlawfully having morphine in their possession, contrary to The Opium and Narcotic Drug Act, 1929. An application for a writ of *habeas corpus* with *certiorari* in aid was dismissed on the preliminary objection that the affidavit of the applicant did not "verify" the copy of the warrant of commitment. It was held that the Crown was entitled to the costs of the application.

Statement

THE accused were convicted of unlawfully having morphine in their possession. An application for a writ of *habeas corpus* with *certiorari* in aid was dismissed on the preliminary objection that in each case the affidavit of the applicant did not "verify" the copy of the warrant of commitment. The Crown applied for costs. Heard by MCDONALD, J. at Vancouver on the 8th of March, 1934.

Argument

Henderson, for the accused: When the application is dismissed on a technical objection costs should not be imposed: see *The Queen* v. *Mortson* (1867), 27 U.C.Q.B. 132; *Rex* v. *Bennett* (1902), 5 Can. C.C. 456; *Rex* v. *Rondeau* (1903), 9 Can. C.C. 523; *Reg.* v. *Banks* (1895), 1 Can. C.C. 370.

Remnant, for the Crown, referred to *Rex* v. *Ferguson* (1916), 26 Can. C.C. 220 and *In re Narain Singh* (1908), 13 B.C. 477.

Judgment

MCDONALD, J.: In these cases the Crown asks for costs against the unsuccessful applicants for a writ of *certiorari*. It seems clear from the decision in *Rex* v. *Ferguson* (1916), 26 Can. C.C. 220, in which MACDONALD, J. followed *In re Narain Singh* (1908), 13 B.C. 477, that the settled practice in this Province is to allow costs in such cases.

The order will go accordingly.

Order accordingly.

REX v. GAUTSCHI.

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1934

Jan. 9.

REX v. GAUTSCHI

Minimum Wage Act—Employment on commission basis—"Employer" and "employee"—Definition—R.S.B.C. 1924, Cap. 173.

By section 2 of the Minimum Wage Act "employer" includes every person, firm or corporation, agent, manager, representative, contractor, sub-contractor or principal or other person having control or direction of any employee, in any occupation, trade or industry or responsible directly or indirectly for the wage of another.

"Employee" includes every female person who is in receipt of or entitled to any compensation for labour or services performed for any employer.

The accused conducted a hairdressing parlour in Vancouver at which employees were engaged admittedly subject to the minimum wage for women. In the adjoining premises he conducted an annex in which he supplied full equipment, power and supplies, advertised it as an annex to his main establishment and claimed to permit girls to work therein on their own account upon the basis of division of earnings, 30 per cent. to the girls, 70 per cent. to himself. The Minimum Wage Board fixed the compensation payable to such persons at $14.25 per week and the amount of the complainant's earnings was less than the average of that sum. The evidence established that the complainant could come and go as she pleased, that no control or direction was had over her by the accused's manager, that she left without notice, that when business became slack the girls working in the annex divided the work by mutual agreement concurred in by the accused's manager. The accused was convicted for unlawfully employing an employee for whom a minimum wage was then fixed under the Minimum Wage Act for less than the minimum wage so fixed. On appeal to the County Court the conviction was quashed.

Held, on appeal, reversing the decision of HOWAY, Co. J., and restoring the conviction, that the owner of the premises in receipt of 70 per cent. of the income was in full "control" in the sense the word is used in the Act and that there was also "direction" by him and by his supervisor. The 30 per cent. too was compensation for labour performed. "Wages" as defined includes "compensation for labour or services, measured by time, piece or otherwise." The Act therefore applies.

APPEAL by the Crown from the decision of HOWAY, Co. J. of the 26th of June, 1933, quashing the conviction of accused on a charge of unlawfully employing one Dorothy Martin, an employee for whom a minimum wage was fixed under the Minimum Wage Act, for less than the minimum wage so fixed. The accused had a hairdressing establishment on Granville

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Statement

Street in Vancouver to which was attached an annex in which a number of girls worked under an assistant. Miss Martin, a qualified hairdresser, was employed on a basis of being paid 30 per cent. of the amount charged for work done with the employer's machine and she received 10 per cent. more for all work done on her own machine. She worked in the annex from October 15th, 1932, until February 28th, 1933, when she voluntarily left the employment. She received in all $178 for her services. The conviction was quashed on the ground that the evidence did not shew such control or direction as is essential to the establishment of employer and employee as defined by the statute.

The appeal was argued at Vancouver on the 11th and 12th of October, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Argument

Orr, for appellant: Accused had a hairdressing establishment with an annex attached in which he employed girls qualified to do the work, and paid them a 30 per cent. commission on the work actually done. We say this commission did not meet the amount allowed under the Minimum Wage Act. The learned judge below said we were only entitled to a proportionate part of the wages when they do not work the whole period allowed. Employer and employee are defined in section 1 of the Act. An employer is one in control or direction of an employee and responsible for wages. This applies to accused. The girl got $178, when under the Act she should have received at least $249. The work she did is covered by "occupation, industry or trade": see *New Plymouth Borough Council* v. *Taranaki Electric-Power Board* (1933), A.C. 680; 102 L.J., P.C. 212; 3 W.W.R. 126 at p. 128.

Lucas, K.C., for respondent: The appeal must fail: (1) The relationship of employer and employee has not been established. The evidence establishes the *status* of an independent operator. No control was agreed to or exercised and no direction was exercised as to the method in which the complainant should perform her work. (2) The Minimum Wage Board has not purported to deal with piece-work or contract work on any class of employment measured otherwise than by time and has established the

minimum time rate of 48 hours a week. The evidence established that no computation of time was made by anyone. (3) There was no agreement of employment as required by section 13 of the Minimum Wage Act. This is a prerequisite of a penalty being imposed. (4) There must have been a pre-existing contract of employment and three tests are applicable, namely: (a) A fixed period of time or fixed hours of work; (b) a fixed or definite rate of wages or compensation; (c) an obligation to perform work. Each of these tests, being applied to the situation here, are answered in the negative. Therefore no employment was established.

Orr, replied.

Cur. adv. vult.

9th January, 1934.

MACDONALD, C.J.B.C.: The respondent was the proprietor of a hairdressing establishment known as Maison Henri Ltd., situate in Vancouver. The complainant Miss Martin was a graduate of a hairdressing school. The defendant opened what is called an annex to his regular hairdressing establishment but which he claims was entirely independent thereof. His object in doing this, he said, was to provide work for girls, whose business was hairdressing, out of employment. He says that such girls were coming to him almost every day asking for work and that by reason of the depression he was unable to employ them, yet being sympathetic of their condition he determined to open this annex and allow them to carry on business in it for their own purposes. He paid the rent of the annex and supplied the equipment including hairdressing toilet articles, etc. He also put in charge of the annex a manager whose salary he paid. He issued a handbill on which was printed:

> Maison Henri Ltd. Annex. We have opened a new Department. Permanent wave $1.25. Finger Wave .25. Marcel .25. Shampoo .25. Manicure .25. All Licensed and Experienced Operators. Not a school. No students. 556 Granville Street. Same entrance as Thos. Cook and Son, Ltd.

The complainant received from a boy on the street a copy of this handbill and applied for work at the annex. She was given a "wave" to do and thereafter was introduced to the respondent and made her arrangements with him. He told her

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that she should have 30 per cent. or if she supplied her own machine 40 per cent. of her gross takings as her compensation, and that he should have the balance to recoup him for the rent and other services which he was to perform. She was therefore put to work in the annex and continued there from about the middle of October, 1932, until about the end of February when she voluntarily left without notice.

The question is was the respondent her employer as defined by the Minimum Wage Act for women and was, under the circumstances, the respondent liable to prosecution for a breach of that Act, the Minimum Wage Board having fixed the compensation payable to such a person at $14.25 per week? The amount of the complainant's earnings during the period aforesaid was less than an average of that sum. The evidence is (including that of the complainant) that she could go and come as she pleased and she left without notice and that no control or direction was had over her by the manager Mrs. Fellowes. She says that when business became slack the girls working there agreed to divide themselves into two groups, one working full time and alternately half time in each group. This was arranged by the girls themselves and concurred in by Mrs. Fellowes. Were these girls and particularly the complainant servants of the respondent within the meaning of the said Act? I can see no difference as far as this case is concerned between the ordinary definition of master and servant and the definition given in chapter 1 of the Act. " 'Employee' includes every female person who is in receipt of or entitled to any compensation for labour or services performed for any employer" and "employer" is defined as the "person . . . having control or direction of any employee"; and "wages" is defined as including "any compensation for labour or services, measured by time, piece, or otherwise."

MACDONALD, C.J.B.C.

In *Performing Right Society, Ld.* v. *Mitchell and Booker (Palais de Danse) Ld.* (1924), 1 K.B. 762 the question of who is a servant was very fully discussed by Mr. Justice McCardie. He quotes from Pollock on Torts, 12th Ed., pp. 79-80, the following:

> The relation of master and servant exists only between persons of whom the one has the order and control of the work done by the other.

and from Salmond's Law of Torts, 6th Ed., p. 96, he quotes this:

> A servant is an agent who works under the supervision and direction of his employer; an independent contractor is one who is his own master; . . .

He then makes reference to Archbold's Criminal Pleading, 26th Ed., pp. 601, 612, and to the judgment in *Reg.* v. *Negus* (1873), L.R. 2 C.C. 34, 37, wherein Blackburn, J. said:

> The test is very much this, *viz.*, whether the person charged [that is, as a clerk or servant] is under the control and bound to obey the orders of his master. He may be so without being bound to devote his whole time to this service; but if bound to devote his whole time to it, that would be very strong evidence of his being under control.

Mr. Justice McCardie held in the case before him that the persons in question were the servants of the defendant because the written agreement of contract made it clear to him that they were in a great many respects subject to his control and direction.

The present case, while an unusual one, seems to me to resolve itself into this. The annex was the establishment of the respondent; it was controlled by one of his employees, Mrs. Fellowes; he advertised to the world that it was carried on in connection with his regular establishment—Maison Henri Ltd.; he authorized the complainant to work in the annex and promised her a percentage of her gross earnings while he retained the balance. It is true that there was very little interference with her work by Mrs. Fellowes. There were these directions, however, exercised, *viz.*, the fees to be charged were fixed by the handbill. There seemed to have been no occasion for exercising control or giving directions during her employment. She worked there for the period mentioned above and did her work not only for customers of her own but for others who came to the shop for service. The question involved in this appeal is one of fact or of mixed fact and law. The facts have been found by the learned magistrate in the appellant's favour and while the learned judge appealed from took a different view of them yet I am satisfied that his view is incorrect. He seems to have thought that a wage based upon a hiring not limited to periods of time is inapplicable to the facts of this case. I gather from his reasons that he thought the board should have fixed the rate

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on the basis of compensation for piece-work although he appears to question the practicability of that manner of fixing compensation. I see no difficulty, however, in harmonizing the wages consisting of a percentage of her earnings with the method adopted by the board. I look upon the 30 per cent. or 40 per cent. as it was in the complainant's case as her wages. She earned during the whole period a sum of money which was less than the sum which the board considered the minimum wage should be and the only practical way of fixing the minimum wage was to name a minimum for a period as they did and if the wage paid failed to conform to that standard but fell short of it, the employer would be liable for breach of the Act. I think, therefore, the learned magistrate came to the right conclusion and I would set aside the judgment of the learned County Court judge and thus allow the appeal.

MACDONALD, C.J.B.C.

MARTIN, J.A.: I agree that this appeal should be allowed, because in brief, and upon the particular facts, which are very complicated, the unusual arrangement between the complainant and the respondent brings the former within the definition of "employee" in section 2 of the Minimum Wage Act, Cap. 173, R.S.B.C. 1924, and the latter within that of "employer" in the same section, and therefore he was rightly convicted under section 13 of that statute, for employing the complainant at "less than the minimum wage."

MARTIN, J.A.

MCPHILLIPS, J.A.: I concur in the judgment of my learned brother the Chief Justice and would allow the appeal, reverse the judgment of the learned County Court judge and restore the conviction of the learned magistrate.

MCPHILLIPS, J.A.

MACDONALD, J.A.: The respondent was convicted under the Minimum Wage Act, (R.S.B.C. 1924, Cap. 173) for unlawfully employing Dorothy Martin, a hairdresser, for less than the minimum wage fixed by a valid order of the board at $14.25 per week. The respondent's submission is that because of the special conditions under which Miss Martin worked she was not an "employee" and therefore not subject to the Act. He conducts a hairdressing parlour in Vancouver in which

MACDONALD, J.A.

employees are engaged admittedly subject to the Act. In 1932 he divided the premises and constructed an annex with a separate entrance from the street. A superintendent was placed in charge of this annex and she, on respondent's direction, gave employment to Miss Martin and others on a commission basis. They received 30 per cent. of the receipts for all work done by them, the respondent taking 70 per cent. He paid the rent and supplied materials including machines. Miss Martin however had her own machine and received an allowance for it. As it is contended that on these facts the respondent was not "an employer" as defined by the Act, and Miss Martin not an "employee" but an independent contractor it is necessary to refer to the Act and to the conditions of employment in more detail. By section 2

"Employer" includes every person, firm, or corporation, agent, manager, representative, contractor, sub-contractor, or principal, or other persons having control or direction of any employee in any occupation, trade, or industry, or responsible directly or indirectly for the wage of another.

and

"Employee" includes every female person who is in receipt of or entitled to any compensation for labour or services performed for any employer.

For the purposes of this Act one is to be considered an "employer" who has "control or direction of any employee." The word "employee" too is used in a comprehensive sense to include one entitled to "any compensation for labour or services performed for any "employer" in the sense in which the latter word is used.

Did respondent personally or through his superintendent "direct or control" the complainant, *i.e.*, check, guide, direct or supervise with authority? If either aspect is present, *viz.*, control or direction, respondent must be treated as an "employer."

As His Honour Judge HOWAY found that "the evidence does not shew that control or direction which is essential under the Act" we should before reversing it find evidence of "control or direction" from the respondent's case or from undisputed facts. Respondent controlled as to remuneration. He also said "we employed about 20 or 21 girls" although I would not place undue emphasis on the word "employed" as used by him. His superintendent assigned customers in the annex to the different hairdressers including the complainant unless the customer

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expressed a preference. That was direction. The respondent occasionally called girls from the annex to the main establishment when extra busy there where they worked on the same percentage basis, asking first "if they wanted to go." That may not be full "control" but it is to a limited extent "direction." He "controlled" the prices to be charged for hairdressing in the annex. It was a place where cheaper service was given at his direction. He exercised the right of dismissal: at all events told two girls that "they were not needed in the place any more." If they did bad work he would say: "Your work is not satisfactory and we don't need you any more, you don't need to come back any more." That was exercising control. If we turn to the evidence of appellant's witnesses there was direction and control in other details, but I am satisfied that it is established from the evidence referred to. There is no doubt that the owner of the premises, in receipt of 70 per cent. of the income was in full "control" in the sense the word is used in the Act and that there was also "direction" by him and by his supervisor. The 30 per cent. too was "compensation" for labour performed. "Wages" as defined includes "compensation for labour or services, measured by time, piece or otherwise" (section 2). I have no doubt therefore that the Act applies. It is drawn to prevent evasion by resorting to unusual methods of employment. It is designed also to ensure a minimum or living wage.

MACDONALD, J.A.

The point arises however—did appellant prove that respondent failed to pay Miss Martin $14.25 for any week during the employment? That was a *sine qua non* to the imposition of a penalty. It ought to be a simple matter to prove receipt of less than $14.25 in one selected week yet no attempt was made to do so in an explicit and satisfactory manner. While, however, criticizing the method of proof I am satisfied the evidence does disclose a breach of the Act on this heading: in fact there can be no reasonable doubt on the point.

I would allow the appeal.

MCQUARRIE, J.A.

MCQUARRIE, J.A.: With all deference I cannot agree with the conclusion of the learned County Court judge that the transaction disclosed by the evidence is not one coming within the

terms of the statute. I am of opinion that the Act is wide enough in its provisions to prohibit an arrangement such as we have here except under the penalty therein prescribed.

I would allow the appeal.

Appeal allowed.

Solicitor for appellant: *G. W. Scott.*

Solicitors for respondent: *Lucas & Lucas.*

ROBERTSON v. VIVIAN AND VIVIAN GAS ENGINE WORKS.

Damages — Illegal seizure of engine in boat — Loss of season's fishing— Return of engine—Measure of damages.

R. and T. agreed to build a boat for fishing and trapping. When partially built they purchased a gas-engine from the defendants under a conditional sale agreement for $500, and paid $200 at the time of the sale. The engine was installed in the boat but before its completion, T., owing to lack of funds, said he would have no more to do with it and he left for Vancouver, having paid $200 towards the expenses of building the boat up to that time. R. finished the boat in 1929 and used it for trapping and fishing until February, 1933, having in the meantime paid the instalments on the engine, the last payment being made in March, 1932. In February, 1933, the defendants, through their bailiff, seized the engine under the conditional sale agreement, brought it to Vancouver and four days later delivered it to T. upon T. paying the balance the defendants alleged was due. In June following the defendants discovered their book-keeper had made a mistake and that the engine had been paid for in full by R. prior to the seizure. In an action for damages the plaintiff recovered $450 for loss of use of the engine and for return of the engine, or in lieu thereof its value fixed at $125.

Held, on appeal, reversing the decision of LENNOX, Co. J. in part (*per* MARTIN, MACDONALD and MCQUARRIE, JJ.A.), that as the plaintiff obtained ample damages in the award of $450 for being deprived of the use and possession of the engine for the whole of one season, he was only entitled on the evidence before the Court to its possession for said "current season," the subsequent situation not being in issue before the Court.

Per MACDONALD, C.J.B.C.: That the appeal should be dismissed.

Per MCPHILLIPS, J.A.: That the appeal should be allowed.

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1934

March 6.

ROBERTSON v. VIVIAN

Statement

APPEAL by defendants from the decision of LENNOX, Co. J. of the 17th of November, 1933, in an action for the return of a gasoline-engine improperly seized and for damages for loss as a result of the seizure, in being unable to fish during the fishing reason of 1933. The plaintiff and one Thompson agreed to build a boat for fishing and trapping in 1927, and when the boat was partly built at Quatsino they purchased a gas-engine from the defendants under a conditional sale agreement signed by both of them on November 15th, 1927, the purchase price being $500 of which $200 was paid at the time of the sale. The engine was installed in the boat but before the boat was finished Thompson said he had no more money and that he would have no more to do with the boat and he left for Vancouver. Thompson paid $200 towards the boat and the engine and the plaintiff paid the balance of the cost being about $800. The boat was completed in 1929 and it was used by the plaintiff for fishing and trapping until February, 1933. The plaintiff was late in his payments on the engine but eventually paid the last payment about the end of March, 1932. On February 24th, 1933, the defendants, through their bailiff, seized the gas-engine under the conditional sale agreement and it was taken to Vancouver. Three or four days later the engine was handed over to Thompson (former partner of the plaintiff) who paid the defendants the balance they alleged was due under the conditional sale agreement. In June following the defendants' book-keeper found that a former book-keeper had made a mistake in his entries and that the plaintiff had paid for the engine in full prior to the seizure. They endeavoured to get the engine back from Thompson but he refused to return it, claiming he had an interest in it prior to the seizure and was going to hold it. The defendants, on filing their dispute note, paid into Court with a denial of liability the sum of $75 in satisfaction of the whole of the plaintiff's claim and $6.75 for costs. The plaintiff recovered judgment for $450 damages and the return of the engine or in lieu thereof its value fixed at $125.

The appeal was argued at Victoria on the 7th and 8th of February, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Manson, K.C., for appellants: The plaintiff and Thompson were admittedly partners and the plaintiff had no right to bring this action alone. The case referred to by the learned trial judge, *Bleaden* v. *Hancock* (1829), 4 Car. & P. 152, is not in point. On the definition of partnership see Pollock on Partnership, 12th Ed., 4. Letters were written by the defendants to the plaintiff in regard to the alleged balance due, but he never answered them. That a partnership existed see 6 C.E.D. 488; *Gilmour* v. *Griffis* (1904), 7 Terr. L.R. 225. The learned judge said that Thompson withdrew but there was no dissolution: see *Lane* v. *Taylor* (1866), 5 N.S.W.S.C.R. (L.) 84. The partnership connection still exists and there is non-joinder of parties: see *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504 at pp. 517-8; *Hoodless* v. *Smith* (1912), 7 D.L.R. 280 at p. 281; *Vipond* v. *Furness, Withy & Co.* (1916), 54 S.C.R. 521; *Harrison* v. *Bevington* (1838), 8 Car. & P. 708; *Graham* v. *Robertson* (1788), 2 Term Rep. 282; *Martin* v. *Whitney* (1908), 69 Atl. 888 at p. 889; *Sindelar* v. *Walker* (1891), 27 N.E. 59; *Midland Oil Co.* v. *Moore* (1924), 2 F. (2d) 34 at p. 36; *Reed* v. *Gould* (1895), 63 N.W. 415 at p. 416. There was no motion to amend and parties cannot now be added: see *Hawden* v. *Yorkshire Miners' Association* (1903), 1 K.B. 308 at p. 341.

Argument

Wismer, for respondent: The plaintiff heard nothing of Thompson for two years prior to the seizure. We submit there never was a partnership between Robertson and Thompson; he was merely a co-owner in part. In determining the existence of a partnership regard must be had to the intention of the parties from the whole facts: see Lindley on Partnership, 9th Ed., pp. 26 and 30. Thompson quit and said he would have nothing more to do with the boat. Common ownership does not create a partnership. Thompson had merely a small interest in the boat and engine when he left: see Pollock on Partnership, 12th Ed., p. 5; Salmond on Torts, 7th Ed., pp. 105-6 and 419; Bullen & Leake's Precedents of Pleadings, 8th Ed., pp. 18 and 24; *Cullen* v. *Knowles* (1898), 2 Q.B. 380; *In re Toper* (1920), 89 L.J., K.B. 477; Halsbury's Laws of England, Vol. 27, p. 869, sec. 1532. The plaintiff was in sole possession of the boat and had a right to sue. The fishing season started in

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the middle of February and continued to the end of October. Thompson in fact made Robertson a bailee of what interest he had in the boat: see *Bleaden* v. *Hancock* (1829), 4 Car. & P. 152. The facts shew there was a dissolution of any partnership when Thompson left in 1928: see Lindley on Partnership, 9th Ed., 677. The defendants did not act reasonably, they did not take care to find out as to the final payment being made and did not discover their error for three months. The damages found by the learned judge below should be upheld: see *Williams* v. *Currie* (1845), 1 C.B. 841; 135 E.R. 774; *Nagy* v. *Venne* (1916), 34 W.L.R. 413.

Argument

Manson, in reply, referred to *Vedder* v. *Chadsey* (1884), 1 B.C. (Pt. 2) 76; *Performing Right Society, Ld.* v. *London Theatre of Varieties, Ld.* (1924), A.C. 1 at p. 20; Halsbury's Laws of England, Vol. 22, p. 393, sec. 797.

Cur. adv. vult.

6th March, 1934.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: This is an appeal from LENNOX, Co. J. of the County Court of Vancouver. I would dismiss the appeal.

The plaintiff (respondent) and Thompson were either partners in the engine or joint owners of it originally. The parties had apparently made an arrangement to build a fishing-boat, equip it with an engine and go fishing for profit. They bought the engine from the defendants (appellants). It was a new engine and they paid $200 cash on it and gave a conditional sale agreement for the balance. After Thompson had left Quatsino and the engine had been installed in the boat the plaintiff met him in Vancouver and apparently asked him to go back and carry out the arrangements with him. Plaintiff says Thompson's answer was:

> I don't want to go fishing and I don't want to have anything to do with that boat nor with you either.

Thompson does not specifically deny the words above quoted and at the end of his evidence he said this:

> Well, the other two, I wrote and told him that seeing he had the boat for two or three years and used it, it is up to him to pay the balance.

This left the plaintiff in full possession. Accepting the

plaintiff's statement of what Thompson said to him as set out above, I think that that put an end to whatever arrangements they had together whether a partnership or a joint interest at least as to possession of the boat and it was so held by the learned trial judge. The plaintiff paid the balance due on the engine of $300, but by a mistake of the defendants in their book-keeping the defendants thought there had been default in payment and sent their bailiff to Quatsino to seize the engine which he did after the plaintiff had explained to him that it had been paid for in full. The bailiff took the engine out of the boat and carried it down to Vancouver. The defendants then discovered their mistake and instead of returning the engine to Quatsino and installing it in the boat where they found it they gave it over to Thompson who claimed some sort of interest in it. The plaintiff therefore sued, when the learned judge found the fishing partnership non-existent. He awarded the plaintiff $450 for the loss of the fishing season, and the return of the engine and if the engine were not returned an additional sum of $125 as further damages. There is no finding by the judge of a partnership. He found that if there was such a partnership or if there was joint ownership, Thompson had withdrawn from it. Thompson had paid only $100 on the engine when it was bought, as did the plaintiff. The price was $500. The plaintiff paid the balance of $300. The learned trial judge says:

MACDONALD, C.J.B.C.

> In face of these facts, however, if I were called on to decide that question I would find that Thompson had abandoned his claim to an interest in the engine as such. . . . Robertson was personally damnified by the defendants' actions. He had the right of user and enjoyment of the goods.

I see no reason to disagree.

The learned trial judge finds that a fair amount of damages to allow would be $450, along with the return of the engine, which later he fixed at $125. I do not know why so small a sum was awarded, when it cost $500, but I would not interfere with this finding.

The conduct of the defendants cannot well be defended. They not only made a mistake in their books, but when they sent their bailiff up to seize the engine he ignored the plaintiff's statement that the price had been paid in full which he could have verified by wire. When the defendants discovered their mistake instead

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of returning the engine to the plaintiff and installing it in the boat at Quatsino they handed it over to Thompson without any proof of his right to it. I do not understand why the value of the engine was put at $125. It was practically new when seized and only a short time before had been sold by the defendants for $500, but I do not question the judgment on this account. The recoupment for the loss of the season's fishing is not recoupment for the loss of the engine. Plaintiff is at least entitled to the same right as a bailee for loss of his bailment when taken by a trespasser.

MARTIN, J.A.: This is an action to recover damages for the wrongful seizure and detention of a gasoline-engine used in a fishing-boat, and judgment was entered for $450 damages upon plaintiff's claim for "$500 for his loss as a result of being unable to fish during the current season," and $125 on the claim for the "return of the said gas-engine or its value."

The case is a complicated one and the evidence on both sides obscure or wanting in certain essentials, and it is impossible to do full justice to all concerned because upon the record as it now stands one Thompson, who was a joint purchaser with the plaintiff of the engine from the defendants and must, upon the unsatisfactory evidence, be still regarded as a co-owner thereof, was not made a party to the proceedings as he should have been and no application was made below or here to do so.

MARTIN, J.A.

Dealing, then, with the matter as may best be done from such a premise, and after carefully considering all its aspects, the best conclusion I can arrive at is that the damages for $450 should be allowed to stand as a complete satisfaction of the plaintiff's present claims therefor, and though there is not a little to be said in favour of the appellants' counsel's submission that they are excessive, yet they are not so to an extent which would justify our interference in view of the "difficult task" created by the circumstances—*cf.* the recent decision of the Supreme Court in *Peterson* v. *McIntosh* (1934), 1 D.L.R. 289.

But the award of $125 for the value of the engine cannot be supported because it was returned to the co-owner Thompson, after the unfortunate seizure made *bona fide* under a mistake of non-payment, and the rights between the two owners could

only have been determined if they were parties, as aforesaid, and even though the plaintiff was entitled to the exclusive possession of the engine during the "current" fishing season, yet he has obtained ample damages in said award of $450 for being deprived by defendants of its use and possession for the whole of that season, and therefore he can get no more merely because the same persons kept it from him during that season for any other reason or because they mistakenly and *bona fide* delivered it to his co-owner, which act, however, did not increase the wrong done to him because he at most was only entitled upon the evidence now before us to its possession for said "current season," the subsequent situation is not in issue in this present question.

It follows that the appeal should be allowed and the damages reduced to $450.

McPHILLIPS, J.A.: This appeal calls for the consideration of an alleged cause of action as set forth in the plaint the relevant paragraphs being as follow:

4. On the 15th day of November, A.D. 1927, the plaintiff together with one Alex. Thompson purchased, from the defendants, a six-horse power gasoline-engine at and for the sum of Five hundred dollars ($500), paying therefor the sum of Two hundred dollars ($200) in cash and a conditional sale agreement for the balance to be paid as set out in the sale agreement.

5. The defendants were paid the balance of the moneys owing under the said agreement and the plaintiff received a receipt in full of all claims together with the original note endorsed as paid in full.

6. On or about the 24th day of February, A.D. 1933, the defendants caused to be seized, by their bailiff under the conditional sale agreement, the said gas-engine which was removed from the plaintiff's boat and returned to the defendants thereby depriving the plaintiff of the use of the said engine and the gas-boat in which it was installed.

7. As a result of the seizure of the said engine the plaintiff has been prevented from carrying on his usual occupation of fishing and has lost practically a whole season's fishing which, in the ordinary course, would have netted him approximately Five hundred dollars ($500).

8. The gas-boat from which the said engine was removed by the defendants has been idle and has thereby deteriorated causing loss to the plaintiff.

9. WHEREFORE THE PLAINTIFF CLAIMS:

(a) Return of the said gas-engine or in lieu thereof, its value. (b) Damages in the sum of $500 for his loss as a result of being unable to fish during the current season. (c) Damages for loss through deterioration of his gas-boat. (d) Costs of this action.

It will be seen that the gas-engine was purchased by the

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plaintiff (respondent) associated with one Alex. Thompson; in fact the purchasers were carrying on business in partnership and the evidence is that there was no dissolution of partnership and no notice of dissolution. The business of the partnership was one of fishing and the engine in question was installed in a fishing-boat. Now the attempt here is on the part of the plaintiff to arrogate to himself the property in the engine and bring an action for the unlawful seizure thereof which arose really from misadventure as all the moneys were paid in respect of the purchase but the books of the defendants—appellants—were in error and failed to shew the final payment. No evidence can be said to have been adduced to establish that the respondent was entitled to bring the action being only one member of a partnership and no dissolution shewn. I would refer to what Earl Carins, L.C. said in *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504, at p. 518:

> There are various ways of dissolving a partnership—effluxion of time, the death of one partner, the bankruptcy of one, which operates like death, or, as in this instance, a dry, naked agreement that the partnership shall be dissolved. In no one of those cases can it be said that to all intents and purposes the partnership is dissolved, for the connection still remains until the affairs are wound up.

MCPHILLIPS, J.A.

Then even apart from the partnership, undoubtedly, Alex. Thompson was, and still is, a co-owner with the plaintiff and these two grounds as to the proper parties not being before the Court as being necessary parties were not remedied. No application was made for amendment or the adding of Alex. Thompson as plaintiff or defendant. Now this, in my opinion, is a fatal objection alone and disentitles the plaintiff to succeed. As to the seizure itself it was a right the appellants had under the conditional sale agreement covering the sale of the engine, but as it turned out payment had been made in full. Seizure, however, did take place and the appellants took the engine out of the boat and had possession of it for three or four days and after the seizure the appellants got in touch with Alex. Thompson, the co-owner with the plaintiff of the engine, and I think it well to call attention to the evidence of the book-keeper of the appellants given in the action: [after setting out the evidence at length the learned judge continued].

It is to be noted that the learned counsel for the respondent

said "Malice does not enter into this case at all." Therefore it was not a case for exemplary or vindictive damages.

In other words, compensation not restitution is generally the proper test (*Wednesbury Corporation* v. *Lodge Holes Colliery Co.* (1906), 76 L.J., K.B. 68; (1907), 1 K.B. 78. Here we have it conceded that there was no "malice" as stated by counsel for the respondent in the Court below and the engine was only withheld for three or four days and Alex. Thompson, one of the co-owners, takes delivery of the engine from the appellants and when the appellants were willing to return the engine and install it in the boat, Thompson, we have seen, said that he was not going to give up the engine, that he had an interest in it and he was going to hold it. As I read the evidence the respondent would not appear to have intended to go fishing that season and had made no move in that direction at all—he only seized upon what had transpired to make out a case of damages in the way of deprivation of being able to use the boat that season. The appellants did not prevent that—they were willing to replace the engine in the boat but the co-owner Thompson would not have it. The appellants rightly in law delivered the engine to one of the co-owners and it was his, Thompson's, action that prevented the engine being put back in the boat, not the fault of the appellants. The respondent should have gone to Thompson and fought the question out with him. Any damages sustained other than trifling were not consequent upon the taking of the engine withheld for only three or four days and thereafter held by the co-owner Thompson. In my reading of the evidence everything points to lack of good faith on the part of the respondent. The happening is seized upon to compel the appellants to pay to him profits upon fishing which he never intended to embark upon but decided that upon the facts and circumstances to visit upon the appellants the alleged profits he would have made on a fishing venture that he never intended going upon. If he really meant to embark upon it, why did he not see to it that the engine was again installed in the boat, as the appellants were ready and willing to do but were prevented by the co-owner Thompson? But that misfortune was the respondent's own position not caused by the appellants. The co-owner in law had an equal right with the respondent to the

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engine and insisted upon it. At this time the fishing season had not opened and nothing turns on any such contention. Above all though it is clear to demonstration that the respondent failed upon the facts to establish any case that he would have made a dollar of profit if he had gone fishing. There is no evidence upon which any damages can in law be reasonably assessed. Now in paragraph 12 of the dispute note of the appellants we have it stated:

> The defendants do not admit that they are liable in any damages to the plaintiff, but have paid into Court with a denial of liability the sum of $75, in satisfaction of the whole of the plaintiff's claim herein, and the sum of $6.75 in respect of fees and costs.

In my opinion if the respondent had a cause of action the amount paid into Court and directed to be paid out to the respondent was ample in the way of damages in so far as the appellants are concerned. The real detention undoubtedly was on the part of the appellants' partner and co-owner, as if he had not intervened and insisted upon holding the engine the engine would have been installed and the fishing season could have been taken advantage of by the respondent. But, as I have stated already, the respondent would not appear to have intended to go fishing but asks damages for the loss thereof. If there was loss of the fishing season it was the fault of Thompson, the partner of the respondent, not the fault of the appellants. But again, even if there was any liability, no damages have been shewn. However, over and above all I have said, here is a case of a partnership and co-ownership and upon the facts of the case the damages as sued for can be looked at in no other way than as damages to which the partnership may be entitled and only one of the partners sues; further there is the additional complication of co-ownership and only one of the co-owners sues and the still further complication, if there was detention of the engine, or it could be said the co-owner Thompson wrongfully detained the engine—if that be possible in the case of co-ownership, which I think cannot be, it was the co-owner who detained the engine from the respondent, not the appellants. Finally if in law, with the action constituted as it is, there was the right to sue—which is not my opinion—the damages paid into Court are amply sufficient to satisfy the claim of the respondent.

MCPHILLIPS, J.A.

I would allow the appeal and dismiss the action.

MACDONALD, J.A.: I shall not outline the evidence or discuss the cases referred to. I am satisfied, after full consideration, that the proper conclusion on the unusual state of facts presented is this: The plaintiff with the assent of Thompson had a legal right as against all the world to pursue his ordinary avocation for the season with the use of the boat and engine and could maintain an action for the invasion of that right. To deprive him of the engine was a tort. Having the right to use it the mischief could only be repaired by returning it, not to a co-owner, but to the plaintiff.

The evidence as to damage is not satisfactory. I cannot say however that if a jury awarded $450 we ought to interfere and the same principles are applicable to a finding by a judge. The damages however should be limited to $450. This sum represents the amount he would have earned if he had the use of the engine. Ordinarily a nominal sum should be allowed for failure to return it but as $450 is at least a generous allowance I should limit the damages to that amount. The appeal is allowed in part.

MCQUARRIE, J.A.: I think the respondent is entitled to damages following the illegal seizure of the engine. He was in possession of it and was entitled to use it, at least during the fishing season. It is admitted that the appellants had no right to take the engine and I think their bailiff was negligent in not checking respondent's statement previous to the seizure, that the respondent had paid the balance due on the engine.

The *quantum* of damages gives rise to some difficulty because of the unsatisfactory nature of the evidence as to damages tendered on behalf of the respondent. In order to avoid the expense of a new trial I would approve the amount fixed by the learned trial judge for damages, *viz.*, $450. I, however, disagree with the learned trial judge as to the second paragraph of his judgment whereby it is ordered that the defendant do return to the plaintiff the gasoline-engine in question in the action or in lieu thereof that the plaintiff do recover against the defendant a further sum of $125. In the circumstances of the case I am of opinion that the appellants were justified in returning the engine to the respondent's co-owner. The respondent's remedy in regard to his right to possession of the engine must be settled

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between him and his co-owner. I will, therefore, favour the amendment of the judgment by striking out the paragraph referred to.

Appeal allowed in part, Macdonald, C.J.B.C. and McPhillips, J.A. dissenting.

Solicitors for appellants: *Williams, Manson & Taylor.*
Solicitor for respondent: *H. W. Colgan.*

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HALL v. MACINTYRE

HALL v. MACINTYRE: SARTORIO, GARNISHEE.

Garnishee—Judgment against trustee of estate personally—Mortgage to estate with interest overdue—Whether payable to the trustee personally—Issue as to.

The plaintiff Hall obtained judgment against *A. D. Macintyre*, sole trustee of the estate of Lewis Campbell, deceased, for $632, and costs for work and labour performed on the Campbell estate. Hall, as judgment creditor, then obtained a garnishee order for $960 against Pastore A. Sartorio, administratrix of the estate of Herman Beckman, deceased. About three years previously Pastore A. Sartorio, as administratrix of the Beckman estate, gave a mortgage to the Campbell estate upon which $960 is now overdue as interest. Upon the application of the judgment creditor an issue was directed to determine the liability, if any, of the garnishee to the defendant. Upon the trial of the issue it was ordered that the garnishee do pay to the judgment creditor $960.

Held, affirming the decision of SWANSON, Co. J. (MARTIN and MACDONALD, JJ.A. dissenting), that the appeal should be dismissed.

Per MACDONALD, C.J.B.C. and MCQUARRIE, J.A.: That the trustee is personally liable to the plaintiff Hall, and in like manner the mortgage money is payable to the trustee personally by the garnishee. The words in the judgment "trustee of the Campbell estate" are words of description only, and the money in fact is payable to the judgment debtor. The judgment should therefore stand in favour of the plaintiff as against the garnishee.

Per MCPHILLIPS, J.A.: *A. D. Macintyre* is sued in his representative capacity as sole trustee of the Campbell estate and judgment has been given against him in his representative capacity. The mortgage debt of the Beckman estate, here attacked, is owing and payable to *A. D. Macintyre* in his representative capacity. Judgment was therefore properly given in favour of the plaintiff as against the garnishee.

Statement

APPEAL by the garnishee from the decision of SWANSON, Co. J. of the 14th of December, 1933, on the trial of a garnishee issue between the judgment creditor as plaintiff and the garnishee as defendant, by order of the 29th of November, 1933. The plaintiff recovered judgment against *A. D. Macintyre*, sole

trustee of the estate of Lewis Campbell, deceased, on the 26th of October, 1933, for the sum of $970. The garnishee as administratrix of the estate of her former husband, Herman Beckman, borrowed $3,500 from the Lewis Campbell estate, that was due and payable on the 4th of June, 1932. To secure this loan she executed a mortgage in favour of *A. D. Macintyre,* trustee under the last will and testament of Lewis Campbell, deceased, and later she borrowed a further $500. The principal has not been paid and on the 23rd of November, 1933, $960 interest was owing by the Beckman estate to the Campbell estate. It was ordered that the garnishee, administratrix of the estate of Herman Beckman, deceased, pay the judgment creditor $960.

Statement

The appeal was argued at Victoria on the 19th and 22nd of January, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

J. G. A. Hutcheson, for appellant: The order was that the issue be tried as to the liability of the garnishee to the defendant, and if so in what amount. The trial judge went beyond the issue he was directed to try. He ordered that the garnishee pay $960 and this goes further than the directions in the order. The only evidence as to the garnishee's liability is that she owes the Campbell estate $960. The judgment is against *Macintyre* personally. The question is whether the garnishee is indebted to the debtor. The effect of the judgment appealed from is that one man's money is used to pay another man's debt. *Macintyre* is sued for something for which he is personally liable. The record will shew that this is a claim the estate could not possibly be liable for, but for which *Macintyre* is alone responsible: see Halsbury's Laws of England, Vol. 14, p. 315, sec. 731; Ingpen on Executors and Administrators, Can. Ed., 380; *Farhall* v. *Farhall* (1871), 7 Chy. App. 123 at pp. 125-6; *Watling* v. *Lewis* (1911), 1 Ch. 414 at p. 423; *Kerr* v. *Parsons* (1861), 11 U.C.C.P. 513; *Campbell* v. *Bell* (1869), 16 Gr. 115; *Dean* v. *Lehberg* (1907), 6 W.L.R. 214; *Security Trust Co. Ltd.* v. *Wishart* (1920), 2 W.W.R. 165; *Walch* v. *Nordquist* (1926), 2 W.W.R. 854; 24 C.J. 739, sec. 1823. In the action *Macintyre* in his personal capacity is antagonistic to the

Argument

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estate and the estate should have independent advice. The judgment, therefore, is not binding on the Campbell estate even if given against the estate: see *In re de Leeuw. Jakens* v. *Central Advance and Discount Corporation* (1922), 2 Ch. 540 at p. 550. It follows that you cannot garnishee a debt due the estate on a judgment that does not bind the estate. There is not absolute right to an order absolute attaching a debt and the Court will look behind the judgment to see from what asset the debt should be paid: see *Roberts* v. *Death* (1881), 8 Q.B.D. 319 at p. 322; *Martin* v. *Nadel* (1906), 2 K.B. 26. *Samis* v. *Ireland* (1879), 4 A.R. 118. The garnishee has a duty to his creditor to shew cause and if he fails to do so he may be liable to the debtor: see *Wood* v. *Dunn* (1866), L.R. 2 Q.B. 73 at pp. 82-3; *Ranson* v. *Platt* (1911), 2 K.B. 291 at 303; *In re Webster. Ex parte Official Receiver* (1907), 1 K.B. 623; Cababe on Attachment, 3rd Ed., 62; *Rankin* v. *McFadyen* (1882), 2 P.E.I. 461; *Saskatoon Hardware Co.* v. *Priel* (1915), 22 D.L.R. 911; *Foulds* v. *Chambers* (1896), 11 Man. L.R. 300.

Argument

Archibald, for respondent: The dispute note simply denies liability and no application was made under section 13 of the Attachment of Debts Act: see *Jacques* v. *Harrison* (1884), 12 Q.B.D. 165. Judgment was given against the trustee in his fiduciary capacity. He is trustee and the word "as" is not required in the style of cause to so describe him: see *Samis* v. *Ireland* (1879), 4 A.R. 118 at p. 137. That a debt due the judgment debtor in his representative capacity may be attached see *Burton* v. *Roberts* (1860), 29 L.J., Ex. 484; *Fowler* v. *Roberts* (1860), 2 Giff. 226; 66 E.R. 95; *In re Raybould. Raybould* v. *Turner* (1900), 1 Ch. 199 at p. 201; *In re Blundell. Blundell* v. *Blundell* (1890), 44 Ch. D. 1 at p. 8; *Ex parte Garland* (1804), 10 Ves. 110. The cases he cited are all on the question of a trustee incurring a debt for work done or goods delivered. Here she pledged the estate by mortgage: see *Gavin* v. *Hadden* (1871), L.R. 3 P.C. 707. On the issue the judge may order payment by the garnishee: see section 9 of the Attachment of Debts Act.

Hutcheson, in reply, referred to Halsbury's Laws of Eng-

land, Vol. 14, p. 294, secs. 682-3; *In re Johnson. Shearman* v. *Robinson* (1880), 15 Ch. D. 548; *In re British Power Traction and Lighting Company, Limited* (1910), 2 Ch. 470.

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Cur. adv. vult.

6th March, 1934.

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MACDONALD, C.J.B.C.: Order directing a garnishee issue to find "as to the liability of the garnishee to the defendant" judgment debtor. The issue was tried by the County Court judge at Kamloops who gave judgment against the garnishee for the amount she owed to the judgment debtor, who was the trustee of the late Lewis Campbell, deceased, more than twenty years. The money was money payable to the trustee under a mortgage made to him as such trustee, subsequent to testator's death.

It is well understood law that an executor or trustee who makes a contract in relation to his trust is personally liable to the contractor for the price agreed upon. In this respect see the authorities cited by the trial judge with which I agree. The converse must also be true when moneys due by the contractor are payable to the trustee.

In this case the trustee is personally liable to the plaintiff Hall and in like manner the mortgage money is payable to the trustee personally by the garnishee herein. The wording of the judgment therefore that the garnishee shall pay the mortgage moneys to the trustee of the Campbell estate is merely descriptive of him. I think the words "trustee of the Campbell estate" are words of description only and that the money in fact is payable to the judgment debtor. So construed the judgment is the proper one. The garnishee is liable to the trustee personally. Therefore, the order must be so construed. That is to say the amount was owing to the trustee as judgment debtor not to the trustee as representative of the Campbell estate. Therefore, I think, the appeal should be dismissed. The judgment should stand in favour of the plaintiff, the judgment creditor, against the garnishee for the amount admitted by her to be owing to the judgment debtor.

MACDONALD, C.J.B.C.

I would dismiss the appeal with costs.

MARTIN, J.A.: This appeal should be allowed, in my opinion,

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because, putting it shortly, the garnishee, administratrix, was only liable to the Campbell estate and not to the judgment debtor, *Macintyre,* in his personal capacity; but, on the authorities cited, the action and judgment against him must in legal strictness be regarded as brought and entered against him in that capacity, so therefore the debt due by the garnishee to said estate is not subject to attachment by the plaintiff under such circumstances which, in any event, make *Macintyre* alone liable for the amount of the judgment.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am in complete agreement with the very able judgment of SWANSON, Co. J. in this case notwithstanding the very elaborate and careful argument of Mr. *Hutcheson,* counsel for the garnishee, which in my opinion does not fit or can be held applicable to the facts or the law in this appeal. Mr. *Hutcheson* laid great stress upon this point—that *A. D. Macintyre,* sole trustee of the estate of Lewis Campbell, deceased, was not a sufficient description of the estate, but was merely descriptive of *Macintyre* personally. With this I cannot agree nor do I consider the authorities cited as applicable to the facts of this case have any force or application. In my opinion it is clear to demonstration that the moneys here attached are moneys due by the estate and payable by the garnishee to the estate—the plaintiff (respondent) having recovered a judgment against the estate—the description of the estate as sued and as judgment entered against it being "*A. D. Macintyre,* sole trustee of the estate of Lewis Campbell, deceased." I pointed out during the argument that in a previous appeal heard at the same sittings of this Court of Appeal, we gave a judgment in another case—*Hall* v. *Macintyre, Sole Trustee of the Estate of Lewis Campbell, Deceased*—wherein Mr. *Craig, K.C.,* appeared as counsel for the same estate, the estate being sued in the same form as the estate is here described and Mr. *Craig* representing the estate as so described submitted that the estate was entitled by way of counterclaim to a judgment for $1,000 or thereabouts. In that he failed. My learned brother MARTIN, though, would have allowed the sum of $350 to the estate. With leading counsel supporting a claim for the estate, similarly described as in this case, there would be com-

plete estoppel as to the sufficiency of the description. Further, in my opinion, it was idle argument in view of the facts in this case, but over and above all that my opinion is that the description of the estate is good and sufficient and binding upon the estate in law and Mr. *Hutcheson's* client, the garnishee herein, will be fully protected in making payment in compliance with the terms of the judgment here under appeal, that is, that it will be in law a valid payment to the estate of a debt due by Pastore Angele Sartorio, administratrix of the estate of Herman Beckman, deceased, to *A. D. Macintyre,* sole trustee of the estate of Lewis Campbell, deceased. Here it is clear that the debt due and attached was a debt due to the Lewis Campbell estate. In any case, as I view it, there being a judgment entered in the form in which it is entered against *A. D. Macintyre,* sole trustee of the estate of Lewis Campbell, deceased, it must so long as that judgment stands be deemed to be a judgment debt due by the estate. In *Burton* v. *Roberts, Parker garnishee* (1860), 29 L.J., Ex. 484-5, Bramwell, B., there said:

. . . . the Court are of opinion that where the action is against the executor a debt due to an executor is subject to an attachment under the garnishee clauses.

MCPHILLIPS, J.A.

Here we have a judgment debt against the Lewis Campbell estate.

Further upon the facts of the present case, even were it capable of being said that the debt attached is a personal debt, with which submission I do not agree, it is now in the form of a judgment debt against the Lewis Campbell estate and is a liability of the estate and payable out of the assets of the estate (*Raybould* v. *Raybould* (1900), 1 Ch. 199).

Here we have moneys attached due by the garnishee to the Lewis Campbell estate and the plaintiff (respondent) has a judgment against *A. D. Macintyre,* sole trustee of the estate of Lewis Campbell, deceased. The debt is now merged in the judgment. Yet the garnishee (appellant) in this Court questions the validity of that judgment. In my opinion that contention is not open to the garnishee. *Gavin* v. *Hadden* (1871), L.R. 3 P.C. 707 is a case much in point. At pp. 726-7 we find Sir Joseph Napier, Bart., who delivered the judgment of their Lordships, saying:

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Irregularity, error of fact or of law, must be shewn in the suit itself, must be rectified by application to the original Court, or by way of appeal from or review of the judgment. In this case the fresh suit is not by the original defendant, but by a co-executor and co-devisee. That makes no difference. It would cause most incalculable mischief if it were once supposed, that an action and judgment against an executor, or other legal representative, as such, is not as binding against the testator's estate as any action or judgment against any defendant is binding against him. The only ground on which it is competent for any other executor, or any other person interested in the estate, to question in a new suit the proceedings in a former action which has resulted in a judgment against the property of the testator, is fraud.

Here the garnishee (appellant) has ample protection. Further, the garnishee has no *status* in this Court to question the judgment.

In the County Court of Yale the records shew that the judgment is a judgment by the plaintiff (respondent) against the Lewis Campbell estate and the moneys attached are moneys due to that estate by the garnishee and the judgment under appeal was the trial of an issue in relation thereto.

MCPHILLIPS, J.A.

The formal judgment is in the words and figures following:

The issue herein directed to be tried by His Honour Judge SWANSON by order dated the 29th day of November, 1933, coming on for trial on the seventh day of December, 1933, in the presence of *J. R. Archibald*, of counsel for the judgment creditor, and *R. L. Maitland, K.C.*, of counsel for the garnishee:

IT IS ORDERED that the garnishee, Pastore Angele Sartorio, administratrix of the estate of Herman Beckman, deceased, do forthwith pay to the judgment creditor the sum of $960.

AND IT IS FURTHER ORDERED that the said garnishee do forthwith pay to the judgment creditor his costs of the garnishee proceedings to be taxed.

It is this judgment which the garnishee appeals against. The judgment in my opinion is right and the appeal should be dismissed.

MACDONALD, J.A.

MACDONALD, J.A.: The plaintiff Hall obtained judgment against *A. D. Macintyre,* sole trustee of the estate of Lewis Campbell, deceased, for work and labour on the Campbell estate performed under a contract with *Macintyre* as trustee. The formal judgment entered after the issue herein was tried provides that

THIS COURT DOTH ADJUDGE that the plaintiff do recover from the defendant, sole trustee of the estate of Lewis Campbell, deceased, the sum of $632, together with his costs to be taxed.

Hall, as judgment creditor, on the affidavit of Mr. *Archibald*, obtained a garnishee order for $960 against Pastore Angele Sartorio, administratrix of the estate of Herman Beckman, deceased. The latter disputed liability. Upon application of the judgment creditor an issue was directed to determine the liability of the garnishee, if any, to *A. D. Macintyre*, sole trustee of the estate of Lewis Campbell, deceased. Pastore Angele Sartorio testified that a mortgage was given by her as administratrix of the Beckman estate to the Campbell estate upon which $960 was overdue as interest. The mortgage was not produced. His Honour Judge SWANSON based on written reasons after trial of the issue "ordered that the garnishee, Pastore Angele Sartorio, administratrix, . . . , do forthwith pay to the judgment creditor the sum of $960."

The garnishee appeals from this order on the ground that it was beyond the scope of the issue to order the garnishee to pay this sum to the plaintiff but particularly that it was bad in law inasmuch as the garnishee owed no sum of money to *A. D. Macintyre* who alone (with right of indemnity) it was submitted was personally liable to the judgment creditor.

MACDONALD, J.A.

It is clear that the judgment recovered by Hall was against *Macintyre* personally; not in his representative capacity as trustee. He is personally liable on a contract for work and labour done or for goods sold and delivered even if it amounted to more than the assets of the estate in his hands (*Farhall* v. *Farhall* (1871), 7 Chy. App. 123, 127; Ingpen on Executors and Administrators, Can. Ed., 380; *Kerr* v. *Parsons* (1861), 11 U.C.C.P. 513; *Campbell* v. *Bell* (1869), 16 Gr. 115; *Dean* v. *Lehberg* (1907), 6 W.L.R. 214; *Security Trust Co., Ltd.* v. *Wishart* (1920), 2 W.W.R. 165; *Walch* v. *Nordquist* (1926), 2 W.W.R. 854. He has of course a right of indemnity but we are not concerned with that. The words in the formal judgment "sole trustee of the estate of Lewis Campbell, deceased" must be read as descriptive merely. Even if the word "as" preceded the phrase it would not be effective to bind the estate. In *Watling* v. *Lewis* (1911), 1 Ch. 414 at 423 Warrington, J. said:

> Those words "as such trustees" again, in my view, in a covenant of this kind, have no effect at all. A covenant by a person "as trustee" does not

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render his trust estate liable, it is a covenant by himself. It is exactly as if an executor entering into an obligation not merely in respect of some debt of his testator, but in respect of some obligation which he in his capacity as executor has himself undertaken since the death of the testator, covenants "as executor" to pay. That is a covenant by himself.

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It is not in any event the form of judgment requisite where the estate is bound (Chitty's K.B. Forms, 16th Ed., 689). It follows therefore that *Macintyre* was personally liable to Hall.

If the $960 owing by the garnishee are moneys payable to *Macintyre* available to him for the discharge of a personal obligation we could not interfere. That is not so. The learned

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trial judge apparently examined the mortgage in the Land Registry office and based conclusions upon it. This course if uniformally followed might result in prejudice to one of the parties. He found it was executed after the death of the testator to *Macintyre* as trustee of the Campbell estate. But moneys payable to him as trustee for another cannot be used to liquidate a personal obligation payable out of his own assets. It is rather startling to suggest that he could do so. It is not a debt due to *Macintyre* personally and it is in that capacity that he must pay the Hall judgment. An order which would leave the garnishee liable to pay the debt a second time should be refused.

I would allow the appeal.

MCQUARRIE, J.A.

MCQUARRIE, J.A.: I agree with the Chief Justice and would dismiss the appeal.

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

Solicitors for appellant: *Maitland, Maitland, Remnant & Hutcheson.*

Solicitors for respondent: *Cornwall & Archibald.*

HUTCHINSON AND DOWDING v. BANK OF TORONTO (No. 2).

MCDONALD, J. (In Chambers)

1933

Dec. 30.

HUTCHINSON v. BANK OF TORONTO (No. 2)

Practice—Action against pledgee of stock-broker—Discovery of documents —Motion for further and better affidavit—Plaintiffs' pleadings—Effect of.

In an action by a customer of a stock-broking company against the Bank of Toronto as pledgee of the company, the plaintiff moved for a further and better affidavit of documents, particularly the correspondence between the Vancouver branch of the bank and its head office, relative to the financial position of the company.

Held, that upon the case set up in the pleading the company's insolvency or the bank's knowledge thereof are irrelevant. The only question in issue is whether or not the bank had knowledge of the agreement set up under which the company's authority to deal with the certificate is alleged to have been limited, and the application should be dismissed.

APPLICATION by plaintiff for further and better affidavit of documents. Heard by McDONALD, J. in Chambers at Vancouver on the 29th of December, 1933. Statement

G. L. Fraser, for the application.
E. Bull, contra.

30th December, 1933.

McDONALD, J.: The plaintiff (Dowding) alleges that upon employing R. P. Clark & Co. (Vancouver) Ltd. (herein called the company) as his broker, he deposited with the company certain share certificates of Imperial Oil Limited, the company thereupon orally agreeing . . . that it would not sell or in any way deal with the said shares without the consent of plaintiff or alternatively until after express notice had been given to the plaintiff. It is alleged that the company, without authority or without colour of right, pledged the certificates in question with the defendant bank, and that the bank has refused to return the certificates to the plaintiff or to account for the proceeds thereof. It is not alleged (though it has been treated as common knowledge) that the company has meanwhile become insolvent, nor that the bank had notice of such insolvency. The plaintiff moves for a further and better affidavit of documents Judgment

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seeking discovery particularly of the correspondence passing between the Vancouver branch of the bank and its head office relative to the account of the company and to its financial position, as well as monthly statements of the company shewing its financial position.

Previously the defendant had moved for particulars of the whole of the circumstances under which the certificates were deposited with the company but plaintiff's counsel stated to the Court that the agreement above recited constituted the whole agreement and that no further particulars could be given. That statement was accepted and the motion was dismissed.

The point made upon the present application is this: That upon the case set up in this pleading all questions relating to the company's insolvency or the bank's knowledge thereof are irrelevant. With this contention I agree. It may be that plaintiff by the form of his pleading has tried to escape the results of the decisions in *Robinson* v. *Bank of Toronto* (1932), 45 B.C. 518; 2 W.W.R. 91; *Patrick* v. *The Royal Bank of Canada* (1932), 45 B.C. 437; 2 W.W.R. 257, and *London Joint Stock Bank* v. *Simmons* (1892), A.C. 201; 61 L.J., Ch. 723, but whether that be so or not, and no matter where the *onus* lies, I am of opinion that upon this pleading, and having regard to the decision in *Rimmer* v. *Webster* (1902), 2 Ch. 163; 71 L.J., Ch. 561, the only question in issue is whether or not the bank had knowledge of the agreement set up under which the company's authority to deal with the certificates is alleged to have been limited.

Judgment

Application dismissed; costs to the defendant in the cause.

Application dismissed.

WHIELDON *ET AL.* v. FRASER VALLEY MILK PRODUCERS ASSOCIATION *ET AL.*

MCDONALD, J.

1934

Feb. 1.

WHIELDON v. FRASER VALLEY MILK PRODUCERS ASSOCIATION

Practice—Examination for discovery—Scope of—Breach of contract—Disclosure of reasons for—Right to compel.

In an action based upon an allegation that the defendants Morrison and Norrish, being under contract with the plaintiffs, broke such contract by reason of inducements by threats or otherwise of the other defendants, the defendants Morrison and Norrish on examination for discovery admitted the breach, but when asked the reason for breach, declined to answer. Later in the examination they gave as a reason that the plaintiffs had not carried out their part of the contract. This reason was not pleaded in the defence.

Held, that the defendants must answer the questions put to them, if for no other reason than to test their credibility, or to put it in another way, to press them by way of cross-examination with a view to ascertaining whether or not the reasons which they have given for the breach are true.

Hopper v. *Dunsmuir* (1903), 10 B.C. 23, applied.

MOTION for an order that the defendants Morrison and Norrish be compelled to answer questions put to them on examination for discovery. Heard by MCDONALD, J. at Vancouver on the 30th of January, 1934. Statement

C. F. MacLean, for the motion.
Maitland, K.C., for defendants Morrison and Norrish.
Gibson, for Fraser Valley Milk Producers Association.

1st February, 1934.

MCDONALD, J.: Motion by plaintiffs to compel defendants Morrison and Norrish to answer questions put to them upon examination for discovery. The action against these defendants is based upon an allegation that they respectively, being under contract with the plaintiffs, broke such contract by reason of inducements by threats and otherwise of the other defendants. Upon the examination for discovery the defendants admit the breach. When asked the reason for the breach, they, on the advice of counsel, declined to answer. Later in the examination they gave as the reason the fact that plaintiffs had not carried Judgment

MCDONALD, J.

1934

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WHIELDON v. FRASER VALLEY MILK PRODUCERS ASSOCIATION

Judgment

out their part of the contract. It may be noted that no such reason is pleaded by way of defence. Obviously the plaintiff desires to get from these defendants an admission as to what took place between them and the other defendants and it is objected that such matters are irrelevant inasmuch as the only issue between the plaintiff and these defendants is as to whether there was a breach and, if so, what are the damages. I was at first of the impression that this was a complete answer but upon reflection and upon a consideration of the judgment in *Hopper* v. *Dunsmuir* (1903), 10 B.C. 23, I think this is not so. I am not called upon to consider what use may be made of the examination hereafter but I think in view of the above decision shewing how wide are the powers of examination, the defendants must answer the questions put to them if for no other reason than to test their credibility or, to put it in another way, to press them by way of cross-examination with a view to ascertaining whether or not the reasons which they have given for the breach are the true reasons. The order will accordingly go that these defendants attend at their own expense and answer the questions which they have refused to answer.

Motion granted.

WRIGHT v. MACDONALD AND MUIR.

MCDONALD, J. (In Chambers)

1934

Feb. 2.

WRIGHT v. MACDONALD

Practice—Breach of contract—Damages—Amendment—Joinder of defendant—Discretion of Court.

In an action for damages for breach of contract whereby he was employed as the defendants' selling agent, the plaintiff alleged that such breach was the result of an illegal arrangement entered into between the defendants and one Howe, to which illegal arrangement he declined to become a party. On plaintiff's motion for an order amending the statement of claim and adding Howe as a party defendant:—

Held, that if the plaintiff succeeds against the present defendants, the presence of Howe as a party is unnecessary; and if he fails against the present defendants he must equally fail against Howe. The application is dismissed.

Gowland v. *William Gowland (1916) Limited* (1919), 147 L.T. Jo. 252 followed.

APPLICATION for an order to amend the statement of claim and to add one Howe as a party defendant. Heard by McDONALD, J. in Chambers at Vancouver on the 1st of February, 1934. Statement

Hamilton Read, for the application.
Housser, contra.

2nd February, 1934.

McDONALD, J.: Plaintiff sues defendants for damages for breach of a contract whereby he was employed as their selling agent. In his statement of claim he alleges that such breach was the result of an illegal arrangement entered into between the defendants and one Howe to which illegal arrangement he declined to become a party. He now moves for an order amending his statement of claim and adding Howe as a party defendant. In the proposed amendments he seeks to set up, firstly, that the defendants and Howe wrongfully combined to break the agreement made between plaintiff and defendants and thereby caused damage to plaintiff; and, secondly, that Howe wrongfully induced and procured the defendants to break such agreement and thereby caused damage to plaintiff. Judgment

Admittedly there is a very wide discretion as to adding a

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defendant, but I am unable to distinguish this case from *Gowland* v. *William Gowland (1916) Limited* (1919), 147 L.T. Jo. 252. Applying the reasoning of Younger, J. in the second part of his judgment in that case to the present case, the position is this: If the plaintiff succeeds against the present defendants the presence of Howe as a party is unnecessary; and if he fails against the present defendants he must equally fail against Howe.

Judgment

If he proves the breach of his contract by defendants he will recover against them such damages as naturally flow from that breach, and he could recover no more than that amount even if Howe were a party defendant. It is to be feared that there may be some point in the suggestion of counsel for the defendants that the real purpose of the application is to obtain such benefit as might accrue from an examination of Howe for discovery.

The application is dismissed with leave reserved (as in the case cited) to bring another action against Howe after the trial of the present action. Costs to the defendants in the cause.

Application dismissed.

BARBOUR v. BARBOUR.

MCDONALD, J. (In Chambers)

1934

March 13.

BARBOUR v. BARBOUR

Husband and wife—Alimony—Order for—Means of husband to pay—Right of examination as to—R.S.B.C. 1924, Cap. 51, Sec. 58—Divorce rule 79 (a).

An application under section 58 of the Supreme Court Act for an order that a husband, against whom the wife had obtained an order for payment of alimony, do attend for examination on oath as to his means of making payment, was dismissed.

APPLICATION for examination of husband against whom an order for payment of alimony has been made as to his means of making payment. Heard by McDONALD, J. in Chambers at Vancouver on the 28th of February, 1934.

Statement

G. A. Grant, for the application.
Evans, contra.

13th March, 1934.

McDONALD, J.: This is an application under section 58 of the Supreme Court Act, R.S.B.C. 1924, Cap. 51, for an order that the respondent, against whom the applicant has obtained an order for the payment of alimony, do attend for examination on oath as to his means of making payment. Objection is taken that there is no jurisdiction to make such order, the applicant being confined to the remedies provided by rule 79 (*a*) of the Divorce Rules. It has been held on several occasions by the judges of this Court that the remedy now sought does not lie; but it is suggested that the decisions of the Court of Appeal in *Laird* v. *Laird* (1920), 28 B.C. 255; 3 W.W.R. 1, and *Allen* v. *Allen* (1923), 32 B.C. 274, were not considered when that conclusion was reached.

Judgment

I have studied these two decisions carefully and in my opinion they do not touch the point now under discussion. I am bound to follow the previous decisions of this Court.

The application is dismissed.

Application dismissed.

MCDONALD, J. (In Chambers)

1934

Feb. 22.

FLETCHER, TURNEY & HANBURY LIMITED v. COLQUHOUN, DEWOLF & COMPANY LIMITED.

Practice—Examination for discovery—Amendment of pleadings—Right to second examination—Limitation of.

FLETCHER, TURNER & HANBURY LTD. v. COLQUHOUN, DEWOLF & CO. LTD.

When pleadings have been amended raising new issues after examination for discovery, an order may be made allowing a second examination of the same party limited to the matters raised in the amendment.

Statement

APPLICATION for an order that the plaintiff be allowed to examine an officer of the defendant company a second time in consequence of certain amendments to the pleadings since the first examination. Heard by MCDONALD, J. in Chambers at Vancouver on the 20th of February, 1934.

G. L. Fraser, for the application.
Bull, K.C., contra.

22nd February, 1934.

Judgment

MCDONALD, J.: Application by plaintiff for an order that it be at liberty to examine for a second time an officer of defendant company, in consequence of certain amendments which have been made in the pleadings since his former examination. There is no rule providing for such second examination but it is argued that the order ought to be made as being necessary in the interests of justice. Similarly there was no rule in Ontario but when the matter came before Teetzel, J. in *Standard Trading Co.* v. *Seybold* (1904), 7 O.L.R. 39, his Lordship found that it had been the settled practice before the Master in Chambers that such an order be made and his Lordship followed that practice. Later that decision was followed by Bucke, M.C. in Saskatchewan in *Graham* v. *Shannon* (1919), 2 W.W.R. 30. While there seems to be no settled practice in British Columbia on the subject it does seem to me that it is in the interests of justice that such an examination be allowed, it being a principle in our jurisprudence that upon the close of the pleadings an examination for discovery may be had. It does not seem to me to be stretching that practice unduly to allow a second exam-

ination when the pleadings have been amended so as to raise a new issue. The order will accordingly go; the examination to be confined to matters arising out of the amendments.

Application granted.

MCDONALD, J. (In Chambers)

1934

Feb. 22.

FLETCHER, TURNER & HANBURY LTD. *v.* COLQUHOUN, DEWOLF & CO. LTD.

McGUIRE v. CRESTLAND TRUST COMPANY LIMITED.

MURPHY, J. (In Chambers)

1934

April 9.

Practice—Costs—Contract sued on held to be illegal—"In pari delicto"—Allowance of costs—"Good cause"—Scale—Appendix N.

In an action in which the contract sued upon was held to be illegal, the defendant was allowed its costs on the appropriate scale.

MCGUIRE *v.* CRESTLAND TRUST CO. LTD.

APPLICATION for costs by the defendant in an action where the contract sued upon was held to be illegal. Heard by MURPHY, J. in Chambers at Vancouver on the 5th of April, 1934.

Statement

Nicholson, for the application.
McTaggart, contra.

9th April, 1934.

MURPHY, J.: Plaintiff contends that as the contract sued upon has been held to be illegal the parties are *in pari delicto* and defendant should not be given costs. Assuming, without deciding, that under our practice this would in general constitute "good cause" in the case at Bar there is the, to my mind, important fact that defendant warned the pool management that it regarded the contract as unenforcible and declared it would not be a party to any litigation initiated to compel observance of the contract's provisions.

Judgment

The pool management desirous, as I think, of obtaining a Court ruling on the main features of the contract commenced this action against defendant and persisted in carrying it on despite the stand taken by defendant in relation to other litiga-

MURPHY, J. (In Chambers)

1934

April 9.

McGUIRE v. CRESTLAND TRUST CO. LTD.

Judgment

tion based on the contract which defendant thought the pool management had in contemplation. These being the facts it would, in my opinion, be unjust to penalize defendant by depriving it of its costs. On the other hand I do not think any special cause has been shewn for ordering costs to be taxed on a higher scale than the one that would apply without a special order. The suggestion is that the true object of the litigation was to get a ruling on the validity of the contract and with that view I agree. I do not think, however, that the stringent provisions of Appendix N should be departed from in such a case as the one before me. The object of Appendix N is, I think, to enable parties contemplating litigation to form a fairly accurate estimate of the party and party costs for which they will be liable in case of non-success. To depart lightly from the provisions of Appendix N would result in the reintroduction of uncertainty on this score which it was brought into force to eliminate. If once the principle be adopted that the nature of the contract involved is to be the criterion of "special cause" the utmost uncertainty as to *quantum* of possibly party and party costs would seem to be the almost inevitable consequence. Defendant is to recover its costs on the appropriate scale.

Application granted.

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Jan. 9.

THE TRUSTEE OF BLUE BAND NAVIGATION CO. v. PRICE WATERHOUSE & CO.

THE TRUSTEE OF THE PROPERTY OF BLUE BAND NAVIGATION COMPANY, LIMITED, A BANKRUPT v. PRICE WATERHOUSE & CO.

Company—In liquidation—Auditors—Duties as to examination of securities—Negligence—Misfeasance—B.C. Stats. 1929, Cap. 11, Sec. 107.

The defendants were auditors of the Blue Band Navigation Company from its incorporation in 1920 until its bankruptcy in September, 1931. One Whittall was the first president of the company and general manager and continued as such until its bankruptcy. The trustee of the company brought action against the defendants for damages for misfeasance in respect to the audit of the books of the company, two audits only being in question, namely, for the fiscal years ending respectively on the 30th of June, 1929, and the 30th of June, 1930. When the defendants were engaged on the audit for the year ending June 30th, 1929, the books shewed that Whittall from time to time withdrew $41,607 from the company, and it appeared at the end of the fiscal year that Whittall was credited with $25,000 and a company known as the Western Trading Syndicate was debited with $25,000, the page containing a memo reading "Transfer as per Whittall's instructions," and the same page shewed the profit and loss account was credited with $12,000 described as "Extraneous" and the Western Trading Syndicate was further debited with $12,000, the result being, under Whittall's instructions, to reduce his debt to the company by $25,000 and to shew the company as being owed $37,000 by the Western Trading Syndicate. On being questioned by the auditor as to the Western Trading Syndicate debt Whittall intimated he did not wish to disclose anything as to the assets of the Western Trading Syndicate or the names of its members, they being matters of a confidential nature, and after further discussion the auditor pointing out the necessity of his having evidence of the collectability of the account, Whittall gave his written guarantee for the amount of the advance, Whittall's financial standing at the time being amply sufficient to cover the debt. The entry in the auditor's balance sheet shewed an item of $37,000 as a debt of the syndicate without any explanation or comment in connection therewith, and in the following December at a meeting of the shareholders it was drawn to the attention of the meeting that the debt was guaranteed by Whittall which was accepted without comment. The $12,000 item was subsequently paid to the company. The plaintiff recovered judgment on the trial for $25,000 on the ground that the entry on the balance sheet of the sum of $37,000 as a debt of the syndicate and as a good asset as such at its face value without any explanation or comment, was under the circumstances seriously misleading to the shareholders and unjustifiable.

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Held, on appeal, reversing the decision of FISHER, J., that the auditors accepted the explanation of the president and vice-president in connection with the account of the Western Trading Syndicate and the shareholders accepted Whittall's guarantee in place of the fuller explanation as to the syndicate which Whittall declined to give. The shareholders had implied evidence that the account of the syndicate was not sound, as otherwise the guarantee would not have been necessary and they could have enforced the guarantee at once when Whittall was in a financial position to meet it. What the auditors did in all the circumstances of the case cannot properly be considered as negligence.

Statement

APPEAL by defendants from the decision of FISHER, J. of the 1st of August, 1933, in an action for damages for negligence, misfeasance and breach of contract in their duties as auditors of Blue Band Navigation Company, Limited. The company was incorporated in 1920 and carried on a logging and towing business. The defendants, since the incorporation of the company, were employed as auditors of the company. One Norman R. Whittall, since the incorporation of the company, had been president and director of the same until its bankruptcy on September 11th, 1931. The said Whittall without authority withdrew moneys from time to time from the company over and above his salary, amounting in the whole to $41,607. On June 31st, 1929, Whittall altered the books of the company by crediting his account in the ledger with $25,000 and charging said sum to an alleged syndicate called "Western Trading Syndicate," said syndicate being in fact a mere *alias* for Whittall. The whole of said sum of $41,607 was converted by Whittall to his own use, and judgment was obtained by the trustee of said company against Whittall for said sum on the 19th of September, 1932. The plaintiff claimed that the defendants in breach of their duty failed to report specifically to the shareholders as to the withdrawal of said $41,607, and further that for the years 1924 to 1931 Whittall withdrew in the guise of salary $61,000, when he was only entitled to $1,500 per annum as salary, and by reason of this breach the plaintiffs have been deprived of the excess of the moneys so withdrawn. The plaintiffs recovered judgment for $25,000.

The appeal was argued at Vancouver on the 13th to the 19th of October, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

J. W. deB. Farris, K.C., for appellants: The learned judge gave judgment for $25,000 without giving credit for the $12,000 profits that were paid into the company. The loan to the syndicate appeared to the auditor to be regular and was guaranteed by Whittall, who at the time could have paid the account involved and the auditor is not liable: see *In re City Equitable Fire Insurance Co., Lim.* (1924), 94 L.J., Ch. 445 at p. 488. There are no grounds on the facts here on which the learned judge can base misfeasance or negligence on the part of the auditors. First the case cannot succeed on the pleadings. Secondly even if we were negligent they must fail as they have failed to prove damages and they have failed to prove we were the proximate cause of the damages. They must shew that if they had sued at the time they would not have recovered the money and they must first shew they would have sued. The auditor thought Whittall's share in the company at the time was worth $90,000: see *Canadian Woodmen of the World* v. *Hooper* (1933), 1 D.L.R. 168. The auditor's report was regular and there was not misfeasance: see *International Laboratories Ltd.* v. *Dewar* (1933), 3 D.L.R. 665; *London and General Bank; Theobald's Case* (1895), 64 L.J., Ch. 866 at pp. 876-7 and 883; *In re Kingston Cotton Mill Co.* (1896), 65 L.J., Ch. 673 at pp. 675-6; *In re Republic of Bolivia Exploration Syndicate, Lim. (No. 2)* (1913), 83 L.J., Ch. 235; *In re City Equitable Fire Insurance Co., Lim.* (1924), 94 L.J., Ch. 445 at p. 476, and on appeal *ib.* 486 at pp. 487 and 492; *Mead* v. *Ball, Baker and Co.* (1911), 28 T.L.R. 81. This is a case of joint tort feasors and when they obtain judgment against one the others are released.

Argument

Burns, K.C., for respondent: This company was incorporated as a private company in 1921. It had two departments (a) logging; (b) towing. In 1928 the logging business dwindled to very little. Whittall and Thicke controlled the business and Whittall was in such a position at the time that the auditors cannot be heard to say that they acted reasonably in all the circumstances in accepting the facts from Whittall or relying on anything he said. The circumstances were sufficient to arouse suspicion. The item as to the syndicate first appeared in the balance sheet of 1929. There was no resolution of the

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directors fixing a salary. Over $29,000 was borrowed by Whittall in 1929, and if we had known of this in 1929 we would have realized the amount and it would have prevented a further loan of $16,000. Advancing money to shareholders is *ultra vires* and the minor shareholders can intervene for fraud or *ultra vires*. The directors had no authority to advance moneys to Whittall or the syndicate: see *In re Marseilles Extension Railway Co.* (1871), 7 Chy. App. 161 at p. 168; *In re Haycraft Gold Reduction and Mining Company* (1900), 2 Ch. 230 at p. 235; *In re Greymouth Point Elizabeth Railway and Coal Company, Limited* (1904), 1 Ch. 32. The transaction with the Western Trading Syndicate was *ultra vires* of the company. This was a loan of the company's money merely for speculation purposes: see *Joint Stock Discount Co.* v. *Brown* (1866), L.R. 3 Eq. 139 at p. 150; *Stephens* v. *Mysore Reefs (Kangundy) Mining Co.* (1902), 71 L.J., Ch. 295 at p. 298; Palmer's Company Law, 15th Ed., 2. On the duty of an auditor see *Leeds Estate Building &c. Co.* v. *Shepherd* (1887), 57 L.J., Ch. 46 at p. 56; *London and General Bank; Theobald's Case* (1895), 64 L.J., Ch. 866 at p. 876; *Thomas* v. *Devonport Corporation* (1900), 1 Q.B. 16 at p. 21. The loan was *ultra vires* of the company: see *In re Anglo-Cuban Oil, Bitumen and Asphalt Co.* (1917), 86 L.J., Ch. 264. The damages is what has been lost.

Argument

Farris, in reply, referred to *Cotman* v. *Brougham* (1918), A.C. 514; *In re City Equitable Fire Insurance Co., Lim.* (1924), 94 L.J., Ch. 445 at p. 501; *International Laboratories Ltd.* v. *Dewar* (1933), 3 D.L.R. 665 at p. 705.

Cur. adv. vult.

9th January, 1934.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The action is brought by the respondent for damages for negligence in the auditing of its books, particularly in relation to a sum of $37,000, charged to the account of the Western Trading Syndicate. It is alleged that Norman R. Whittall, director and president of the respondent wrongfully converted to his own use large sums of money and that the appellants the auditors did not report this conversion to

the meeting of shareholders. The learned trial judge found that the defendants were negligent in this respect and gave judgment against them for $25,000 of said moneys. The statement of claim in the action is wide enough to include all misconduct of the auditors from the inception of the company in 1920 down to the present time, but I think the inquiry was confined by the judge to the alleged conversion by Whittall of the said $25,000. This would seem to be the view of the trial judge. In his reasons for judgment he said:

> In my opinion the view given in regard to the item of $37,000 was a very incomplete and misleading one as to what was going on in the company and after carefully considering the authorities referred to and the application of the law as therein laid down to the facts of the particular case before me I am forced to the conclusion and find that with respect to the said item of $37,000 the defendants having certified the balance sheet with the entry therein of that comparatively large sum as a debt of the Western Trading Syndicate and a good asset as such at its face value as above set out without reporting to the shareholders the various facts and circumstances known to them as aforesaid and without any comment thereon failed to discharge their duties as auditors to ascertain and state the true financial condition of the company at the time of the audit. The defendants having committed a breach of the duty laid upon them by the contract are therefore liable to the plaintiff for any loss proved to have been sustained by the company through breach of contract as aforesaid unless any of the other defences raised by the defendants can be sustained.

When the auditors found the sum of $25,000 charged to the account of the Western Trading Syndicate they applied to the president of the company, Whittall, and to the vice-president Thicke for information concerning it. Whittall stated that he did not wish to give particulars of the personnel of the Company as they were confidential but in order to satisfy the auditors he said he would guarantee the account and did so by a written guarantee given at the time. This was assented to by Thicke. At that time Whittall was known to the auditors to be a very wealthy man owning a large block of the shares of the bankrupt company which I shall hereafter refer to as the company, and they knew that the company was entitled to a lien on these shares for any sums which Whittall might owe them. So far, therefore, as the standing of Whittall is concerned at that time the guarantee was amply sufficient to protect the company. The auditors acting upon this information allowed the charge to remain against the Western Trading Syndicate and in reporting

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to the company respecting their audit for the year up to the 30th of June, 1929, the said guarantee was set out in full, but the details of their discussion with Whittal were not mentioned. The debit of the $25,000 against the Western Trading Syndicate was brought about by Whittall and the other officers of the company. It appears that Whittall had withdrawn moneys from the company from time to time and on the 30th of June, 1929, had the debit of this money transferred to the Western Trading Syndicate who were thereupon debited with the $25,000 and Whittall credited with the same. It appears from what I said above that Whittall refused to give any explanation respecting the Western Trading Syndicate and that they enquired also from Thicke who was the vice-president of the company who referred them to Whittall. Therefore, it must be taken that if there was any failure to explain the matter further the failure was Whittall's in refusing to give any further explanation to the auditors. The auditors not unreasonably, I think, accepted the written guarantee of Whittall as sufficient directions to the company and as sufficient for their purpose in making the audit. Now when the balance sheet was before the meeting of creditors held on the 16th of December, 1929, one of the members, *viz.*, Sir Stephen Lennard interrogated Whittall about this Western Trading Syndicate account and what occurred is stated by Thicke in his evidence as follows:

> Isn't this what happened at that meeting in December, 1929, Sir Stephen Lennard asked Mr. Whittall for information as to the Western Trading Syndicate? That is right.
>
> And Mr. Whittall said that the advances to the syndicate were guaranteed by him, Whittall, personally, and that that was all that was necessary to be said. There was further discussion than that.
>
> Wasn't that the substance of it? That is right.

The shareholders took no special action in connection with this account but adopted the minutes accepting the audit. At a meeting of the 24th of November, 1930, the same reference to the account of the Western Trading Syndicate was incorporated in the audit and apparently it passed without question.

It will be noted that the evidence is dealing with the sum of $25,000 whereas the guarantee was for $37,000. This comes about because the $25,000 was considered as an advance to the Western Trading Syndicate, not an investment of the company.

The Western Trading Syndicate made a profit of $12,000 with that advance which was not paid into the company until after the audit of 1928-29, but was paid in thereafter. The learned trial judge accepts the evidence that this was an advance to the syndicate and was not an investment. He refers to this matter on page 96 of the appeal book and at page 97 he finds the plaintiff's damages at $25,000. This, I understand to mean that he accepted the evidence that the advance was $25,000, and that the profit was the profit of the Western Trading Syndicate and not the profit of the company from an investment and that therefore the $12,000 should be deducted from the $37,000 as a payment on principal. The learned judge proceeds:

> I have only to add that I would not find them liable to any further extent as the breach of duty I have found on the part of the defendants was solely with respect to the said sum of $37,000 as aforesaid and any loss sustained beyond the said amount of $25,000 through withdrawals of other moneys by the said Whittall either before or after such breach of duty of the defendants cannot, in my opinion, reasonably be held to have been the natural result of such breach of duty.

In this way he speaks of all breach of duty other than the Western Trading Syndicate transaction.

Now assuming that the auditors discovered that the $25,000 advanced to the Trading Syndicate was transferred from Whittall's account who charged it to the Trading Syndicate, and assuming that they were doubtful of the propriety of that transaction which in effect changed Whittall's indebtedness to the company to the extent of $25,000 to the Trading Syndicate, they thereupon made enquiries above mentioned and were refused information covering the affairs of the Trading Syndicate. It was contended by the plaintiff that there was no such company; that it was a name used by Whittall for his own purpose but the learned trial judge has found against this and further we have on the balance sheet among sundry debtors the Trading Syndicate, and, as sundry creditors, to the same extent, the said Whittall. It was, of course, the auditors' duty in ascertaining the financial standing of the company to find out what assets the Trading Syndicate owned, but when they got the guarantee of Whittall, although it was irregular to do that, and having regard to the fact that the shareholders discussed the question in general meeting when the guarantee was

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noticed, can it be said that the failure of the appellants to set out the conversation between themselves and Whittall and Thicke, or to make further enquiries, or to call attention of the shareholders to the fact that it be suggested the company had no right to permit Whittall to withdraw moneys for his own purposes, amounts to a breach of duty or misfeasance, or if technically such the same ought not to be relieved against under sections 106 and 107 of the Companies Act. I think that if the company had any right to permit these directors or president to withdraw moneys for their own purposes that fact would appear in the memorandum of association and the shareholders would be presumed to have knowledge of it. The auditors therefore might very well have considered it was unnecessary to call the shareholders' attention to this breach of the company's powers.

There is no question as to the *bona fides* of the auditors. That has been found by the trial judge and no one has cast any reflection upon their honesty and, in my opinion, what they did, all the circumstances of the case being considered, cannot properly be considered as negligence. They accepted the explanation of the president and the vice-president in connection with the account of the Western Trading Syndicate as did also the shareholders. Did the shareholders tacitly consent to accept Whittall's guarantee in the place and stead of fuller explanation which Whittall declined to give? I think they did. The shareholders had implied evidence that the account of the Western Trading Syndicate was not sound since otherwise the guarantee would not have been necessary. They had the power to enforce the guarantee at once when Whittall was in a good financial position to meet it. They did not do it. They come forward after Whittall's financial position has changed and after they have obtained judgment against him in an action in the Supreme Court for the amounts they are now seeking to collect and after a return of the sheriff of *nulla bona*.

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I think, under the circumstances above referred to, the conduct of the defendants caused no damages to the plaintiff or his company, but if other views should prevail I think I ought to express the opinion that the auditors should be relieved from any liability under said section 107 of the Companies Act. I

agree with the finding of the trial judge that the respondent was not a joint tort feasor with Whittall. The said action in the Supreme Court against him was entirely different and the rule as to joint tort feasors has no application.

The appeal is allowed.

MARTIN, J.A.: I agree in allowing this appeal.

MCPHILLIPS, J.A.: In this case a judgment was entered in favour of the plaintiff (respondent) against the defendants (appellants), auditors for the plaintiff, for the sum of $25,000, following the judgment of Mr. Justice FISHER. The reasons for judgment of the learned trial judge are most explanatory and set forth the facts so completely that little reference need be made to them. I confine myself to but a few that must be borne in mind. The Blue Band Navigation Company went into bankruptcy and the respondent is the trustee thereof. The company is a private company and for years one Whittall, president and director, had been allowed to carry on its affairs with associate directors, and throughout those years, some ten or more, the appellants were the auditors for the company. Under the constitution of the company the directors were empowered to exercise the powers of the company. The shareholders would appear to have given little attention to the operations and few in number ever attended the annual meetings. Whittall therefore upon the facts would seem to have been so to speak the company. He was a man of large means with a large holding of shares in the company, in fact, had a holding of shares much greater than that which would give him control of the company and apparently all was satisfactory until the years 1929 and 1930, when apparently the company met with reverses. Then questions arose as to the liability of the auditors and this action was brought by the trustee in bankruptcy. Upon a careful review of all the facts I may say that I am in agreement with the learned trial judge up to that stage in his judgment where he used the following language:

Having in mind the duty and responsibility of an auditor as so defined I have to say at the outset that I think that, up to the time the defendants were engaged on their audit for the fiscal year ending June 30th, 1929, and ascertained what they then did with respect to the item of $25,000 as

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hereinafter mentioned, they could reasonably look upon the advances to or withdrawals by Whittall as simply debit balances, though large ones, in a current account with Mr. Whittall, manager and director, as aforesaid, had in which items were credited to him or withdrawals he made were debited to him. (See answers 46-48 by Mr. Gyles on his examination for discovery). Under the circumstances I cannot find that up to that time the defendants had failed in their duty to the company in not ascertaining or in not reporting if ascertained the fact that there was no contract or resolution of the company authorizing Mr. Whittall to withdraw these moneys.

Now the position as to the $25,000 for which in the end the learned judge gives judgment was really not changed in reality at all as then, with $12,000 added thereto, the debit of $37,000 was charged to the Western Trading Syndicate and when the auditors asked for explanation as to this Whittall states that he does not wish to disclose information; that it is a confidential or private matter—no suggestion that there was no such syndicate and it was never proved that it was non-existent or not a syndicate of financial worth or standing. The auditors apparently did not think that they should further probe into the matter when Whittall came forward and said that he would give his written guarantee, which was given and reads as follows:

> With reference to the Western Trading Syndicate account, this letter is to certify that I am personally responsible for the full amount of the moneys owing to you, which are now being used by this syndicate.

In my opinion there was no dereliction of duty here when one considers the manner in which the shareholders had for years allowed the affairs of the company to be carried on. Further Whittall's financial standing according to the evidence was then undoubted and the guarantee could have been called up at any moment. This was admittedly the position. Then as to $12,000 of the $37,000, this was profit which went to the company from the Western Trading Syndicate and was credited in the balance sheet of 1930 and the debit as against the Western Trading Syndicate stood reduced to $25,000, the amount originally debited to Whittall later transferred to the syndicate and covered by the Whittall guarantee.

Now the finding of the learned trial judge with which I do not agree reads as follows:

> I think I am doing justice to all parties when I say that on the evidence before me I must find, as I do, that the withdrawals by Whittall of the said sum of $25,000 in various small amounts at different times were

advances to Whittall himself made at such times but I cannot find that when the transfer on the books of the company was made on the 30th day of June, 1929, as aforesaid the Western Trading Syndicate was a mere *alias* for the said Whittall and would infer, as I do, that there was such a syndicate on the said 30th day of June, 1929, and also that profits amounting to $12,000 had actually been made by that time for the company by speculating with $25,000 of the funds of the company and these profits were later paid to the company. I have however no evidence or no sufficient evidence as to the nature of the speculations carried on or the nature of the transaction with the Western Trading Syndicate to make any finding as to whether or not the use made of the said sum of $25,000 was improper in law in the sense that it was used for objects for which the company could not have legally used it or whether or not it was proper to debit the Western Trading Syndicate with the said sum of $25,000 nor do I think it necessary to make any finding on these issues raised in order to dispose of the issue as to whether or not the defendants in respect of the matter now being considered fully discharged their duties as auditors as defined in the authorities cited "to ascertain and state the true financial condition of the company at the time of the audit." In September, 1929, the auditors took the responsibility of accepting the said transfer notwithstanding the absence of information and explanation as hereinafter referred to and of certifying a balance sheet which shewed an item of $37,000 at its face value as a debt of the Western Trading Syndicate without making any explanation or comment in connection therewith in their certificate or report. After a careful consideration of the things which were ascertained and those which were not ascertained by the auditors as hereinafter set out in detail, I am satisfied that they had not ascertained and stated to the shareholders the true financial position of the company. The entry in the balance sheet of the sum of $37,000 as a debt of the said syndicate and as a good asset as such at its face value without any explanation or comment was under the circumstances seriously misleading to the shareholders and unjustifiable, depriving them as it did of the opportunity of judging for themselves what action should be taken for their own protection after having received independent and reliable information respecting the true financial position of the company at the time of the audit.

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To give some indication of the affairs of the company and to shew that this matter of $25,000 as an advance first to Whittall and later transferred as a debit of the Western Trading Syndicate and that knowledge of the transaction was made known to the shareholders at the annual meeting in 1929, I think it well to quote from the evidence of C. S. Thicke, one of the directors of the company:

Who carried on the entire complete management of the affairs of the company during this ten years? I did so far as the towing was concerned.

The combined operations? Mr. Whittall looked after the logging and shingle business entirely.

Who kept the books of the company? Mr. McMillan in the latter years.

Under whose supervision? Mine.

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Have you been connected with the work continuously during these ten years? Yes.

In the office right along? Yes.

And you had full knowledge of what was done by yourself and Whittall? Yes.

In June, 1929, an entry was made charging the Western Trading Syndicate with $25,000 advances, and a profit charge of $12,000. Did you know of that? Yes.

As a director? Yes.

How did you know it? In discussion with Mr. Whittall.

Did you agree and approve of it? Yes.

Did Mr. Cotter come to you about this item? Yes.

You heard Mr. Cotter's evidence about what happened? Yes.

Do you agree with that? Yes.

Had you any negotiations about this time for the purchase of any of Whittall's shares? No.

Or later did you? Or was it only his father's shares? Up to that time it was only his father's shares.

Did you have any negotiations about Whittall's own shares? Yes.

When was that? Oh, probably 1930, the latter part of 1929.

At what price? Something over $100,000 for his share.

In your opinion was that a fair price for them? Yes.

Did you know anything about Whittall's financial position as of June, 1929? No, not the details of it.

Did you know in a general way? Yes, I thought he was worth considerable money.

Apart from the ownership of these shares? That is right.

How about the actual assets of the company in the way of tugs and improvements made on them? Could you say anything about that to shew the financial position of the company? They were insured at that time for about $160,000. We had other assets.

When were they re-engined? The first Diesel was put in in 1925 or 1926, and the second one a year later, and the third one in 1930.

Were there quite large expenditures made? Yes, one was $30,000 odd, one $40,000, and another $13,000 or $14,000.

Who decided on that policy? Mr. Whittall and myself.

Without consulting the others? Yes.

Was a resolution prepared afterwards in accordance with that for the shareholders? Was that ever brought up? No.

Do you remember the annual meeting in December, 1929? Yes.

Do you know Sir Stephen Lennard? Yes.

Was he a shareholder of the company at that time? Yes.

Do you recall any questions by him? Yes.

Who did he direct his questions to? Mr. Whittall.

What were they about? The Western Trading Syndicate.

About the insurance? That appears in Exhibit 3 in that connection, and what were his questions? I don't remember what they were.

I mean the purport of them? To find out what the Western Trading Syndicate consisted of.

Who answered it? Mr. Whittall.

What did he state about it? That I cannot tell now.

Going back, to assist your memory this way, do you recall the information given to the auditor, Mr. Cotter, about this syndicate? Mr. Cotter discussed it with Mr. Whittall himself. I referred him to Mr. Whittall.

Do you recall whether the statement of Mr. Whittall explaining this was in keeping with your knowledge of what the syndicate was? Mr. Whittall told me it was stock and shares of himself and friends, in which we would participate in the profits.

And the $12,000 was what? Profits.

While you cannot remember exactly what Mr. Whittall said, was his statement to Sir Stephen Lennard at the meeting in keeping with what he told you? Yes.

Was there any statement made to the meeting about guarantees? Yes.

By whom? By Mr. Whittall.

What did he say? He said he had guaranteed it.

Was any statement made so that all the shareholders would hear it? Yes.

Do you remember whether Sir Stephen made any statement to the meeting after he heard this? No, I do not remember what was said.

It is plain that the shareholders were fully apprised at the annual meeting of the shareholders in 1929 of the guarantee given by Whittall and the stated debit as against the Western Trading Syndicate of $37,000, and the auditors' report shewed this debit. Then we have the balance sheet of 1930 as reported by the auditors at the annual meeting of the shareholders shewing that the debit of $37,000 stood at $25,000, the company having received $12,000 Western Trading Syndicate profits.

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It would appear that in June, 1931, by the statement of assets and liabilities as made by the auditors there was on June 30th, 1930, an excess of assets over liabilities of $130,660.92. In making that report what follows is a portion thereof:

SUNDRY DEBTORS:

Comprises advances to Mr. N. R. Whittall personally of $16,602.74, and advances to Western Trading Syndicate guaranteed at the time of such advances by Mr. N. R. Whittall, who informs us that at the present time he is unable to make payment of the respective amounts and, therefore, they have been fully reserved for.

BILLS AND ACCOUNTS RECEIVABLE:

We have examined these accounts in detail and, from the information and explanations received, are of the opinion that adequate provision has been made for non-collectable accounts. The accounts receivable are hypothecated to the bank as additional security for their loan.

CURRENT LIABILITIES:

We have satisfied ourselves as far as possible that all liabilities as at June 30, 1931, have been included in the statement.

STATEMENT OF ASSETS AND LIABILITIES:

This statement has been prepared to shew the excess of assets over lia-

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bilities on the basis of the valuations which we have obtained from the management.

Yours very truly,
PRICE WATERHOUSE & CO.

It would appear that this company met with severe reverses in common with many others consequent upon the crash in stocks and the general depression that followed, and which is still continuing but gradually improving.

Whittall was the president and a director of the company and as I have already intimated was with his fellow directors allowed to conduct the business of the company—this extending over ten years. Of course, he had the controlling interest of the company, was a rich man, and the shareholders were apparently content to allow this course of things to go on.

Whittall evidently came forward when the affairs of the company were not going well, namely, on the 29th of August, 1929, he wrote the following letter to the company:

This is to certify that I have waived for the financial year ending June 30th, 1929, the sum of Eight Thousand Dollars ($8,000) due me on my salary.

Further, we find the auditors on August 3rd, 1931, writing to the creditors of the company in the following terms:

We have examined the books and accounts of the Blue Band Navigation Company Limited for the purpose of ascertaining the financial position of the company as at June 30, 1931, and have prepared and attach hereto:

Balance sheet as at June 30, 1931 Exhibit A
Statement of assets and liabilities as at June 30, 1931. Exhibit B.

We have not made an examination as at this date of the operations for the year ended June 30, 1931. In connection with the statements submitted herewith we have the following comments:

BALANCE SHEET

Capital Assets:

These are included at the valuations as shewn by the books of the company.

Bond and Sundry Shares:

These comprise the following bond and shares:

$500	Dominion Tug & Barge Co. Ltd. at 7% due 1947	$500.00
2,000	shares Bayview Mining Co. Ltd.	1.00
15,000	shares Multi-Copy Writer Corporation Ltd. and half interest in 8,750 shares	
2,275	shares Georgia River Gold Mining Co.	
		$501.00

LUMBERMAN'S INDEMNITY EXCHANGE:

The claim against this company amounts to the sum of $1,338.96, but as the collection is dependent on what may be realized by the liquidator of

the Lumberman's Indemnity Exchange on claims which they have against other parties, a reserve of $1,238.96 has been provided in the accounts.

INSURANCE POLICIES:

This valuation is in accordance with information received from the local representatives of the respective insurance companies. The policies are held by the bank as collateral to their loan.

INVENTORIES:

The inventories have been included at valuations made by the management and may be briefly summarized as follows:

1	Brass propellor	$ 525.00
12	Propellor blades for tugs	360.25
	Mill tools	350.00
	Fuel—	
	Coal and oil in bunkers and tugs	1,268.24
	Boat supplies and provisions	750.21
		$3,253.70

[For the balance of the letter see *ante* pp. 337-8.]

It was not until the 19th day of September, 1932, that The Trustee of The Property of Blue Band Navigation Company, Limited, a bankrupt (the respondent here) took judgment against Whittall, the judgment reading as follows:

UPON motion of the plaintiff, and upon hearing Mr. *O. F. Lundell*, of counsel for the plaintiff and Mr. *R. Symes* of counsel for the defendant, and upon reading the admissions contained in the statement of defence herein:

THIS COURT DOTH ORDER AND ADJUDGE that the plaintiff recover from the defendant the sum of $41,607.99 and his costs of this action to be taxed.

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This judgment included the amount of the guarantee of Whittall of $25,000, the trustee in bankruptcy in the particulars to the statement of claim setting forth (d):

(d) Part of the said sum of $41,607.99, namely the sum of $25,000, was charged by the defendant to an alleged syndicate, called "Western Trading Syndicate," which in fact was a mere *alias* for the defendant.

The learned trial judge in this action made a finding as we have seen that the Western Trading Syndicate was not a mere *alias* for Whittall, the learned trial judge further saying "would infer as I do that there was such a syndicate."

Now it is a significant fact that although the company was adjudged a bankrupt on the 11th of September, 1931, judgment was not taken against Whittall until the 19th of September, 1932. Why all this delay? It may have well been that the money could have been got from Whittall if prompt action had been taken. Then again in my view of the law as applied to

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the facts of this case the trustee (the respondent) has no position whatever here to support damages as against the auditors (the appellants) as the trustee should have proceeded against the Western Trading Syndicate which he has not done. It may well be that the Western Trading Syndicate is well able to pay the amount of its indebtedness. There is the further significant fact that the trustee (the respondent) never called Whittall as a witness at the trial, although we were advised by counsel at this Bar that he was present at the trial of the action—no apparent effort to at all ferret out the financial standing of the Western Trading Syndicate. This, in my view, is fatal to any possible claim for damages as against the auditors (the appellants). The duty existent upon the trustee in bankruptcy was to exhaust all remedies and compel payment by the Western Trading Syndicate or shew that all legal remedies had been fruitless. For all this Court knows the Western Trading Syndicate may be perfectly good financially and can be compelled to pay the amount covered by the Whittall guarantee. What the trustee (the respondent) had to shew was that the debit against the Western Trading Syndicate was worthless; that Whittall was worthless and satisfy the Court that the auditors (the appellants) were liable. The learned trial judge imposed liability upon the auditors (the appellants) and assessed the damages at $25,000, the amount of the guarantee given by Whittall. Where was there liability if the Western Trading Syndicate was financially sound and able to pay the debt? The learned trial judge concluded his reasons for judgment in the following terms:

> I come now to consider the question of damages and the true measure thereof. Counsel on behalf of the plaintiff submits that the amount of the judgment against Whittall, *viz.*, $41,607.99, should be the measure to be applied while counsel on behalf of the defendants submit that the *onus* of proof is on the plaintiff and that no damages have been proved to have resulted to the plaintiff from the defendant auditors having acted as they did. In this connection reference might be made again to the passage set out from the judgment of the Court in *In re Republic of Bolivia Exploration Syndicate Lim. (No. 2)* (1914), 83 L.J., Ch. 234 to the effect that when it is shewn that audited balance sheets do not shew the true condition of the company and that damage has resulted the *onus* is on the auditors to shew that the resulting damage is not the result of any breach of duty on their part. Apart from this rule however I find that the plaintiff has

satisfied the *onus* of proof to the extent of $25,000 and even with the rule I would find that this amount is all the defendants are liable for. I do not think the defendants are entitled to any reduction of such amount by reason of the fact that the company, as already pointed out, had received the sum of $12,000 through Mr. Whittall in November, 1929, and that the Western Trading Syndicate account had been credited with such sum. The balance sheet certified by the defendants as at June 30th, 1929, shewed the Western Trading Syndicate as a debtor to the extent of $37,000 and after payment of the $12,000 the later balance sheet, as at June 30th, 1930, shewed the syndicate as still a debtor to the extent of $25,000 and the defendants had obtained another guarantee from Whittall for the amount and, as already intimated, the judgment obtained by the plaintiff later against Whittall included the said sum of $25,000 and the execution issued was returned *nulla bona*. On the evidence and my findings as above therefore it is apparent that it has been shewn that the audited balance sheets do not shew the true condition of the company and that damage has resulted. The question then is to what extent must the resulting damage be considered as the result of the breach of duty on the part of the defendants as aforesaid. In the *Canadian Woodmen* case, *supra* [(1933), 1 D.L.R. 168] the Court, at pp. 171-2, says:

"The judgment should be varied by declaring that the auditors are liable to the plaintiff for all loss that has resulted from the failure of E., M. & Co. [*i.e.*, the auditors] to disclose to the plaintiff the true facts when they came to the knowledge of the auditors early in 1928. Had the true facts then been disclosed the plaintiff might then have taken steps for its own protection. It was deprived of this opportunity by the breach of duty of these defendants. Clarke it seems was then solvent and probably would have paid if pressed."

From this passage it is apparent that the auditors' responsibility is as to circumstances at the time of the audit. As to what such circumstances were in the present case, I would begin by saying that upon the evidence before me I must come to the conclusion that at the time the defendants failed to disclose the true facts when they came to their knowledge about the end of August, 1929, the said sum of $25,000 had not been lost by the speculating but was then being used by the syndicate along with profits of $12,000. The amount therefore thus outstanding in the hands of the syndicate for which the company had Mr. Whittall's guarantee, though without the knowledge of the shareholders was the sum of $37,000 and, according to the evidence of Mr. Cotter, Whittall was then solvent and the company would have received payment in full immediately if it had requested such payment. It is or may be argued on behalf of the defendants that there is no proof that the company would have taken any steps to protect itself but certainly it was deprived of the opportunity to do so, by the breach of duty of the defendants as aforesaid and following the rule suggested in the *Canadian Woodmen* case I would hold that proof of this and of the circumstances existing as aforesaid at the time of the audit is sufficient proof of the loss having been sustained through such breach to make the defendants liable to the plaintiff in damages to the extent of $25,000 being the unpaid balance of the said amount of $37,000. I have

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only to add that I would not find them liable to any further extent as the breach of duty I have found on the part of the defendants was solely with respect to the said sum of $37,000 as aforesaid and any loss sustained beyond the said amount of $25,000 through withdrawals of other moneys by the said Whittall either before or after such breach of duty of the defendants cannot, in my opinion, reasonably be held to have been the natural result of such breach of duty. For the principles applicable on this phase of the matter reference might also be made to what was said by Robson, J.A. in *International Laboratories Ltd.* v. *Dewar* (1933), 2 W.W.R. 529 at 562-3, where the judgment of the Court in *Canadian Woodmen of the World* v. *Hooper*, *supra*, is referred to.

There will therefore be judgment in favour of the plaintiff against the defendants for the sum of $25,000 and costs.

It will be seen that the judgment of the learned trial judge is based upon the Whittall guarantee.

I have gone at some length into the facts to give a clear perspective but I have no hesitation whatever in stating my view that upon all the facts no responsibility whatever can be imposed upon the auditors (the appellants) in this case. I am unable to grasp the real meaning of the learned trial judge's language where he says (above quoted) "the defendants [the auditors] failed to disclose the true facts when they came to their knowledge about the end of August, 1929, the said sum of $25,000 had not been lost by the speculating but was then being used by the syndicate along with the profits of $12,000." It was not a part of the auditors' duty to say moneys of the company should not be risked in speculating. This was the business of the directors of the company and the directors withheld the information and in due time at the annual meeting of the shareholders, as we have seen, full disclosure was made by Whittall at the shareholders' meeting in December, 1929, Sir Stephen Lennard putting questions to Whittall during the course of the meeting and it was elicited that the $25,000 was in the hands of the Western Trading Syndicate and the company would participate in the profits and that in fact $12,000 in the way of profits had already been made and that Whittall had guaranteed the $25,000 which was in the hands of the Western Trading Syndicate. I cannot, with great respect to the learned trial judge, agree with his finding of responsibility upon the auditors in view of these facts. The auditors' duty did not extend to directing how the company should carry on its business nor was there

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any duty to say anything as to the worth of people with whom the company was doing business. If anything it was something in excess of their legal duty to exact the guarantee of Whittall. It was a matter for the directors to determine as to what people they would trust or repose confidence in not the auditors, save, perhaps, where the knowledge of auditors extended to moneys being placed in hands of people notoriously unworthy of credit. Nothing of that character enters here. Upon the facts of the present case, it would appear that the auditors have been placed in the position of insurers, a position absolutely untenable and incapable of being substantiated as I view it. With respect to the law as applicable to the facts of this case and as to the liability in law generally imposed upon auditors there are several well-known cases, but perhaps the leading case may well be stated to be *In re City Equitable Fire Insurance Co., Lim.* (1924), 94 L.J., Ch. 445; (1925), Ch. 407.

Here we have the auditors asking information from Whittall the president and one of the directors and he gives in answer thereto that the money previously debited to him has now been debited to the Western Trading Syndicate and that profits of $12,000 have already been achieved. Whittall said that it was a confidential matter, when asked for further particulars in regard to the syndicate. The result of things was that Whittall again assumed the liability, as to the $25,000 and $12,000 profits, *i.e.*, $37,000 giving his guarantee in writing which the auditors considered satisfactory and admittedly at that time and for some very considerable time thereafter Whittall was a man of large means and if the company had desired to enforce the guarantee the money would have been forthcoming. Further as I have already indicated the company took no steps whatever to enforce payment against the Western Trading Syndicate. That may well be because of the standing and stability of the syndicate. No evidence has been led upon this point at all. It may well be said that the statutory duty upon the auditors cannot be said to be absolute but must necessarily be considered in the light of the information asked for by the auditors and the explanations given. Upon turning to Halsbury's Laws of England, 2nd Ed., Vol. 5, p. 386, we find this foot-note:

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(r) *Leeds Estate Building and Investment Co.* v. *Shepherd* (1887), 36 Ch. D. 787; 9 Digest 555, *3668*; *Re London and General Bank (No. 2)*, *supra, per* Lindley, L.J., at p. 683. The auditor must shew reasonable skill, care and caution in the performance of his duties, but he is not bound to be a detective, and is "a watch-dog, not a bloodhound" (*In re Kingston Cotton Mill Co. (No. 2)*, (1896), 2 Ch. 279, C.A., at p. 288; 9 Digest 554, *3661*); and see *Squire, Cash Chemist* v. *Ball, Baker & Co.* (1911), 106 L.T. 197, C.A.; 1 Digest 433, *1243*; *Fox & Son* v. *Morrish, Grant & Co.* (1918), 35 T.L.R. 126; Digest Supp.; and note (*q*), *supra*.

I think it well to quote what Pollock, M.R., said at p. 503, in the *City Equitable* case, *supra*, and give it heed in this case:

> Now when one approaches this case, quite apart from the question of law with which I shall have to deal later, it is of the first importance to remember that one is looking into facts which have been subjected to the scrutiny and have been explained by the ability of accountants who have come in to look at all the books, and not only the books of the City Equitable Company but also the books of Ellis & Co. It is not easy to reconstruct the true position as it stood before the auditors when they were called upon to do their duty in the three successive years in which their conduct is challenged. It is also proper to remember that when a big disaster has occurred, such as the failure of this company, which, as I have said, was a notable company in its day, there is, on the part of some, a desire to find a scapegoat who can be made responsible, and possibly make good some of the losses which have occasioned disaster to so many. But it is the duty of the Court, as far as possible, to endeavour to ascertain what was the problem presented to the auditors, and what was the knowledge available to them at the time.

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By way of some analogy as affecting the facts of this case the debit first to Whittall—later the Western Trading Syndicate—the guarantee given and Whittall's financial standing as to the $25,000 and $37,000, I would refer to what Pollock, M.R. said at pp. 505-6:

> When Mr. Lepine called attention to the fact that 161,000*l.* had been sent or dispatched or placed in Ellis & Co.'s hands for the purpose of the ranch, and he pointed out that it exceeded the authorized amount by 11,000*l.*, he was then told either by Mansell or by Mr. Bevan that under the circumstances Ellis & Co. would debit it to their account. I suppose in business that meant this, that it was not a matter of very great concern, if all had gone well, whether this money was advanced to the ranch by Ellis & Co. or a partner in Ellis & Co., or one of the persons concerned in it. The sum of 11,000*l.* was comparatively not a very large one, and whether it was debited to one account or another was a matter of little moment. As a matter of fact, in consequence of the information Mr. Lepine received, it was debited to Ellis & Co., and at that time I think there is no doubt from the evidence that Ellis & Co. could have drawn, or certainly were supposed to be able to draw, a cheque at any time for 11,000*l.*, and that 11,000*l.* is found included in the sums at call or short notice.

I think it well to quote from Pollock, M.R. at pp. 509-10:

What is the standard of duty which is to be applied to the auditors? That is to be found, and is sufficiently stated, I think, in *In re Kingston Cotton Mill Co. (No. 2)* (1896), 2 Ch. 279. As I have already said it is quite easy to charge a person after the event and say: "How stupid you were not to have discovered something which, if you had discovered it, would have saved us and many others from many sorrows." But it has been well said that an auditor is not bound to be a detective or to approach his work with suspicion or with a foregone conclusion that there is something wrong. "He is a watchdog, but not a bloodhound." That metaphor was used by Lopes, L.J. in *In re Kingston Cotton Mill Co. (No. 2)*. Perhaps, casting metaphor aside, the position is more happily expressed in the phrase used by my brother Sargant, L.J., who said that the duty of an auditor is verification and not detection. The *Kingston Cotton Mill* case is important, because expansion is given to those rather epigrammatic phrases. Lindley, L.J. says: "It is not sufficient to say that the frauds must have been detected if the entries in the books had been put together in a way which never occurred to anyone before suspicion was aroused. The question is whether, no suspicion of anything wrong being entertained, there was a want of reasonable care on the part of the auditors in relying on the returns made by a competent and trusted expert relating to matters on which information from such a person was essential."

In view of this quotation above and applying the principle that the learned Master of the Rolls so graphically calls up, and bearing in mind the facts of the present case, I think the auditors here carried out their full duty. Further, Pollock, M.R. at p. 514:

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I am not content to say that simply because a certificate was accepted otherwise than from a bank therefore there was necessarily so grave a dereliction of duty as to make the auditors responsible. In my opinion it is for the auditor to use his discretion and his judgment, and his discrimination as to whom he shall trust; indeed, that is the right way to put a greater responsibility on the auditors.

I would refer to the judgment of Warrington, L.J. (now Lord Warrington) in the *Equitable* case, *supra,* that I have been quoting from. At pp. 519, 520 we have this said:

The ordinary duties and obligations of an auditor without reference to this or any other special article or stipulation as to the terms of his employment are stated by Lindley, L.J. in full in *In re London General Bank (No. 2)* (1895), 2 Ch. 673, 682. It is unnecessary to read the whole of that part of his judgment which deals with the point, but I think it is perhaps desirable to read the following passage: "It is no part of an auditor's duty to give advice, either to directors or shareholders, as to what they ought to do. An auditor has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of the company is being conducted prudently or imprudently, profitably or unprofitably. It is nothing to him whether

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dividends are properly or improperly declared, provided he discharges his own duty to the shareholders. His business is to ascertain and state the true financial position of the company at the time of the audit, and his duty is confined to that." He then proceeds to discuss in what way he is to perform that duty in reference to examining the books of the company and verifying the statements contained therein in order that he may be able truly to certify that which he had to certify under the Companies Acts. Then he goes on to point out that an auditor is not an insurer; that he is not bound to do more than exercise reasonable care and skill in making inquiries and investigations, and further that what is reasonable care in any particular case must depend upon the circumstances of that case.

Again in *In re Kingston Cotton Mill Co.* (*No. 2*) Lindley, L.J. in dealing with one particular point that arose in that case says: "It was further pointed out that what in any particular case is a reasonable amount of care and skill depends on the circumstances of that case; that if there is nothing which ought to excite suspicion, less care may properly be considered reasonable than could be so considered if suspicion was or ought to have been aroused. These are the general principles which have to be applied to cases of this description. I protest, however, against the notion that an auditor is bound to be suspicious as distinguished from reasonably careful." In that case it was accordingly held that the auditor was entitled to accept the certificate of the company's manager, though on subsequent investigation it turned out that the manager had been for some years defrauding the company and that his certificate was intended to cover up those frauds. The duty of the auditor is to verify the facts which it is proposed to state in the balance sheet, and in doing so to use reasonable and ordinary skill. I need say no more about the general duties of an auditor.

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Here we have the case of a company for ten years and more allowing the president, Whittall, to absolutely manage its affairs and with his associate directors exercise all the powers of the company. In view of all of the facts in the present case, and applying the principles of the law thereto, my conclusion is that the auditors proceeded honestly and discharged their duty and cannot be held liable in damages as they have been in the Court below. There is no foundation upon which any damages could be rightly assessed against them even if it could be said there was any liability upon the auditors which, of course, is not my opinion.

I would allow the appeal, reverse the judgment of the Court below and dismiss the action.

MACDONALD, J.A.

MACDONALD, J.A.: This is an appeal from a judgment of FISHER, J. awarding $25,000 damages against the appellants

(auditors) for negligence and misfeasance in respect to the audit of the books of the respondent company (referred to as the company) now in liquidation and represented by a trustee in bankruptcy.

Two audits only are in question, *viz.*, for the fiscal years ending respectively the 30th of June, 1929, and the 30th of June, 1930. The controversy, although it has many ramifications, relates largely to the treatment by the auditors of an account between the company and the Western Trading Syndicate, hereinafter referred to as the syndicate. It is necessary, however, to survey the whole operations of the company to see if incidents appear that ought to arouse suspicion in the minds of the auditors. A general outline of the facts will be found in the judgment under review.

I refer first to the pleadings as it was submitted that in respect to the negligence alleged therein the findings of the trial judge are favourable to the auditors and that the negligence actually found by him is not supported by the pleadings. This contention is based on the submission that respondent's case at the trial depended upon a finding that the so-called syndicate did not in fact exist. It is alleged in paragraph 6 of the statement of claim that Whittall, president of the company, before liquidation, wrongfully converted to his own use $41,607.99 of the company's funds and that the auditors failed to discover it. Particulars were given as follows:

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(a) He (Whittall) wrongfully withdrew $41,607.99 in excess of any sum he was entitled to for salary, etc. (b) The Company had no power to permit him to do so or to receive it by loan or otherwise. (c) This sum was taken without the knowledge of, or the authorization of the directors or shareholders. (d) At or about the end of the 1928 fiscal year Whittall falsified the company's books by crediting his own account with $25,000 and by charging this sum in the company's books to the syndicate which was a mere *alias* for Whittall. (e) At the same time he falsely credited profit and loss account in the ledger of the company with $12,000 profits from investments debiting the syndicate with this amount. (f) The result of these entries was to shew that the syndicate owed the company $37,000 and to reduce the debit in Whittall's account from $29,698.15 to $4,698.15. (g) The said syndicate was a myth, the name being invented by Whittall to wrongfully procure company moneys for his own use and to conceal from the company the amount of his unauthorized withdrawals and for the purpose of representing that profits of $12,000 had been earned on investments while the fact was that all such entries were false

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and no such profits were earned by the company. (h) All of said sums amounting to $41,607.99 were withdrawn by Whittall and converted to his own use and moneys of the company were used by Whittall and not for company purposes.

The basic allegation herein is that the syndicate was *non est*: conjured up by Whittall as a false front to conceal a large part of the withdrawals which he made from the company as a shareholder from time to time and to unload them on a fictitious debtor. According to the findings of the trial judge this was not so. He said:

> The evidence before me is very meagre. I have no evidence or no sufficient evidence as to the nature of the business of the Western Trading Syndicate, or who constituted it or what the arrangement with the syndicate was. . . .
>
> I think I am doing justice to all parties when I say that on the evidence before me I must find, as I do, that the withdrawals by Whittall of the sum of $25,000 in various small amounts at different times were advances to Whittall himself made at such times but I cannot find that when the transfer on the books of the company was made on the 30th day of June, 1929, as aforesaid the Western Trading Syndicate was a mere *alias* for the said Whittall and would infer, as I do, that there was such a syndicate on the said 30th day of June, 1929, and also that profits amounting to $12,000 had actually been made by that time for the company by speculating with $25,000 of the funds of the company and these profits were later paid to the company.

We are asked to reverse that finding on the ground that it is an inference drawn from facts. I would not do so. The respondent might have supplied additional evidence. The trustee could have examined Whittall in the bankruptcy proceedings on a point so vital to ascertain the facts in relation to the syndicate but did not choose to do so. They relied at the trial solely on the evidence given on discovery of Mr. Gyles, the auditors' chief representative in Vancouver who, however, had no first-hand knowledge of this particular audit and upon the documentary evidence. The company's trustee, a chartered accountant, who might, if possible, point to items indicating failure by the auditors to properly advise the shareholders, was not a witness. With so little evidence led and more withheld it is impossible to reverse the finding referred to. We must treat it as an existing entity.

Whittall however refused to disclose to the auditors its personnel or the nature of its business except that it was engaged in speculative ventures in the stock market and this action arises

because the auditors did not report that fact to the shareholders. It also follows that we must view the case on the assumption that $25,000 of Whittall's withdrawals were handed to the syndicate in different amounts and that through speculating with it $12,000 in profits were received.

The auditors by a certified balance sheet (Exhibit 3), dealing with the fiscal year ending June 30th, 1929, under the heading "Sundry Debtors" referred to the syndicate as a debtor of the company in the sum of $37,000, *i.e.*, $25,000 advanced and $12,000 earned in profits but not then received. This balance sheet is attacked on the ground that it did not disclose a true and correct view of the company's finances. Particulars were given in paragraph 9 of the statement of claim, detailing in what respect it was false and misleading as follows:

(a) It shews the syndicate a debtor for $37,000 whereas no such syndicate existed. (b) It shews $12,000 profits whereas no profits were earned or received. (c) It did not disclose an indebtedness of Whittall to the company of $29,698.15 (in other words that he owed the company this amount, not the syndicate, *i.e.*, the larger part of it). (d) It did not exhibit a true and correct view of the state of the company's affairs as shewn by its books, shewing again that the attack on the balance sheet is based on the allegation that the syndicate did not exist and hence could not be a debtor; that $12,000 was not earned because no profit-making entity was *in esse* and that Whittall should have been shewn as the debtor for the full amount. Assuming, therefore, the existence of the syndicate, the balance sheet (Exhibit 3) did correctly outline the true facts and the only point for debate is whether or not they were exhibited with sufficient detail or were presented in such a light that shareholders would likely be, and in fact were, deceived.

The next allegation of negligence is found in pargraph 10 of the statement of claim, *viz.*, that

> The said defendants [appellants] were guilty of negligence and misfeasance in the preparation and delivery of the said balance sheet, and with respect to their duties as auditors of the company.

Particulars of this allegation (summarizing them) are as follows:

(a) Did not disclose the true state of affairs (this means as

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given in (a), (b) and (c) of paragraph 9). (b) Appellants should have reported that Whittall withdrew $41,607.29 for his own use and that (1) the company had no power to lend this sum to him and that (2) the company made no contract with Whittall under which this sum could be advanced to him, or withdrawn by him. (The question of authority and its bearing, if any, on the duties of the auditors will be discussed later.) (c) Appellants should have proof that the $25,000 withdrawn and allegedly invested with the syndicate was in fact invested and that securities therefor were exhibited in the name of the company. (It is not the duty of auditors to inquire into the internal affairs of another concern whose books they are not auditing—a debtor of the company—except far enough to ascertain and report the value of any debt or asset.) (d) Appellants if they found that no such investments were made, nor securities available should make a special report thereon to the directors and shareholders. (e) Appellants should satisfy themselves that the alleged profit of $12,000 was earned and if so paid to the company or was represented by securities.

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The foregoing particulars may possibly be taken as charging (on the basis that the syndicate existed) that the auditors should have secured and reported the particulars outlined. However, in paragraph 11, shewing that the plea centres around the allegation that it did not exist, it is pleaded that

> The result of the defendants failing to perform their duties as aforesaid, was to permit the said Whittall to falsify the books of the company as aforesaid, and to conceal from the shareholders of the company the fact that the said Whittall was indebted to the company as aforesaid, and to induce the shareholders of the company to believe that profits of $12,000 had been earned upon investments, when, in fact, no such profits had been earned.

The alleged falsification consisted in shewing the syndicate as a debtor.

The foregoing allegations refer to the audit for the fiscal year ending June 30th, 1929, and the balance sheet exhibited by the auditors. Those charges are repeated in respect to the audit for the fiscal year ending June 30th, 1930, and certified balance sheet presented at that time shewing the syndicate again as a debtor in the sum of $25,000 and omitting to shew that Whittall (not the syndicate) was at that date indebted to the company in

the sum of $30,732.37 for withdrawals. The profit of $12,000 was received in the meantime.

Summarizing the pleadings briefly I would say that the case offered for trial charged that the auditors failed to discover and report the alleged falsification of accounts prepared on the basis the syndicate existed whereas it did not and alternatively that if it did exist they failed to inquire into it and to exhibit securities held for the company. There are other allegations in respect to salary withdrawals and lack of authority to make advances only incidental however to the main case and dealt with separately.

Turning to the evidence, based on the pleadings, I think it is only necessary to refer to it in so far as it bears on the two important aspects of the case shewing (1) how the auditors treated the company's relations with the syndicate and (2) facts disclosed by an examination of the company's books which it is suggested should arouse suspicion. The difficulty in respondent's way in regard to the second aspect is this—that the suspicious facts enumerated would point to the conclusion (and it was so put to us—we were asked to reverse the finding) that the auditors should have concluded that no syndicate existed and that book entries were false and govern their actions accordingly whereas the contrary view must be accepted. I will however refer to these so-called suspicious facts. On the first point what occurred may be stated in the words of Mr. Cotter, the auditor. He first arranged a meeting with Mr. Whittall and Mr. Thicke, the two principal directors, to secure explanations.

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> . . . After a general discussion of the account with Mr. Whittall he intimated to me that he did not wish to disclose either the nature of the speculations or the assets of the Western Trading Syndicate nor did he wish to disclose the names of the members of the syndicate, and that these matters were of an exceedingly confidential nature.
>
> Yes? After a long discussion during which I pointed out to Mr. Whittall that we could not bring these on the balance sheet as an advance, or accounts receivable, unless we received some definite evidence as to the collectability of the account. He finally consented to give his guarantee for the amount of the advance, $25,000, plus the profits referred to of June 30th, 1929, of $12,000. In all he guaranteed $37,000.

The guarantee taken, addressed to the company and signed by Whittall, on August 27th, 1929 (and it was repeated in 1930), was in these words:

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With reference to the Western Trading Syndicate account, this letter is to certify that I am personally responsible for the full amount of the moneys owing to you, which are now being used by this syndicate.

The auditor's viewpoint is revealed by this evidence:

What do you mean by that, you have used that word "collectability" several times? If the company sells logs, or makes any transaction with an outsider, or outsiders, we cannot go to these outsiders and examine their books. We have to make a general examination of the company's own accounts to form an opinion as to the collectability of it. In this particular case the company had advanced $25,000 to a syndicate which we had very little information about. We still had the advance and had to assume that this money was collectable, and there was nothing in the books of the company, and before we could shew it on the balance sheet as an asset we had to pursue these investigations with Mr. Whittall, and accept his unconditional guarantee as to the full amount of the advance and the profit.

The auditors should not insert the amount involved as an asset unless reasonably sure it could be realized. They should not report it as such, not knowing anything about the primary debtor unless acting reasonably they might assume that the guarantor was good for this amount. He based this view, as to Whittall's solvency, on the following facts:

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(1) The general good repute of Mr. Whittall; (2) intimate knowledge of Whittall's profitable participation in deals in which the company also participated; (3) the fact that he held in his own name 2,195 shares of the company having a par value of $219,500 and an actual value in Mr. Cotter's opinion of $100,000 upon which the company had a lien under its articles for any advances due by Whittall to the company.

On the question of the collectability of this amount he gave this evidence:

In your opinion, after you secured Mr. Whittall's guarantee and with the knowledge you state you had of Mr. Whittall and his position, and the shares he had, was this an account payable, justifying it to be put under this heading, the way you have done it? In my opinion if the company had requested Mr. Whittall to repay that money, they would have received their cheque in full the following day.

It was treated in the same way as any other obligation of third parties. The auditors were not obliged to investigate the books of other companies and usually would not be permitted to do so. Their obligation was to exhibit to the shareholders the true financial position of the respondent company and, if the $25,000 owing by the syndicate was worthless as an asset, Whittall's indebtedness to the company would be correspond-

ingly increased. If on the other hand it was perfected by what, in view of all the known facts, might reasonably be regarded as a good guarantee, the indebtedness of the primary debtor might be considered a good asset.

It was urged, however, that the auditors should at least have reported to the shareholders the fact that Whittall refused—as he did—to disclose the identity of the syndicate and thus put them on guard, enabling them also to take action either on the guarantee, or independently of it. The fact of dealings with the syndicate, however, was not concealed. It appears on the balance sheet as a debtor. Advances to shareholders were also shewn. It may be said that Whittall's refusal to disclose was at least unusual, if not indeed suspicious, and comment thereon might well have been made in an appended note. That, however, is simply criticism and more is required as a basis for a finding of negligence. The auditors honestly believed that they got at least the equivalent of the fullest information. This criticism too loses point when it is known that the shareholders had the same information as the auditors. The annual meeting of the company was held in December, 1929. They would have the certified balance sheet (Exhibit 3) before them. Sir Stephen Lennard, a shareholder, was present and asked questions about the syndicate. The purport was to find out "what the Western Trading Syndicate consisted of." Mr. Thicke, a director, detailed in a general way what occurred. He said Mr. Whittall answered him. While he could not remember details he stated that Whittall's reply to Lennard was in keeping with what he earlier stated to him, *viz.*, that it was a transaction in stocks and shares by Whittall and his friends in which the company would participate in profits. The question of the guarantee was also before the meeting. Whittall told the shareholders he had guaranteed it. The statements were made so that all the shareholders could hear it. It is impossible to believe that if the auditors had included in their report the facts disclosed to the shareholders at their annual meeting as early as 1929 they would thereby be stimulated to action. In cross-examination Mr. Thicke put it this way:

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Isn't this what happened at that meeting in December, 1929, Sir Stephen Lennard asked Mr. Whittall for information as to the Western Trading Syndicate? That is right.

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And Mr. Whittall said that the advances to the syndicate were guaranteed by him, Whittall, personally, and that that was all that was necessary to be said? There was further discussion than that.

Wasn't that the substance of it? That is right.

That does not seriously qualify his evidence in chief. If, of course, the auditors suspected fraud their action in respect to information received, or lack of information, would doubtless be different. When it was not suspected—as here—the ordinary source of information was the directors of the company. They relied on Whittall and Thicke.

On the second aspect of the evidence, *viz.*, alleged facts that should excite suspicion, we were directed to an entry in Whittall's account with the company where under date of June 30th, 1929, the entry appears as a credit "West. Trading Synd. $25,000." It was suggested that this entry and a necessary transfer of accounts made at the end of the fiscal year was significant and should have been so regarded. It had the effect of reducing Whittall's withdrawals from the company very materially—imposing the obligation on the syndicate—and it was said inserted at that time to make a better shewing for Whittall in the annual statement to shareholders. If that was the object he might have accomplished it by arranging for a credit of arrears of salary. That entry was made including a charge to the syndicate for $25,000 advances as a result of a discussion between Whittall and Thicke, the active directors, as Mr. Cotter ascertained upon making enquiries. Those withdrawals from the company, in part to loan to the syndicate and in part advances to himself, were made at different times and were crystallized in this entry. The charge in the pleadings in respect to it is that it is a false entry because the syndicate was a mere *alias* for Whittall. With the finding the other way and the assumption that the auditors acted honestly (that is not disputed) and did not suspect fraud this and kindred entries would not necessarily suggest a different course of action to that adopted. It was also suggested that the books of this company, engaged principally in a logging and towing business, shewed a rapidly dwindling business. Assuming that to be true it has no significance. The auditors were not concerned with improvident management except as it might bear on the value of Whittall's guarantee to which I have already referred.

It was suggested too that Whittall's account with its large cash withdrawals, especially in 1928, immediately preceding one of the audits, should arouse the auditors' suspicions and call for a clear explanation. When Mr. Cotter's attention was directed to it he was advised that $25,000 was advanced to the syndicate and erroneously charged to Whittall's account with other withdrawals and with the approval of Thicke this was rectified. Sums advanced for speculation would doubtless be advanced in different amounts. It appeared to be an error in book-keeping later corrected. Careless book-keeping methods by men looked upon as reputable would not necessarily suggest fraud. Auditors in their work must often encounter loose book-keeping methods. They called for explanations. They were given in this case.

The large withdrawals by the directors Thicke and Whittall, particularly the latter, the absence of minutes in respect thereto; alleged absence of power to make loans or contracts covering them indicate, it was submitted, negligent treatment of these accounts in the certified balance sheets. They were inserted as advances to shareholders, instead of to directors. The suggestion was that, if shewn as advances to directors, shareholders would know that they had no supervision by a directing body in charge of the company's affairs. Section 151 (*c*) of the Companies Act, Cap. 11, B.C. Stats. 1929, was referred to. Whatever may be the interpretation of "debts owing to the company from its directors, officers and shareholders respectively," and I have no doubt that it should be inserted as an advance to directors, no substantive claim for a minor error could be made against the auditors. I am satisfied the shareholders were not deceived. It is significant that no shareholders were called as witnesses. It was stated in argument and not disputed that Lennard was in Court at the trial. Those who were allegedly misled or from whom information as to the true financial position of the company was withheld were not called to establish it. The trustee prosecuting the action on behalf of the shareholders—as I read his evidence—never heard of objections from them.

As to the powers of the company, auditors are obliged to read

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the memorandum of association and the articles but are not responsible for an erroneous interpretation of doubtful powers. A reference to the memorandum of association, clause 3 and subclauses (r) (v) and (cc) and to clauses 105 and 106 (8) of the articles would justify the auditors, as laymen, in concluding that the withdrawals by shareholders, or the use of company funds for speculation with the syndicate were not *ultra vires* of the company's powers.

It was submitted, however, that the main objects of the company were towing and logging and other powers must be treated as ancillary and not construed as separate and independent powers. *Stephens* v. *Mysore Reefs* (1902), 71 L.J., Ch. 295 was referred to. It is not clear, however, in the general construction of the memorandum of association that the company was formed for one or two primary purposes only. This case has been blown upon in *In re Anglo-Cuban Oil, Bitumen and Asphalt Co.* (1917), 1 Ch. 477, affirmed by the House of Lords, (1918), A.C. 514, and in any event it is clear that though such a rule may be adopted for certain purposes it should not be applied to the question as to whether or not a transaction is *ultra vires*. The burden on auditors in respect to *ultra vires* acts and in ascertaining the company's powers by perusal of the memorandum and articles is placed upon them solely because of its possible relation to the ascertainment of the true financial condition of the company. It is at least doubtful that auditors, while they should familiarize themselves with the articles, must decide whether or not certain acts are *ultra vires*. Their duty is to shew the financial condition of the company. It is a question of degree of care. Failure to examine the articles at all would be evidence of lack of care whereas wrong interpretation of a doubtful power involving legal knowledge would not. Certainly the shareholders after long familiarity with large advances to shareholders and the investment of company's funds in speculative stocks were not deceived by this practice particularly when it was explained to them and no objections were raised. It may be pointed out when it is suggested that the transactions with the syndicate were unusual and improper that the company's books shew other dealings in shares and stock investments. The appellants were the company's auditors since

1920. Balance sheets for each year were presented to the shareholders. One for 1928 (Exhibit 24) shews among capital assets investments in stocks and shares to the value of $53,000.

I shall not refer at length to the findings of the learned trial judge. He acquits the auditors of any negligence in their various audits up to the fiscal year ending June 30th, 1929. They are, of course, not charged with negligence prior to that date but the significance of this finding is that these early audits placed year by year before the shareholders shewed large advances to certain shareholders without contract and it is submitted without authority. He says (and I agree) that:

> Under the circumstances I cannot find that up to that time the defendants had failed in their duty to the company in not ascertaining or in not reporting if ascertained the fact that there was no contract or resolution of the company authorizing Mr. Whittall to withdraw these moneys. I think that up to that time they had duly discharged the duty of "acertaining and certifying to the shareholders the true financial position of the company at the time of the audit" and in shewing in the balance sheet for the year ending June 30th, 1928, the total amount of the "advances to shareholders" as being the very substantial sum of $20,749.22 they had given sufficient information to the shareholders to put the latter on their guard.

He finds, however, that they failed in their duty because:

> In September, 1929, the auditors took the responsibility of accepting the said transfer notwithstanding the absence of information and explanation as hereinafter referred to and of certifying a balance sheet which shewed an item of $37,000 at its face value as a debt of the Western Trading Syndicate without making any explanation or comment in connection therewith in their certificate or report. After a careful consideration of the things which were ascertained and those which were not ascertained by the auditors as hereinafter set out in detail, I am satisfied that they had not ascertained and stated to the shareholders the true financial position of the company. The entry in the balance sheet of the sum of $37,000 as a debt of the said syndicate and as a good asset as such at its face value without any explanation or comment was under the circumstances seriously misleading to the shareholders and unjustifiable, depriving them as it did of the opportunity of judging for themselves what action should be taken for their own protection after having received independent and reliable information respecting the true financial position of the company at the time of the audit.

The real finding is that there should have been "explanation and comment" as to dealings with the syndicate. The allegation, however, is that there was no syndicate; hence no subject for comment. He states that the $37,000 was shewn as "a good asset" without comment and it was "seriously misleading" to

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the shareholders. The answer is that shareholders who know all the facts cannot be misled. The "true financial position" of a company in respect to one of its assets or debts is shewn by exhibiting it as an asset if reasonably it can be so regarded. The respondent could only complain if able to say "you knew or ought to know that Whittall's guarantee was not worth $37,000." In addition to what has already been said on that point we should look upon it as it would be viewed at that time. Conditions in September, 1929, were exceedingly bright. What might an honest man believe the value of such a guarantee to be at that time in view of property holdings and general values? Further, as already stated, there was a general meeting of shareholders in December, 1929, at which at least as much information as we have at present was given in reference to dealings with the syndicate yet it did not precipitate action. I cannot, therefore, with great respect, follow the trial judge in saying that the shareholders were deprived "of the opportunity of judging for themselves what action should be taken for their own protection" because of failure to comment on a fact well known to them. If they had taken action they would find that, by an extra precaution taken by the auditors, they had a guarantee that could be realized upon at that time. The whole complaint is "no explanation or comment." It reduces the charge of negligence to narrow limits. I feel satisfied that had the auditors appended the note "no information was given to us in respect to the syndicate" this action would not have been launched. I might add as an illustration of the extent to which we are left to draw inferences that, so far as the record shews, there is no evidence that the syndicate was not responsible for the amount, a fact that might have been ascertained by means within the trustee's power.

The duty of auditors is determined by the Companies Act, B.C. Stats. 1929, Cap. 11, Sec. 148 found also in the company's articles, article 129 (2), in conformity with the Act, reading as follows:

> (2) The auditors shall make a report to the shareholders on the accounts examined by them and on every balance sheet laid before the company in general meeting during their tenure of office, and the report shall state:
>
> (a) Whether or not they have obtained all the information and explanation they have required; and

(b) Whether in their opinion the balance sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them and as shewn by the books of the company.

In *London and General Bank; Theobald's Case* (1895), 64 L.J., Ch. 866, where the sections of the English Companies Act are considered are for all material purposes identical, the following deductions may be drawn from the judgment of Lindley, L.J., at p. 877:

(1) They are to give the shareholders independent and reliable information respecting the true financial position of the company at the time of the audit; (2) they are not obliged to give advice to shareholders or directors as to what they ought to do; (3) they are not concerned whether the company is conducted prudently or otherwise. As to how the auditors are to "ascertain and state the true financial position of the company at the time of the audit":

The answer is, By examining the books of the company. But he does not discharge his duty by doing this without enquiry and without taking any trouble to see that the books of the company themselves shew the company's true position. He must take reasonable care to ascertain that they do. Unless he does this, his duty will be worse than a farce. Assuming the books to be so kept as to shew the true position of the company, the auditor has to frame a balance-sheet shewing that position according to the books, and to certify that the balance-sheet presented is correct in that sense. But his first duty is to examine the books, not merely for the purpose of ascertaining what they do shew, but also for the purpose of satisfying himself that they shew the true financial position of the company. This is quite in accordance with the decision of Mr. Justice Stirling in *The Leeds Estate Building and Investment Company* v. *Shepherd* (1887), 57 L.J., Ch. 46; 36 Ch. D. 787. An auditor, however, is not bound to do more than exercise reasonable care and skill in making enquiries and investigations. He is not an insurer; he does not guarantee that the books do correctly shew the true position of the company's affairs; he does not guarantee that his balance sheet is accurate according to the books of the company. If he did, he would be responsible for an error on his part, even if he were himself deceived, without any want of reasonable care on his part—say, by the fraudulent concealment of a book from him. His obligation is not so onerous as this. Such I take to be the duty of the auditor; he must be honest—that is, he must not certify what he does not believe to be true—and he must exercise reasonable care and skill before he believes that what he certifies is true. What is reasonable care in any particular case must depend upon the circumstances of that case. When there is nothing to excite suspicion, very little enquiry will be reasonable and sufficient; and in practice, I believe, business men select a few cases

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at haphazard, see that they are right, and assume that others like them are correct also. Where suspicion is aroused more care is obviously necessary; but still an auditor is not bound to exercise more than reasonable care and skill even in a case of suspicion, and he is perfectly justified in acting on the opinion of an expert where special knowledge is required.

It may be said that the statement of Lindley, L.J., at p. 878, is pertinent and assists the respondent, *viz.*:

A person whose duty it is to convey information to others does not discharge that duty by simply giving them so much information as is calculated to induce them, or some of them, to ask for more. Information and means of information are by no means equivalent terms.

But these remarks were applied to special facts. There the auditors reported the true financial position to the directors but did not lay that report before the shareholders. In *In re Kingston Cotton Mill Company (No. 2)* (1896), 2 Ch. 279, where it was held that an auditor is not bound to be suspicious, as distinguished from being reasonably careful, where there were no facts or circumstances to arouse it—they must simply exercise reasonable care—Lopes, L.J., at pp. 288-89 said:

But in determining whether any misfeasance or breach of duty has been committed, it is essential to consider what the duties of an auditor are. They are very fully described in *In re London and General Bank* (1895), 2 Ch. 673, to which judgment I was a party. Shortly they may be stated thus: It is the duty of an auditor to bring to bear on the work he has to perform that skill, care, and caution which a reasonably competent, careful, and cautious auditor would use. What is reasonable skill, care, and caution must depend on the particular circumstances of each case. An auditor is not bound to be a detective, or, as was said, to approach his work with suspicion or with a foregone conclusion that there is something wrong. He is a watchdog, but not a bloodhound. He is justified in believing tried servants of the company in whom confidence is placed by the company. He is entitled to assume that they are honest, and to rely upon their representations, provided he takes reasonable care. If there is anything calculated to excite suspicion he should probe it to the bottom; but in the absence of anything of that kind he is only bound to be reasonably cautious and careful.

I think, viewing the situation as it existed in 1929, the auditors were justified in relying on the directors. Lindley, L.J., at p. 284, points out:

that an auditor is not an insurer, and [protests] against the notion that an auditor is bound to be suspicious as distinguished from reasonably careful. To substitute one expression for the other may easily lead to serious error.

Again, at p. 285, he said:

I pass now to consider the complaint made against the auditors in this particular case. The complaint is that they failed to detect certain frauds.

There is no charge of dishonesty on the part of the auditors. They did not certify or pass anything which they did not honestly believe to be true. It is said, however, that they were culpably careless.

He then refers to the facts and continued at p. 286:

In this case the auditors relied on the manager. He was a man of high character and of unquestioned competence. He was trusted by everyone who knew him. The learned judge has held that the directors are not to be blamed for trusting him. The auditors had no suspicion that he was not to be trusted to give accurate information as to the stock-in-trade in hand, and they trusted him accordingly in that matter.

This might have been said of Whittall in 1929.

In *In re City Equitable Fire Insurance Co. Lim.* (1924), 94 L.J., Ch. 445 at 493 Sir E. Pollock, M.R. said:

It is for the auditor to use his discretion and his judgment, and his discrimination as to whom he shall trust.

Also Sargant, L.J., at p. 502:

There was a considerable border line of undefined territory, in which the auditor had to be guided by his own personal view of what was sufficient in all the circumstances of the case.

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A Court should be sure of its grounds before substituting its own views long after the event for those of the auditors formed at the time in the light of then existing facts.

The foregoing principles have been generally accepted for many years and no further reference to cases is useful or necessary; the only problem is in applying them to the facts of each case as it arises.

I have no doubt that the conduct of Whittall was not free from blame and the management of the company loose and unsatisfactory. Auditors, however, are not censors and shareholders with knowledge and the obligation to act cannot unload their neglect on the appellants. I would allow the appeal.

McQUARRIE, J.A.: I would allow the appeal and dismiss the action.

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Appeal allowed.

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

Solicitors for respondent: *Burns, Walkem & Thomson.*

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March 6.

SAM SICK HONG v. MAH PON

SAM SICK HONG AND SAM FAT YET v. MAH PON AND THOMPSON & BINNINGTON LIMITED.

Illegal distress — Damages — Chattel mortgage — Fixtures — Machinery— Injunction—Mortgagors' and Purchasers' Relief Act, 1932—R.S.B.C. 1924, Cap. 22, Sec. 4—B.C. Stats. 1932, Cap. 35, Sec. 4.

In 1927 Sam Sick Hong erected a laundry on a premises he owned in Vancouver, and during construction installed certain laundry machinery. He then borrowed $3,500 from one Dawson and gave as security two mortgages, one on the real estate, the other a chattel mortgage on the chattels and fixtures, each expressed to be collateral to the other and to secure the same advance. In April, 1933, Dawson assigned the chattel mortgage to Mah Pon when $2,453.88 was owing. On the 6th of May following, bailiffs under instructions from Mah Pon seized and took possession of all the effects and machinery mentioned in the chattel mortgage, including the boiler, steam-mangles, washers, extractors, and electric motors, to recover said $2,453.88, and remained in possession for six weeks. Mah Pon did not obtain leave under the Mortgagors' and Purchasers' Relief Act to take proceedings. In an action for damages and for illegal seizure and an injunction to restrain a sale until the trial, it was held that the chattel mortgage in question is one affecting lands, so as to fall within the provisions of the Mortgagors' and Purchasers' Relief Act, 1932, and as no order was obtained by the defendant under said Act the plaintiff was entitled to an injunction and damages.

Held, on appeal, affirming the decision of ROBERTSON, J. (MARTIN, J.A. dissenting), that the mortgagee was anxious to secure a lien on the same property by both instruments. If one failed he might have recourse to the other. This is far from indicating a desire to sever. On the special facts with "fixtures" included in both documents there was no severance by contract, the Mortgagors' and Purchasers' Relief Act applies, and there was an illegal seizure.

APPEAL by defendants from the decision of ROBERTSON, J. of the 4th of October, 1933, in an action for damages for illegally distraining and threatening to sell goods and fixtures of the plaintiffs and for an injunction to restrain the defendants from proceeding further with the distress and selling the goods and fixtures. In 1927 Sam Sick Hong erected a laundry on certain property in Vancouver and installed laundry machinery, and in November, 1927, he borrowed $3,500 from one Dawson in security for which he gave two mortgages, the

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first over the real estate in question, which mortgage was expressed to be "collateral to a chattel mortgage of even date herewith to secure the same advance" and the second a chattel mortgage covering a boiler, two steam-mangles, a horizontal steam-engine, three extractors, three washers and one electric-motor, which were said to be in and upon the same premises and the chattel mortgage was expressed to be "collateral to a mortgage of even date herewith and to secure the same advance." On April 29th, 1933, Dawson assigned the said chattel mortgage to the defendant Mah Pon, an employee of a rival laundry. At this time $2,453.88 was owing in respect to the chattel mortgage. No notice of the assignment was given the plaintiff prior to the 8th of May, 1933. On May 6th, 1933, Mah Pon employed the defendants Thompson & Binnington Limited, bailiffs, to seize and take possession of "all the goods and chattels and effects and machinery" mentioned in the chattel mortgage to recover the sum of $2,453.88. On the 8th of May, 1933, the bailiffs seized certain chattels and in addition the boiler, steam-mangles, washers, extractors and electric-motor hereinbefore mentioned, and remained in possession for six weeks. This action was commenced on the 6th of June, 1933, and the plaintiffs obtained an *interim* injunction until the trial. The plaintiff Sam Fat Yet is a son of Sam Sick Hong and has an interest in the real estate. The defendant Mah Pon did not obtain leave under the Mortgagors' and Purchasers' Relief Act, 1932, to take proceedings under the mortgage.

Argument

Nicholson, and *D. Murphy,* for plaintiffs.
Housser, and *R. H. Tupper,* for defendants.

4th October, 1933.

ROBERTSON, J.: In 1927 the plaintiff Sam Sick Hong, being the registered owner of certain real estate in Vancouver, B.C., erected thereon a laundry and during construction installed certain laundry machinery. On the 22nd of November, 1927, the said plaintiff borrowed $3,500 from one Dawson and to secure payment of the same, gave to Dawson two mortgages as follows:

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1. A mortgage over the real estate above described which

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mortgage was expressed to be "collateral to a chattel mortgage of even date herewith made between the parties hereto to secure the same advance" and (2) A chattel mortgage covering a boiler, two steam-mangles, a horizontal steam-engine, three extractors, three washers and one electric-motor which were said to be in and upon the said real estate and the said chattel mortgage was expressed to be "collateral to a mortgage of even date herewith made between the parties hereto to secure the same advance" covering the said real estate.

On the 29th of April, 1933, Dawson assigned the said chattel mortgage to the defendant Mah Pon, an employee of a rival laundry. At this time there was owing in respect of the chattel mortgage $2,453.88 of which $2,025.59 was principal and $428.29 was interest. No notice of the assignment was given to the plaintiff prior to the 8th of May, 1933. On the 6th of May, 1933, the defendant Mah Pon employed the defendants Thompson & Binnington Limited, hereinafter called the bailiffs, to seize and take possession of "all the goods and chattels and effects and machinery" mentioned in the said chattel mortgage to recover the said sum of $2,453.88. On the 8th of May, 1933, the bailiffs seized certain chattels and, in addition, the boiler, steam-mangles, washers, extractors, electric-motor hereinbefore mentioned and remained in possession for six weeks.

On the 5th of June, 1933, the plaintiffs commenced this action for damages and for illegal seizure of the said articles and for an injunction to restrain the sale of same and obtained an injunction, restraining the sale until the trial. The other plaintiff Sam Fat Yet is the son of Sam Sick Hong and has an interest in the real estate.

The defendant Mah Pon did not obtain leave under the Mortgagors' and Purchasers' Relief Act, 1932 (Cap. 35, B.C. Stats. 1932), to take proceedings. The plaintiff does not question the validity of the chattel mortgage.

The plaintiff submits that the articles in question were fixtures and as such were part of the freehold and that at most the chattel mortgage merely empowered the mortgagee to sever the fixtures on default and that until this was done they remained part of the freehold and that no proceedings could

be taken to possess and sell same without first obtaining an order under section 4 (*b*) of the said Mortgagors' and Purchasers' Relief Act, 1932.

The defendant Mah Pon submits that the effect of giving the chattel mortgage was, in law, to sever the fixtures from the freehold just as if they had been physically separated and as between the plaintiff Sam Sick Hong and the defendant Mah Pon, the said articles were to be regarded as chattels and further that having described the articles as goods and chattels in the chattel mortgage the plaintiff Sam Sick Hong is estopped from saying now they are part of the freehold. Further it is submitted that the Mortgagors' and Purchasers' Relief Act, 1932, in any event, has no application to a chattel mortgage of fixtures.

The defendants' counsel relies on certain provisions of the Bills of Sale Act, particularly the definition of "personal chattels" in section 4 thereof. In *Meux* v. *Jacobs* (1875), 44 L.J., Ch. 481, at pp. 483-4, Lord Chelmsford said:

It has been argued that the Bills of Sale Act, having made fixtures personal chattels, these are now personal chattels for all purposes, and that consequently not being assigned, they did not pass under the deposit which was made to Meux & Co. But the Bills of Sale Act applies only to certain cases. It provides that where a bill of sale is made, it must be registered, "otherwise such bill of sale shall, as against all assignees of the estate, and effects of the person whose goods, or any of them, are comprised in such bill of sale, under the laws relating to bankruptcy or insolvency, or under any assignment for the benefit of the creditors of such person, and as against all sheriffs' officers, "be null and void." Fixtures under the interpretation clause are to be "personal chattels," but personal chattels in these particular cases only. It would be a most extraordinary conclusion for your Lordships to arrive at, that because, for a particular purpose, and to prevent frauds upon creditors, it is provided in the interpretation clause of an Act of Parliament that fixtures are to be deemed personal chattels, therefore they are made personal chattels to all intents and purposes, and that also as between a mortgagor and mortgagee they are personal chattels, although certainly not within the terms of the Act.

I, therefore, think that I must consider the question apart from the provisions of the Bills of Sale Act.

As to estoppel the chattel mortgage grants and assigns:

all and singular the goods and personal chattels hereinafter particularly mentioned . . . which said goods and personal chattels may be more particularly described as follows: All and singular the goods, chattels, machinery fixtures and other effects now in and upon

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the real estate above mentioned. There were included in the chattel mortgage certain chattels, such as motor-cars. In the *habendum* and other parts of the chattel mortgage the chattels and the said articles granted and assigned are described as "goods and chattels." In my view however as the chattel mortgage grants "fixtures" no estoppel can arise.

I find upon the evidence that these articles were fixtures and therefore part of the freehold immediately prior to giving of the mortgages in question. There has been no actual severance. Then does the giving of the chattel mortgage effect in law any severance so that the same were no longer part of the freehold?

A. L. Smith, L.J., in delivering the judgment of the Court of Appeal in *Hobson* v. *Gorringe* (1897), 1 Ch. 182 at p. 192, refers to the speech of Lord Chelmsford in the House of Lords in *Bain* v. *Brand* (1876), 1 App. Cas. 762,772 where he said:

> Such is the general law. But an exception has been long established in favour of a tenant erecting fixtures for the purposes of trade, allowing him the privilege of removing them during the continuance of the term. When he brings any chattel to be used in his trade and annexes it to the ground it becomes a part of the freehold, but with a power as between himself and his landlord of bringing it back to the state of a chattel again by severing it from the soil. As the personal character of the chattel ceases when it is fixed to the freehold, it can never be revived as long as it continues so annexed.

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In *Minhinnick* v. *Jolly* (1898), 29 Ont. 238 (affirmed on Appeal) (1899), 26 A.R. 42 the question was whether a fixture had been converted into a chattel by an express intention on the part of the owner to sever the fixture in question. At p. 246, Street, J., who delivered the judgment of the Divisional Court, said:

> The mere expression by Labatt of an intention to sever the engine and sell it to Minhinnick in case the latter should determine to buy it, even though communicated to the defendant could not operate to convert a part of the freehold into a chattel or to alter its character in any way. That could only be done by actual severance, or by a contract for an actual severance, from the freehold of which it formed part.

When the learned judge was referring to the contract for actual severance he means I think a contract which provides for immediate severance.

The chattel mortgage in question did not give this right until default and, as the last payment was not to be made until the 22nd of November, 1933, there might be no default for three

years during which the articles would remain part of the freehold, to be used by the mortgagor.

In Amos & Ferard on Fixtures, 3rd Ed., p. 29 it is said:

> The circumstances of the property being subject to a right of removal, and of being reconverted to a personal chattel, does not affect the nature and condition it has acquired by being incorporated with the realty. It ceases to be a chattel as long as it remains affixed to the freehold, and the only exception to the general rule is, not to its being affixed to, or being part of the freehold, but as to the right of removal.

One of the cases cited in support of the above is *Lee* v. *Gaskell* (1876), 1 Q.B.D. 700. Cockburn, C.J. said, at p. 702:

> Fixtures, although they may be removable during the tenancy, as long as they remain unsevered, are part of the freehold, and you cannot dispose of them to the landlord or anyone else as goods and chattels, because they are not severed from the freehold so as to become goods and chattels. All you can do is to bargain for the sale of them as fixtures, which are subject to the right of the tenant to remove them during the term, but which right is liable to be lost if it is not exercised during the term. There is but a remote analogy between fixtures and growing crops, but there is this obvious distinction between them,—fixtures, when sold as fixtures, are intended to remain where they are, while, as to growing crops, it is the express intention of the purchaser to remove them.

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In January, 1931, the Court of Appeal of Ontario delivered judgment in *Hoppe* v. *Manners,* 66 O.L.R. 587. Orde, J.A., in dealing with the question of fixtures, at p. 592, said:

> It was suggested during the argument that two persons might agree that a chattel should remain a chattel even if affixed to the realty. I know of no authority for this. I think that sometimes there is a confused idea that because a fixture, as between certain parties, may be detached from the freehold and be removed, it is therefore a chattel. But the law affecting fixtures is based upon the fact that as a matter of law a fixture is always part of the land. If fixtures were not land, but were simply chattels, notwithstanding their attachment to the realty, there would be no foundation for the development of any set of principles governing their removal.

Our Court of Appeal delivered judgment in March, 1931, in the case of *Carlson* v. *Duncan,* 44 B.C. 14. The question was, whether a sale of standing timber, for the removal of which the purchaser was to have as much time as he desired, was the sale of an interest in land and the Court held it was. MACDONALD, J.A., with whom the Chief Justice and GALLIHER, J.A., agreed, at pp. 21-22, points out the distinction where the timber is to be severed at once and where the purchaser is to have time to remove it. At p. 23 he said:

> Whether a contract relating to timber constitutes a sale of chattels or relates to an interest in land depends upon the terms of the contract.

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In *Marshall* v. *Green* (1875), 1 C.P.D. 35 it was held that the sale of growing timber to be taken as soon as possible by the purchaser was not a contract for the sale of an interest in land.

The defendant's counsel referred me to several cases, to three of which I shall refer. The first of these is *Rose* v. *Hope* (1872), 22 U.C.C.P. 482 in which the contest was between a valid chattel mortgage of furniture and a subsequent valid mortgage of the freehold without any mention of the chattels. Hagarty, C.J., who delivered the judgment of the Court, said at pp. 485, 486 and 487:

> But I think it clear that the owner of the premises may first give a security on such fixtures and machinery, and that his subsequent mortgage of the land cannot prejudice the prior security.
>
> Owner of both fixtures and land, he, as it were, severs them, one from the other, conveying them to different parties. I think he could equally give a valid security on them as lease the use of them for a term to a tenant. . . . I think that the plaintiff cannot claim these chattels as affixed to the freehold so long as the prior conveyance of them as chattels exists. . . . I think it quite clear that the prior severance of these fixtures as chattels created by the Harleys, continued down to the giving of the second chattel mortgage by McKenzie, and that the latter instrument carries it on by its recitals and legal effect, and that nothing has occurred to let in the claim of the mortgagee of the realty to them as fixtures. . . . If the chattel mortgage debt had been paid off, released or extinguished, we may assume that the mortgagees of the realty would then be considered as entitled to such property, as the "severance" had ceased, and the things had reassumed their original character of fixtures passing with the freehold.

This case is the strongest case in the defendant's favour. It will be noticed that the learned Chief Justice said, at p. 485, "[the] owner of both fixtures and land, as it were, severs them." And, at p. 487, he puts the word "severance" in quotations. I take this judgment to mean that the chattel mortgage was an effectual mortgage of part of the real estate and the subsequent mortgage would be subject to the first mortgage. The learned Chief Justice did not mean to say that the fixtures became chattels when the chattel mortgage was given.

In re E. Eslick (1876), 4 Ch.D. 503 was a case in which the mortgage authorized the mortgagee on default to sever and deal with separately the trade fixtures and accordingly it should have been registered as a bill of sale. The case does not decide that the fixtures were severed by the giving of the mortgage.

In *Stevens* v. *Barfoot* (1886), 13 A.R. 366 Burton, J.A. at pp. 371-2 said:

> I do not entertain a doubt that the mortgagors having still an estate in the land, and in the fixtures, might as against anyone except their prior mortgagee execute such a deed as would alter the character of the property, and impart to fixtures which had previously to that act been part of the realty—even while still attached to the freehold—the character and quality of chattels movable so as to let in execution creditors and subsequent purchasers or mortgagees, as against the mortgagors themselves, and the holder of such deed if invalid under the Chattel Mortgage Act; and I can quite understand that if the mortgagors had, as they had a perfect right to do, created a primary charge on the boiler, treating it as a chattel, and afterwards created a secondary charge by the same instrument on the land and the machinery and fixtures upon it there would have been a clear indication of intention to treat the property as a chattel. . . .

The learned judge does not say that the fixture would be severed and become in fact a chattel. It still remains part of the freehold.

In *Whitmore* v. *Empson* (1857), 23 Beav. 313 referred to by Hagarty, C.J. at p. 369 in *Stevens* v. *Barfoot, supra,* the facts were that a mortgage covering the real estate had first been given and afterwards a chattel mortgage over certain fixtures. Counsel submitted that the fixed chattels which had been mortgaged separately had lost their character as a portion of the realty. Of course this case differs from the present case in that in that case the mortgage of realty was first given but the question which the Master of the Rolls considered was the effect of giving a mortgage of the fixtures. He states at pp. 316-8:

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> But they contend, that this case is distinguished from the ordinary case, by the circumstance that the deeds and bill of sale have made a separation between the freeholds and the chattels attached to it, and which have, in law, as completely severed the chattels from the freehold as if they had been movable and distinct, and as, according to one of the propositions in *Horn* v. *Baker* [(1808)], 9 East 215, a different consideration arises with respect to utensils, where a custom prevails of letting them out to the trade, so, on the contrary, the same rule does not apply to fixtures affixed to the freehold where, by the deeds and mode of dealing therewith by the parties themselves, these fixtures have been severed from them, and treated as something quite distinct from them. . . .
>
> They point out, that although, in the case suggested, the actual appearance and position of the property is not changed, yet that the character of the property is changed from realty into personalty, by the mere mode of dealing with it, and they argue, that so, in the like manner, though these goods and chattels remain attached to the freehold, and would, unless

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thus dealt with, pass with it, still that the dealings of the parties may, in like manner, produce a severance in law between these chattels and the freehold, and thereby alter the character of the property, and impart to chattels fixtures, while still attached to the freehold, the character and quality of chattels movable. . . . They say, that the express words of the deed, the manifest intention of the parties to it, and the necessary operation of these words effectuating this intention, all concur in converting these fixtures into chattels, which must, in law and for the purpose of carrying that deed into effect, be treated as moveable, and as detached from the freehold; that, thereby, they have lost the property of affinity and incorporation with the freehold, which they previously possessed from their position, and have become changed into chattels of another character and description; and that they now partake of the character of those which are moveable, and separated from the freehold, in fact as well as in law.

The learned Master of the Rolls considered the argument but was unable to give effect to the same.

In my opinion the authorities shew that when the question is whether fixtures have ceased to be part of the freehold the test is has there been actual severance or does the contract provide for immediate severance? If neither of these things is present then the fixtures remain part of the freehold.

ROBERTSON, J.

I am of the opinion the chattel mortgage in question is one in regard of or affecting lands so that it falls within the provisions of the Mortgagors' and Purchasers' Relief Act, 1932, and as no order was obtained by the defendant the plaintiff is entitled to an injunction and damages. The plaintiff Sam Sick Hong is entitled to an injunction restraining the defendants from proceedings in respect of the principal sum until an order has been obtained under the Mortgagors' and Purchasers' Relief Act, 1932, or the said Act has been repealed or amended so that an order will not be necessary. There was no proof of any damages or interference with the plaintiff Sam Sick Hong's business. All I have is the fact that the bailiffs were in possession for six weeks. I fix the damages at $100 for which amount the plaintiff Sam Sick Hong will be entitled to judgment against both defendants together with the cost of this action.

The plaintiff Sam Fat Yet has no enforceable interest in this action and so the action, so far as he is concerned, will be dismissed but, under the circumstances, without costs.

From this decision the defendants appealed. The appeal was

argued at Victoria on the 26th and 29th of January, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Bull, K.C., for appellants: It was held that the chattel mortgage was a mortgage with an interest in land, that the articles were to an extent fixtures and part of the freehold. In ordinary cases these articles would be fixtures but when the parties agree and elected to treat them as chattels as between the parties they should be treated as chattels. The Moratorium Act was never intended to deal with anything in a chattel mortgage: see *Evans* v. *Roberts* (1826), 5 B. & C. 829 at p. 837. We are making this contract under the Bills of Sale Act. The learned judge cited *Meux* v. *Jacobs* (1875), L.R. 7 H.L. 481, but that case has no application. They made these chattels by their own act and they are bound by it: see *Scarth* v. *Ontario Power and Flat Co.* (1894), 24 Ont. 446 at p. 451; *Davy* v. *Lewis* (1859), 18 U.C.Q.B. 21 at p. 27; *Dewar* v. *Mallory* (1879), 26 Gr. 618. The learned judge took the wrong view of *Rose* v. *Hope* (1872), 22 U.C.C.P. 482. The owner by the contract severs the fixtures from the land and he has the right to do so: see *Stevens* v. *Barfoot* (1886), 13 A.R. 366. They are estopped from denying they are chattels: see *Minhinnick* v. *Jolly* (1898), 29 Ont. 238 at p. 244; *Hoppe* v. *Manners* (1931), 66 O.L.R. 587; *Carlson* v. *Duncan* (1931), 44 B.C. 14; *Whitmore* v. *Empson* (1857), 23 Beav. 313. The Bills of Sale Act applies and the question of whether the articles can be removed without injury to the building does not affect the point of law to be decided here: see *Gray* v. *McLennan* (1886), 3 Man. L.R. 337.

Nicholson (*Denis Murphy*, with him), for respondent: The machinery was installed before the building was completed. All the articles to which the injunction applies are fixtures. On the meaning of "real property" see Halsbury's Laws of England, Vol. 24, p. 137, sec. 277. On the interpretation of the Mortgagors' and Purchasers' Relief Act see *Re Shepard and Rosevear and Mayes Chemical Co. Ld.* (1918), 42 O.L.R. 184. On the definition of "mortgage" see Coote on Mortgages, 9th Ed., 6; Halsbury's Laws of England, Vol. 21, p. 70, sec. 124. We

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are liable under the mortgage but they must get permission of a judge under the Relief Act. Halsbury's Laws of England, Vol. 3, 2nd Ed., p. 3, sec. 2 deals with the Bills of Sale Act. Except by statute or by actual severance fixtures cannot be separated from the land: see *Meux* v. *Jacobs* (1875), L.R. 7 H.L. 481. These are fixtures and do not become chattels by the instrument: see *Lavery* v. *Pursell* (1888), 39 Ch. D. 508; *Bain* v. *Brand* (1876), 1 App. Cas. 762 at pp. 777-8; *Lee* v. *Gaskell* (1876), 1 Q.B.D. 700 at p. 702; *Jarvis* v. *Jarvis* (1893), 63 L.J., Ch. 10 at p. 13; *Hobson* v. *Gorringe* (1897), 1 Ch. 182 at p. 191; *Reynolds* v. *Ashby & Son* (1904), A.C. 466 at pp. 473-5; Baron on Conditional Sales, 3rd Ed., 115; *Royal Bank of Canada* v. *Coughlan* (1920), 28 B.C. 247; *Carlson* v. *Duncan* (1931), 44 B.C. 14; *Stack* v. *Eaton* (1902), 4 O.L.R. 335; *Hoppe* v. *Manners* (1931), 66 O.L.R. 587. The test is are they realty or not: see *Andrews* v. *Brown* (1909), 19 Man. L.R. 4; *Northern Life Assce. Co.* (1930), 38 O.W.N. 464; Barron & O'Brien on Chattel Mortgages, 3rd Ed., 20; *Morgan* v. *Russell & Sons* (1909), 1 K.B. 357. On the question of estoppel first, in view of the document itself no estoppel can arise as the document cites these articles as fixtures and second, although the document treats the articles as chattels it cannot so change them as to bring them out of the statute: see Cababe on Estoppel, 127.

Bull, in reply, referred to *Reid* v. *Batty* (1933), O.W.N. 496.

Cur. adv. vult.

6th March, 1934.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The plaintiffs claim damages for the illegal distraining of property which they claim is real property, and for an injunction. The property in question is attached to the realty and was so attached by the plaintiff Sam Sick Hong. He gave two mortgages to the predecessor in title of Mah Pon, one a mortgage on the real estate, the other a chattel mortgage on the fixtures each being collateral to the other. Default being made, the defendants by their bailiffs, their co-defendants, entered upon the premises and seized the said fixtures, the same being still attached to the soil, without having obtained the

leave of a judge as provided in the Mortgagors' and Purchasers' Relief Act, 1932. The plaintiffs, therefore, claim that in so doing they committed trespass. I have read the very careful and illuminating reasons for judgment of Mr. Justice Robertson, the trial judge, and can add nothing to what he has so well said. I would, therefore, dismiss the appeal.

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MARTIN, J.A.: With all due respect for contrary opinions this appeal should, in my opinion, be allowed because the authorities cited by Mr. *Bull* establish the position that under the two concurrent instruments in question there was a severance in law from the land of the articles set out in the chattel mortgage which should be regarded as just as effective as though there had been a physical severance: in other words, that since the parties had elected to deal with them as movables they must be held to their election, and as it is clear that some effect must be given to the chattel mortgage, otherwise it was a worse than useless, because misleading, instrument, and as the only effect that can be given it is to hold that it operated as a severance, therefore there must have been that intention when the instruments were executed.

This case, to my mind, comes within the principle of the decision of the Queen's Bench *in banco* in *Davy* v. *Lewis* (1859), 18 U.C.Q.B. 21, 30; of the Common Pleas Division in *Rose* v. *Hope* (1872), 22 U.C.C.P. 482; of Chancellor Spragge in *Dewar* v. *Mallory* (1879), 26 Gr. 618 (explaining *Rose* v. *Hope, supra*); of Burton, J.A. in *Stevens* v. *Barfoot* (1886), 13 A.R. 366, at 371; and of Ferguson, J., in *Scarth* v. *Ontario Power and Flat Co.* (1894), 24 Ont. 446, applying, at p. 451, *Davy* v. *Lewis, supra,* after considering *Meux* v. *Jacobs* (1875), L.R. 7 H.L. 481.

I cannot, with respect, discover any sound ground for the position taken by the learned judge below that the contract must "provide for immediate severance," because a careful examination of the cases cited shews that from their facts no such general implication arises; and it is not the fact, as stated by the learned judge that in the present case the chattel mortgage "did not give the right of severance until default"; on the contrary, it was specially provided that the mortgagee (grantee)

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could remove the "said goods and chattels" for several other reasons which might arise immediately, two of them being "in case the grantee shall feel unsafe or insecure, or deem said goods and chattels in danger of being sold or removed."

Now is it not beyond serious question that under this "feel unsafe" clause alone a right to sever was conferred which could have arisen and been exercised within a few hours, or indeed minutes, after the giving of the mortgage, upon certain facts then first coming to the grantee's notice, *e.g.*, that the grantor had been convicted of criminal acts in a prior transaction of the same nature?

MARTIN, J.A.

To my mind there can be but one answer to that question, and therefore a severance had in legal effect been brought about, because "the parties have made a special contract [and] defined and made a law for themselves on the subject," as Ferguson, J. said in *Scarth's* case, p. 451, adopting Burns, J.'s language in *Davy's* case, *supra*.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am in entire agreement with the very complete and able judgment of Mr. Justice Robertson in this case and do not consider that I could usefully add anything to his analysis of the governing authorities and the learned judge's conclusion upon fact and law.

I would dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: The defendant Mah Pon (appellant) holds by assignment a chattel mortgage on certain goods and machinery in a laundry plant and a realty mortgage on the land on which the plant is built, all owned by the respondent. Both instruments were executed contemporaneously on November 22nd, 1927, to secure an advance of $3,500 and each is collateral to the other. Upon default the appellant Thompson and Binnington Limited, bailiffs, were authorized by the appellant Mah Pon to seize and take possession of the goods, chattels, effects and machinery covered by the chattel mortgage; thereupon action was brought for damages for illegal distress and for an injunction on the ground that as the chattels seized were part of the freehold and an interest in land no leave was obtained from a judge as required by the Mortgagors' and

Purchasers' Relief Act, 1932, B.C. Stats. 1932, Cap. 35. If the "instrument" as defined by section 2 under which seizure was made is a "mortgage or agreement of sale or purchase in respect of or affecting lands," land, including "all real property and every estate, right, title and interest therein both legal and equitable and of whatsoever nature and kind" and the chattels were not severed the seizure was illegal and the judgment should stand.

Appellant submits that while the machinery from the nature, degree and object of the annexation are fixtures still where the owner of both land and chattels chooses to sever them by executing a chattel mortgage in respect thereto they must in law be treated as chattels movable in the same way as if physical severance took place. The chattel mortgage describes the property as "goods and personal chattels" more particularly described as

> all and singular the goods, chattels, machinery, fixtures and other effects now in and upon lots 21, etc.

It is also, however, in my view, important to note that in the realty mortgage the land is conveyed "together with all buildings, fixtures," etc.

The trial judge, after carefully reviewing the cases, held that upon the execution of the mortgages the goods and machinery remained as before, part of the freehold and could only be changed into chattels by actual severance or by a contract providing for immediate severance. It is conceded that if no chattel mortgage had been executed the goods covered by the latter (except three motor-cars) would be part of the security under the mortgage of the freehold. But what was done by respondent, it is urged, shewed an intent or election to treat them as chattels movable distinct from the freehold and as such were conveyed by bill of sale to appellant's predecessor from whom he acquired title.

If the owner of land and chattels first gives a bill of sale of the fixtures and later mortgages the land on which they rest the latter instrument cannot prejudice the prior security of the chattel mortgagee. That is not this case. There is here no distinct and unequivocal separation of the land on the one hand and the fixtures on the other in the two instruments. The

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realty mortgage, as stated, covers the land "together with the fixtures" indicating for greater certainty and particularity an intent to treat the latter as realty. It would be of similar import if after the word "fixtures" the draftsman added "to wit one boiler, etc.," naming the fixtures referred to in the chattel mortgage. The chattel mortgage executed at the same time, it is true, indicates a contrary intention but it conveys no more to the mortgagee (apart from three motors) than that already assigned by the mortgage of the realty. Appellant's case is that while fixtures are part of the freehold still under a special contract as stated by Ferguson, J. in *Scarth* v. *Ontario Power and Flat Co.* (1894), 24 Ont. 436 at 451 "they have made a law for themselves on the subject." The difficulty, however, is to find an unequivocal act to treat the goods as chattels movable. Where is that intention found? Both convey fixtures. Appellant's case, if it has any foundation must rest on contract. In my view it is immaterial whether or not the learned trial judge was right in holding that in the absence of physical severance such a contract to effectuate a change in the character of the property must provide for, or contemplate immediate severance. It is enough to dispose of the case on the basis of appellant's submission, *viz.*, that by contract the parties agreed to treat these articles as chattels. If that is not so the appeal fails. It cannot be said that the parties agreed to treat the fixtures as chattels movable when by two documents really forming one transaction and to secure the same amount each point to a different intent on this vital point. Intention, like election, can only be ascertained by unequivocal acts. One can conceive of a case—and I think it occurred here—where the parties, uncertain as to the degree and object of the annexation, would for greater certainty execute two instruments, the chattel mortgage to be effective in respect to fixtures if the land mortgage was not. If that occurred the intention was, not to sever, but to let the law take its ordinary course. No contract to sever can be deduced from two inconsistent documents.

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I refer to cases to see if they stand in the way of the view indicated. It is true that in *Dewar* v. *Mallory* (1879), 26 Gr. 618, a decision by a single judge, the chattel mortgage was executed contemporaneously with the mortgage of the realty.

Based on the special facts outlined in the statement of the case, Spragge, C. says at p. 620:

> Then, has there been anything in the acts and dealings of the parties indicating a different intent? What was done on the sale by Dewar to McMaster, indicated a different opinion as to the character of these pieces of machinery. It indicated an opinion that in law they were chattels, and in the chattel mortgage they are called chattels. The purchase-money was divided so far as this, that for a certain portion security was given on the land, and for a certain other portion security was given on the articles of machinery in question as chattels; they were described as chattels in a chattel mortgage.

The important distinguishing feature is that the mortgages were given by the owner to secure purchase-money and it was divided part on the security of the land and part on the security of the chattels. At p. 622 he says:

> In this case there are separate instruments, and each, land, and machinery, is made a security for a particular sum; and it is not shewn or suggested that this was not the intention of the parties.

That of course was a clear indication of intention shewing that the chattels were treated as separate and distinct from the realty, quite unlike the case at Bar where one sum was secured by both instruments. Also at p. 623, after referring to *Mather* v. *Fraser* (1856), 2 K. & J. 536 he states:

> This case again is, like *Carscallen* v. *Moodie* [(1858), 15 U.C.Q.B. 304], less strong than the case before me, in there being in that case one instrument for securing one sum of money. It cannot but be *a fortiori* an indication of the like intention, where, as in this case, there are two instruments, each for securing a distinct sum of money.

Carscallen v. *Moodie* deals with questions we are not concerned with in this appeal. I may add it is not clear from the report whether or not for greater particularity, as in the case at Bar, fixtures were included in the mortgage of the realty. I assume not from the extract quoted at p. 622.

It may be said that the inclusion of fixtures in the realty mortgage was unnecessary. Where however we are ascertaining intention from documents we cannot I think ignore it or treat it as surplusage. The word ought in pursuing this inquiry be treated as inserted to serve a purpose and it is immaterial that without it the result—perhaps unknown to the parties—would be the same. On the face of the mortgage fixtures are named as part of the security. Both parties knew that fixtures were included by express words. If different parties were con-

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cerned other considerations might possibly arise. As stated at p. 624:

> . . . but the cases to which I have referred treat of what was done by the owner as an evidence of intention, the owner doing what he had an undoubted right to do in dealing with the machinery; it was of the realty or it was personalty, according as the owner of both the land and the machinery intended it should be. The character he impressed upon the machinery was that of personalty; that was his intention, and unless by some act he manifested a change of intention, the machinery would retain that character.

Here the real intention was just as manifest in the land mortgage as in the chattel mortgage. To destroy it the word "fixtures" should have been stricken out of the former instrument.

Rose v. *Hope* (1872), 22 U.C.C.P. 482 is not conclusive in appellant's favour. The two instruments were not contemporaneous, nor mutually collateral in respect to a single advance. The owner first by executing a chattel mortgage exercised his right to sever the chattels from the realty and this security was not prejudiced by a subsequent mortgage of the land. The conveyances were to different parties. At p. 485, Hagarty, C.J.

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said:

> But I think it clear that the owner of the premises may first give a security on such fixtures and machinery, and that his subsequent mortgage of the land cannot prejudice the prior security.
>
> Owner of both fixtures and land, he, as it were, severs them, one from the other, conveying them to different parties.

And at p. 486:

> I think that the plaintiff cannot claim these chattels as affixed to the freehold so long as the prior conveyance of them as chattels exists.

The first conveyance as chattels was unequivocal. There could be no doubt as to intention. He refers at p. 487 to "the prior severance of these fixtures as chattels."

We were referred to *Stevens* v. *Barfoot* (1886), 13 A.R. 366 where although the facts were unusual certain principles may be deduced. There, as doubtless occurred in the case at Bar, a mortgage of the realty was executed and a chattel mortgage taken as a precautionary measure. The chattel mortgage was executed three days later but it was intended to be one transaction. All that was decided was that the full benefit of the mortgage on the realty was not lost by taking the chattel mortgage three days later. In the case at Bar it is suggested that

part of the property covered by the land mortgage must be taken from under it, *viz.*, the fixtures. Hagarty, C.J. at p. 369 says:

> A different question would have arisen if the owner of the freehold had mortgaged the fixtures before creating any encumbrance on the realty.

I refer to the judgment of Burton, J.A., an able jurist, at pp. 371-2. Assuming, as was not the fact in that case, that the mortgagors had title to the freehold, he pointed out, after stating that in a mortgage of the realty the boiler in question would have passed with the conveyance:

> But it is said that by giving a chattel mortgage three days subsequently, the boiler lost the property of affinity and incorporation with the freehold, which it previously possessed from its position, and had become changed into a chattel of a different description, and partook of the character of those fixtures which are separated from the freehold in fact as well as in law. I do not entertain a doubt that the mortgagors having still an estate in the land, and in the fixtures, might as against anyone except their prior mortgagee execute such a deed as would alter the character of the property, and impart to fixtures which had previously to that act been part of the realty—even while still attached to the freehold—the character and quality of chattels movable so as to let in execution creditors and subsequent purchasers or mortgagees, as against the mortgagors themselves, and the holder of such deed if invalid under the Chattel Mortgage Act; and I can quite understand that if the mortgagors had, as they had a perfect right to do, created a primary charge on the boiler, treating it as a chattel, and afterwards created a secondary charge by the same instrument on the land and the machinery and fixtures upon it there would have been a clear indication of intention to treat the property as a chattel; but I am unable to appreciate the force of the contention that a mortgage, the effect of which is to pass the boiler as part of the realty is to be cut down or restricted in its operation by a subsequent instrument which treats it as a chattel.

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If the realty mortgage in law includes the fixtures and for greater certainty so stipulates this major security can not be affected by a minor one taken on part only of the property covered by the land mortgage. It was not so intended. The mortgagee was anxious to secure a lien on the same property by both instruments. If one failed he might have recourse to the other. This is far from indicating a desire to sever. On this state of facts no question of estoppel can arise.

I find therefore nothing in the cases to overrule the view I venture to express, *viz.*, that on the special facts, with "fixtures" included in both documents there was no severance by contract as intention cannot be definitely ascertained.

I would dismiss the appeal.

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McQUARRIE, J.A.: It seems to be clear that if the articles referred to in the pleadings had been chattels and not fixtures it would not have been necessary to obtain leave under the Mortgagors' and Purchasers' Relief Act before proceeding to enforce a security such as we have here.

There are two documents which must be taken into consideration. These are Exhibits 5 and 6 and are both dated 22nd November, 1927. Exhibit 5 is a chattel mortgage in pursuance of the Bills of Sale Act of

> ALL AND SINGULAR the goods, chattels, machinery, fixtures and other effects now in and upon Lots Twenty-one (21), Twenty-two (22) and Twenty-three (23), except the North five (5′) feet thereof, in Block Ninety-nine (99), District Lot One Hundred and eighty-one (181), City of Vancouver, Province of British Columbia, more particularly in part set forth in Schedule attached hereto.

Exhibit 6 is a mortgage in pursuance of the Short Form of Mortgages Act:

> ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Vancouver, Province of British Columbia, more particularly known and described as Lots Twenty-one (21), Twenty-two (22) and Twenty-three (23), except the North five (5′) feet thereof, Block Ninety-nine (99), District Lot One hundred and eighty-one (181), Group One (1), New Westminster District, according to a map or plan of the said subdivision deposited in the Land Registry office at the City of Vancouver and numbered 196. TOGETHER with all buildings, fixtures, commons, ways, profits, privileges, rights, easements, and appurtenances to the said hereditaments belonging or with the same or any part thereof held or enjoyed or appurtenant thereto; and all the estate, right, title, interest, property claim and demand of him, the said mortgagor, in, to or upon the said premises.

Each document on its face is stated to be collateral to the other and both are made between the same parties and to secure the same advance. No proceeding could be taken to enforce principal in default under Exhibit 6 without first obtaining leave under the Mortgagors' and Purchasers' Relief Act but it is contended by the appellants that the seizure made herein under Exhibit 5 would not necessitate any such leave. In my opinion, after consideration of the authorities cited by counsel, on behalf of both parties, if Exhibit 5 stood alone it might be argued by the appellants that the parties by executing that document had converted what would otherwise be part of the freehold into chattels, or, to put it another way, that they had by executing

Exhibit 5 provided that fixed chattels should lose their character as a portion of the realty but in the case at Bar that is not open to them as both Exhibit 5 and Exhibit 6 were made concurrently, are collateral to each other and both cover the fixtures. I would, therefore, dismiss the appeal.

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellants: *Walsh, Bull, Housser, Tupper & Ray.*

Solicitor for respondents: *J. R. Nicholson.*

REX v. RICHARDS AND WOOLRIDGE.

Criminal law—Trade union—Theatre—Employees—Wage dispute—Strike—Besetting and watching wrongfully and without lawful authority—Criminal Code, Sec. 501 (f)—R.S.B.C. 1924, Cap. 258, Secs. 2 and 3.

By section 501 (*f*) of the Criminal Code everyone is guilty of an offence who "wrongfully and without lawful authority with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain . . . besets or watches the house or other place where such other person resides or works or carries on business or happens to be."

The accused, who were members of the Projectionists Union, affiliated with the New Westminster and Vancouver Trades and Labour Council, were employees on the technical staff of the Edison Theatre in New Westminster. Having a dispute with the theatre over the scale of wages, through their union they notified the theatre that they would stop work on a certain date unless their demands were complied with. The theatre then employed other licensed projectionists who were not members of said union. Later both accused appeared in front of the theatre at about 1.20 in the afternoon wearing yellow slickers on the backs of which the following words were printed: "The Edison Theatre does not employ Union Picture Projectionists affiliated with the New Westminster and Vancouver Trades and Labour Council" and they walked up and down in front of the theatre for about one hour when they were arrested. Evidence was adduced that the theatre suffered loss of business by the parade. Both accused were convicted by the magistrate.

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Held, on appeal, on an equal division of the Court, that the conviction by magistrate *Edmonds* be affirmed.

Per MACDONALD, C.J.B.C. and MCPHILLIPS, J.A.: That the appellants beset and watched the theatre and whether it was done peacefully or not makes no difference. The offence falls within the very language of the section, and as they did these things without lawful authority they are guilty of the crime aimed at by the section.

Per MARTIN, J.A.: That the acts of the appellants were within the limits of the British Columbia Trade-unions Act and therefore were done with the sanction of a "lawful authority" and this conviction should be quashed.

Per MACDONALD, J.A.: That as the "watching and besetting" was carried on without creating a nuisance and without violation or intimidation, without considering the effect, if any, of the provisions of the Trade-unions Act, the appellants' acts were not "wrongful" at common law nor committed "without lawful authority" within the meaning of section 501 (*f*) of the Criminal Code, and the appeal should therefore be allowed.

APPEAL by accused by way of case stated from their conviction by police magistrate *Edmonds* at New Westminster, on a charge under section 501 of the Criminal Code, for that the appellants, on the 27th of March, 1933, at the City of New Westminster, did wrongfully and without lawful authority with a view to compel Frank Kerr, manager of the Edison Theatre in said city, to abstain from employing moving-picture operators not affiliated with the Vancouver and New Westminster District Trades and Labour Council, being something which the said Frank Kerr has a lawful right to do, or to employ moving-picture operators affiliated with the Vancouver and New Westminster District Trades and Labour Council, being something which the said Frank Kerr has a lawful right to abstain from doing; beset and watched the premises of the Edison Theatre, being the place of business of the said Frank Kerr. The appellants were tried summarily and fined $25 each. On the hearing the magistrate found that the following facts were proved:

Statement

(a) The Edison Theatre is a theatre chiefly used for the exhibition of motion pictures and is situate on the south side of Columbia Street in the City of New Westminster between McKenzie and Begbie Streets;

(b) The technical staff employed by the theatre were, until January 14th, 1933, members of the Projectionists Union (Local 348) affiliated with the New Westminster and Vancouver Trades and Labour Council;

(c) Owing to the difficulties arising out of a dispute over a wage scale

the employees belonging to the said union affiliated with the said Vancouver and New Westminster Trades and Labour Council through their union notified the Edison Theatre that they would stop work on January 14th, 1933, unless their demands were complied with and in consequence the said Edison Theatre employed other projectionists who are members of the All-Canadian Congress.

(d) On the 27th day of March, 1933, the date of the charge herein, the Edison Theatre was employing men as motion-picture projectionists who, whilst properly licensed as projectionists and operators, were not members of the said union affiliated with the New Westminster and Vancouver Trades and Labour Council;

(e) The appellants herein are members and officials of the Union of Motion Picture Operators and Projectionists affiliated with the New Westminster and Vancouver Trades and Labour Council, and were such on the 27th day of March, 1933.

(f) On the 27th day of March, 1933, the appellants appeared on Columbia Street aforesaid at the hour of 1.20 p.m. wearing yellow slickers on the backs of which the words following were printed: "The Edison Theatre does not employ Union Picture Projectionists affiliated with the New Westminster and Vancouver Trades and Labour Council."

Statement

(g) The words printed on the slickers were a statement of fact which was true.

(h) The appellants walked up and down on the south side of Columbia Street between McKenzie Street and Begbie Street until 2.15 p.m. when they were arrested.

(i) The appellants did not speak to anyone on the street; they were walking up and down in an orderly manner and did not attempt to prevent people going into the Edison Theatre.

(j) Evidence shewed that the manager of the theatre and the accused Woolridge were good friends and that Woolridge had said to him whilst walking past the theatre "Hello Frank."

(k) Evidence was adduced that the said Edison Theatre suffered loss of business by the parade of the appellants as described herein but that a great deal of the drop off in business was due to bombings of theatres in Vancouver and Seattle.

The question submitted for the opinion of the Court was whether upon the above statement of facts the magistrate came to a correct determination in point of law in convicting the appellants.

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

Sloan, for appellants: What we did was not done unlawfully or without lawful authority: see *Schuberg* v. *Local 118, International Alliance Theatrical Stage Employees* (1926), 37 B.C. 284 and on appeal (1927), 38 B.C. 130; *Quinn* v. *Leathem*

Argument

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(1901), A.C. 495; *Allen* v. *Flood* (1898), A.C. 1. What we did was within the Trade-unions Act, and we are not guilty of any infringement of the Code. It was not a conspiracy, as we did what was lawful. Unless it is actionable as a tort there is no violation of the Code: see *Ward, Lock and Co.* v. *The Operative Printers' Assistants' Society* (1906), 22 T.L.R. 327; *Fowler* v. *Kibble* (1922), 91 L.J., Ch. 353 at pp. 361-2. If we are protected by our Provincial statute, he cannot succeed in an action against us and we are not liable under the Code: see *Sorrell* v. *Smith* (1925), A.C. 700 at 711. The Act gives us the right to try to persuade the public not to buy tickets for the theatre.

Argument

Milledge, for the Crown: "Watching and besetting" is the main offence. The sale of tickets to the theatre fell off and some of the damage was caused by the parade: see *Reners* v. *Regem* (1926), 46 Can. C.C. 14. The *Schuberg* case [*supra*] was an action for damages and does not apply: see *Rex* v. *Blachsawl* (1925), 44 Can. C.C. 286; *Bussy* v. *The Amalgamated Society of Railway Servants and Bell* (1908), 24 T.L.R. 437.

Sloan, in reply, referred to *Reners* v. *Regem* (1926), S.C.R. 499 at 510.

Cur. adv. vult.

3rd October, 1933.

MACDONALD, C.J.B.C.: This is a case stated on a question arising under section 501 of the Criminal Code which imposes criminal liability for watching and besetting. The appellants quitted their employment with a theatre company because of a reduction of wages. They then proceeded to decorate themselves with yellow slickers on the back of which was printed in large letters the following legend:

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> The Edison Theatre does not employ Union Picture Projectionists affiliated with the New Westminster and Vancouver Trades and Labour Council.

These words were true as found by the case stated. The defendants' proceedings were peaceful; their counsel contended their proceedings were not unlawful because their object was not to injure the respondent but to right a trade grievance. Their said conduct did affect adversely the respondent's trade

receipts and profits but very slightly. The appellants so beset the theatre for about one hour when they were arrested. It was argued that they were entitled to the benefit of the Trade-unions Act, Cap. 258, R.S.B.C. 1924, which is in effect a copy of a like section in the English Trade Disputes Act and which until repealed in 1892 formed part of the said section 501. The Trade-unions Act is applicable to civil cases for damages and has no reference whatever to crime and the corresponding English cases must therefore be read with this distinction between the Imperial Act and our Code as it is at present.

The real question for decision here is "Was the appellants' conduct wrongful and illegal?" That question was dealt with and considered in *Reners* v. *Regem* (1926), S.C.R. 499 where the Court sustained a conviction for besetting and watching where the appellant picketed a coal mine in Alberta. Judgment of the majority of the Court was delivered by Newcombe, J., and Idington, J. delivered a separate judgment arriving at the same conclusion. The judges in that case were principally concerned with the judgment in the Court below of Clarke, J.A. who dissented and who applied the language of the Trade Disputes Act, 1906 (6 Edw. 7), Cap. 47 to the case there at Bar, notwithstanding that the words in question had been eliminated from the Code. He appears to have reasoned by analogy that the words besetting and watching meant the same in both cases.

MACDONALD, C.J.B.C.

In *Reners'* case, *supra,* the acts of the appellants were much more aggressive and injurious than in this case where the besetting and watching were peaceful. The words of section 501 are that persons are guilty of the offence

> who, wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain, . . .
>
> (f) besets or watches the house or other place where such other person resides or works, or carries on business or happens to be.

The majority of the Court in *Reners'* case found the defendants guilty and sustained the judgment below.

Section 501 applies to persons "who, wrongfully and without lawful authority, with a view to compel" the theatre company to abstain from reducing the appellants' wages, which it had a lawful right to do, beset or watch "the house or other place where such other person resides or works, or carries on business or

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happens to be." There is nothing in the section relating to the purpose for which the acts complained of were done. The appellants beset and watched the theatre, whether peacefully or not makes, in my opinion, no difference. The offence falls within the very language of the section and since they did these things without lawful authority they were guilty of the crime aimed at by the said section and, in my opinion, the appeal should be dismissed.

MARTIN, J.A.: This case turns upon the meaning of the words "wrongfully and without lawful authority" in section 501 of the Criminal Code, as applied to the present facts which, as set out in the case stated, are, in essence, that the two accused were, on the 27th of March, 1933, during a strike of the union of which they were members arising out of a labour grievance with the owners of the Edison Theatre, walking to and fro in an orderly manner, for less than an hour before their arrest, on the same side of one of the streets of the City of New Westminster, on which was situate the said theatre, wearing ordinary yellow waterproofs called "slickers," on the backs of which was the following printed statement:

> The Edison Theatre does not employ Union Picture Projectionists affiliated with the New Westminster and Vancouver Trades and Labour Council.

MARTIN, J.A.

It was found that the statement was true in fact, and also that the accused did not speak to or molest anyone or obstruct the entry of patrons of the theatre, and also that the theatre nevertheless "suffered loss of business by the parade of the appellants" to some extent at least.

Now upon these facts it is beyond question, to my mind, that the appellants were, from a civil point of view, in this Province, conducting themselves in a legal manner and were not liable for any loss to the theatre occasioned by their actions because in doing what they did they had the "lawful authority" of the Provincial "Act Relating to Trade-unions," Secs. 2 and 3, Cap. 258, R.S.B.C. 1924, as their justification, and their actions did not amount even to "peaceful picketing" of the mildest type, but at most to "watching" only, and not besetting, in the true sense (*cf. Reg.* v. *Hibbert* (1875), 13 Cox, C.C. 82 and

Reg. v. *Bauld* (1876), *ib.* 282) and the "watching" was of the kind justified by said sections 2 and 3, authorizing the "communicating" and "publishing" of "facts respecting employment" and "information with regard to a strike or lock-out," and therefore it comes within the decisions of my brother M. A. MACDONALD and myself in *Schuberg's* case (1927), 38 B.C. 130 (wherein the acts complained of were much more pronounced than herein) and to those decisions I adhere (with all due respect to the contrary opinion of the other two members of the Court) and refer to them, at pp. 140-2 without citation, for my views upon the *Blachsawl* and *Reners* cases, which, though decided upon very different facts (even to the extent of the appellant in the latter case participating in trespass—p. 508), were much relied upon by the respondent herein, only adding that in neither of those cases was a Provincial statute invoked as constituting a "lawful authority" for the conduct complained of.

By that expression (which derives its origin from the Imperial Conspiracy and Protection of Property Act, 1875, Cap. 86, Sec. 7) the Parliament of Canada evidenced its intention, in my opinion, to recognize the admitted powers of Provincial Legislatures to deal with trade disputes under their jurisdiction over "property and civil rights in the Province" and where the old common law civil relations between employer and employed have been constitutionally altered by such Legislatures a course of conduct which under that old law was unlawful became one which was done by "lawful authority" and therefore, to bring the point home to the present case, if the "besetting or watching" here complained of (under subsection (*f*) of section 501) amount to no more than is authorized by our said Provincial Trade-unions Act then that particular conduct is excluded from the penal operation of section 501 by its own terms.

MARTIN, J.A.

Such being the case, there is nothing unreasonable in the view that the National Parliament has had special regard to the exceptionally difficult matter of trade-union disputes (which come also within the "class of subjects" of a "local or private nature in the Province" assigned thereto by section 92 (16) of

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the B.N.A. Act) and therefore has decided to co-operate with the Provinces in dealing with them, and to that end has in effect made the special local exception that where acts are done in pursuance of civil rights conferred by a Provincial Legislature they are done by "lawful authority."

At the outset, it is clear that some weighty meaning must be given to those words because they are of prime importance in prosecutions under the section and constitute the essence of the offence, and so the absence of that "authority" must be averred and proved—*Reners'* case, *supra,* pp. 505, 507-8. Now there is only one power that can bring the conduct of people in Canada within the scope of "the criminal law," as that term is used in section 91 (27) of the B.N.A. Act, and that is our National Parliament, and it alone can define the acts which constitute any offence against that law, and is entirely free to make such limitations and exclusions, geographical or otherwise, as it may deem best in the public interest, either in relation to any or all of the nine Provinces of Canada or to its own vast National Territories, and hence we find a number of provisions in the Criminal Code and other criminal statutes which have a different effect in different places, such, *e.g.,* as the Money Lenders Act, Cap. 135, R.S.C. 1927, which is excluded from operation in the Yukon Territory; and this differentiation occurs not only in the various Provinces of Canada but in special localities within the Provinces themselves as the result of many prosecutions being made subject to the unfettered leave, *i.e.,* local "authority" of the Attorney-General of the Province in which the alleged offence occurs, *e.g.,* by Code Secs. 594 (explosives), 596 (breach of trust), 597 (concealing deeds and falsifying pedigrees), and 598 (uttering defaced coin), and it is very apt and significant that by section 592 this "authority" is shared between the National Attorney-General and the local Attorney-General of the Province concerned, in offences for unlawfully obtaining and communicating official information.

A striking illustration of local application is to be found in the Lord's Day Act, Cap. 123, R.S.C. 1927, Sec. 16, which provides that

> No action or prosecution for a violation of this Act shall be commenced

without the leave of the Attorney-General for the Province in which the offence is alleged to have been committed. . . .

A prosecution under that section in this Province is to be found in *Rex* v. *Laity* (1913), 18 B.C. 443, and the effect of local circumstances was considered and applied by our late brother IRVING in *Re Lambert* (1900), 7 B.C. 396, wherein he said, respecting a by-law of the City of Vancouver to prevent barbers from exercising their trade on Sunday (pp. 398-9):

> The Provincial Legislature may very well have said, "For the better observance of Sunday, the City Council may compel barbers' shops to be closed"; but who can say that it was the intention to go further and prohibit a barber from exercising his trade on his premises behind closed doors, or in the private house or rooms of his employers? Mr. *Cane* pointed out many cogent reasons why this power should not be conferred on the Council of a City which is the terminus of a railway and where travellers are continually arriving or departing after or upon long trips upon which shaving or hair cutting is impossible. And, although I am not concerned with the question of expediency, I must not, in construing the Act, lose sight of the circumstances under which it was passed, and of the locality affected by it.

Therefore we have the result that the Attorney-General of a Province in the proper exercise of his "lawful authority" may prevent the prosecution of a certain class of persons in one city in his Province because of local conditions though he might well permit it in another "locality affected" in a different way.

MARTIN, J.A.

Furthermore, the National Parliament must have had the Provincial Legislature in mind when it referred to a "lawful authority" because, under the circumstances, it was obviously not referring to its own powers by that inapt reference, and there was no other constitutional "authority" that had any jurisdiction over the matter in any respect except the Provinces which, as having civil jurisdiction over it, were deeply interested in and gravely affected by the operation of the section. The reasonable inference is, therefore, that as the Provinces alone could reasonably come within the contextually unusual term employed they must by clear implication be taken to be referred to just as effectually as if the expression had been "lawful Provincial authority," or "lawful authority of the Attorney-General of the Province" where it was intended, as in the offences cited, to confer the local authorization upon him and not the Province itself acting by its Legislature.

In view of the importance and novelty of the question it has

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received my prolonged consideration with the result that I can only reach the conclusion, with all due deference to contrary views, that under the circumstances before us (and every case must be decided on its own—*Reners* v. *Regem, supra,* p. 506) the acts of the appellants were within the limits of the said British Columbia Trade-unions Act and therefore were done with the sanction of a "lawful authority" as that expression is used by the National Parliament in said section 501 and so this conviction should be quashed.

This conclusion, be it understood, does not mean that if the appellants had exercised their said limited rights in a wrongful manner they could justify that misexercise by invoking the Provincial statute which conferred such rights, because it was decided in *Reners'* case, *supra,* p. 506 by the Supreme Court of Canada (now, since the abolition of appeals to the Privy Council in criminal cases, the final authority—*Rex* v. *Wu* (1933), [48 B.C. 24], 3 W.W.R. 651) that

> watching or besetting, if carried on in a manner to create a nuisance, is at common law wrongful and without legal authority . . . [and also] that if picketing be carried on in a manner to create a nuisance, or otherwise unlawfully, it constitutes an offence within the meaning of the statute.

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That is the controlling judgment of five members of the Court and though Mr. Justice Idington, in agreeing in dismissing the appeal, put the matter somewhat differently yet we must follow the opinion of the Court; and it is to be noted that he twice misquoted the statute at p. 513 as dealing with "besetting and watching" whereas it says "besets or watches." This disjunctive distinction is important because this case is one of "watching" only and that course of conduct may unquestionably be lawfully pursued under the "authority" of certain appropriate Provincial statutes even though it may "compel any . . . person to abstain from doing anything which he has a lawful right to do," etc., *e.g.,* in the case of health officers in the exercise of the very wide powers of surveillance, including "inspection," "house-to-house visitation," "isolation," etc., which are conferred by many sections of the Health Act of this Province, Cap. 102, R.S.B.C. 1924, which powers are recognized by the National Parliament, as pointed out in our recent decision in *Standard Sausage Co. Ltd.* v. *Lee* (1933), 47 B.C. 411 at 427, where it is said, of the National Health Act,

. . . In defining the wide "duties and powers of the Minister of Health" section 4 declares that they shall be carried out in a spirit of "(a) Co-operation with the provincial, territorial, and other health authorities with a view to the co-ordination of the efforts proposed or made for preserving and improving the public health, the conservation of child life and the promotion of child welfare." And section 7 disclaims interference with "any Provincial or Municipal Board of Health or other health authority operating under the laws of any Province."

This essential spirit of legislative co-operation in the field of those "classes of subjects" which under sections 91-2 of the B.N.A. Act substantially pertain to both the Nation and the Provinces is just as effectively carried out by the language used in said section 501 of the Code as in the said section of the Health Act, and though the Provincial authority is not expressly named yet it is recognized by clear implication.

In conclusion I shall only say that even if this view of section 501 should turn out to be erroneous, yet the equal division of opinion in this Court shews that there is a substantial doubt about its construction, and therefore it comes within the following citation from Mr. Justice IRVING's judgment in *Lambert's* case, *supra,* p. 399:

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All statutes which encroach upon the rights of a subject, whether as regards person or property, should be interpreted, if possible, so as to respect such rights. The Legislature having, by the use of an ambiguous expression, left a reasonable doubt as to its meaning, the benefit of that doubt should be given to the subject.

Since that was said, about a third of a century ago, the old Full Court and this Court have often adopted that just and reasonable course and in my opinion, we should, in any event, adopt it now and leave it to the National Parliament to declare beyond doubt, if it feels so disposed, that it regards what the appellants have done as constituting a crime.

This view of the matter is also fortified by the recent decision of the Court of Criminal Appeal in England in *Rex* v. *Chapman* (1931), 100 L.J., K.B. 562, wherein the Court said, *per* Lord Hewart, C.J.:

Much argument has taken place and may take place on the meaning of the words "of twenty-three years of age or under," but we have come to the conclusion that in this case the observations, based upon a series of decisions, apply, which are to be found in Maxwell on the Interpretation of Statutes (7th Ed.), at p. 244: "Where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the

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subject and against the Legislature which has failed to explain itself." On that ground the Court has decided to allow the appeal and to quash the conviction.

Therefore on this ground also I would quash this conviction.

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MCPHILLIPS, J.A.: This appeal comes to us upon a case stated from *Henry L. Edmonds, K.C.*, police magistrate in and for the City of New Westminster, reading as follows: [After setting out the case stated, part of which is already set out in the statement the learned judge continued].

The question here to be determined was carefully considered in *Schuberg* v. *Local 118, International Alliance Theatrical Stage Employees* (1927), 38 B.C. 130. That was a civil case for damages and the plaintiff recovered damages in amount $1,750. This Court in the case just referred to was equally divided. To give a clear idea of the subject-matter of the case it will be convenient I think to give a copy of the head-note in that case which reads as follows:

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The plaintiff, owner and operator of a theatre, reduced the number of the stage hands from seven to five. The stage hands, who were members of the defendant trade-union, went on strike and the plaintiff employed non-union men to fill their places. The trade-union then distributed handbills at the theatre entrance addressed to the public, stating that the plaintiff's theatre "is unfair to organized labour" and they had motor-cars and sandwich-men going up and down before the theatre entrance displaying signs and banners bearing the same statement. The plaintiff recovered judgment in an action for damages and an injunction.

On appeal, the decision of GREGORY, J. was affirmed on an equal division of the Court.

Per MACDONALD, C.J.A., and MCPHILLIPS, J.A.: An actionable wrong was done by the defendants with the object of compelling the plaintiff, by inflicting loss upon him, to do something from which he had a legal right to abstain from doing and the case falls within the principle of *Quinn* v. *Leathem* (1901), A.C. 495. The Act relating to Trade-unions does not protect a labour-union from liability for conspiring to injure an employer in his business and from intentionally injuring him.

Per MARTIN, J.A.: The producing and staging of plays and the sale or purchase of tickets of admission thereto are within section 3 of the Act relating to Trade-unions and what the defendants did is within the expressions (a) "publishing information with regard to a . . . labour grievance or trouble . . . "; (b) "warning workmen . . . employees or other persons . . . not to seek employment in the locality affected . . . ;" and (c) warning the same "from purchasing, buying, or consuming products produced or distributed by . . . " said employer. The handbill is in effect a direct and unmistakable "warning" to the "theatre-

going public" against "buying" the "product" that the plaintiff was offering to the public and it was the falling off in the sale of his tickets that he complained of. The expression "communicating of facts" in section 2 of the Act does not require a full statement of all relevant facts *pro* and *con.* nor the exactness required in legal proceedings and the statement that an employer is "unfair to organized labour" is not necessarily merely a statement of opinion; further, the statement that "conditions enjoyed by stage employees for eighteen years are now denied them by the present management" was one of fact in substance; and the allegation that it had been proved at the trial that the theatre was "unfair to organized labour" had been established. The case comes within the second of the two propositions deduced by Lord Cave in *Sorrell* v. *Smith* (1925), A.C. 700 at p. 712.

Per MACDONALD, J.A.: Theatre-goers are purchasers of products produced or distributed by an employer of labour within the meaning of the latter part of section 3, and it is permissible to warn persons from purchasing or buying products produced by the employer of labour party to a strike or labour grievance and it is not necessary that the warning be based on "fair or reasonable argument" or confined to "communicating facts" as in section 2. The acts complained of were not accompanied by unlawful threats or intimidation, and acts performed pursuant to legislative permission should not be regarded as done maliciously.

In my opinion the facts of the present case equally demonstrate that there has been an infraction of the law here of the Criminal Code, Sec. 501 (*f*). I may say that I adhere to the views expressed by me in the *Schuberg* case at pp. 142-8. I would quote in part what I said at pp. 146-7, and it covers the facts of the present case: MCPHILLIPS, J.A.

Here, unquestionably, the respondent had the legal right to carry on his theatre without interference at the hands of the appellants, the right to engage workmen, and the right to discharge workmen and to employ men belonging to unions or not belonging to unions, to define the number of workmen to be employed at any particular work, in short, do all that any employer of labour is entitled to do. No doubt, though, the employer must provide his employees with a safe place to work, but no question of that character arises here. What was done here was, in my opinion, the invasion of a legal right; the respondent had the right to carry on his business without unlawful interference, and what the appellants have been found liable for is this—the unlawful interference with the respondent in the exercise of his legal rights and such interference produced injury to the respondent and damages have been rightly assessed and imposed upon the appellant therefor.

Unquestionably upon the facts of this case—as stated in the case stated—the appellants did beset and watch the premises of the Edison Theatre, 652 Columbia Street in the City of New Westminster contrary to the statute. It has been attempted here to shew that what was done was not in its nature besetting

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or watching. It passes my comprehension to hold otherwise. Here we have the appellants wearing yellow slickers on the backs of which the words following were printed:

> The Edison Theatre does not employ Union Picture Projectionists affiliated with the New Westminster and Vancouver Trades and Labour Council.

The fact that it was true does not absolve the appellants—it only accentuates the infraction of the criminal law. It establishes watching and besetting when we find that so garbed and labelled these men walked up and down on Columbia Street where the theatre is situate. It was not at all necessary to do more than this. To commit an infraction of the law it was in no way necessary to establish the offence to prove that they attempted to prevent people going into the Edison Theatre. Then we have 4 (k): [already set out in statement].

There was wrongful interference here with the business of the theatre—it was besetting and watching and contrary to the criminal law of Canada (section 501 (*f*)).

I would refer to what Newcombe, J. said in *Reners* v. *Regem* (1926), S.C.R. 499 at p. 508 (Newcombe, J. was concurred with by Duff and Mignault, JJ.):

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> It is not for this Court to judge the evidence, except to determine whether there be any. The appellant's case fails if evidence be found which the trial judge was bound to consider tending to shew that the watching and besetting, which is conclusively found to have taken place, was wrongful and without lawful authority, and I think there is such evidence in each of the aspects to which I have referred.

Here we have a case stated which sets forth what was done. It was wrongful and without lawful authority. Can there be any conclusion here other than that it was done for the purpose of injuring the owner or operator of the theatre and affecting him in the way of bringing about the impossibility of carrying it on by lack of patronage? (Also see *Rex* v. *Blachsawl* (1925), 44 Can. C.C. 286—and this is a case within the same subsection as the present case.) We have *Rex* v. *Blachsawl* (1925), 3 W.W.R. 345, which I referred to in the *Schuberg* case, 38 B.C. at p. 145, a criminal case and an analogous case, an unanimous judgment of the Supreme Court of Alberta. There it was held that distribution of handbills on the street in front of the place of business was a violation of section 501 (*f*) of the Criminal Code.

In my opinion the learned police magistrate was right in finding the appellants were guilty of the offence charged; that is, he came to a correct conclusion in point of law in convicting the appellants and it follows that the appeal in my opinion should be dismissed.

MACDONALD, J.A.: Appeal on a case stated under Part XV. of the Code from a conviction under section 501 (*f*) of the Code for watching and besetting the premises of the Edison Theatre in New Westminster with a view to compelling the manager to abstain from employing moving-picture operators not affiliated with the Vancouver and New Westminster District Trades and Labour Council. Owing to a wage dispute employees belonging to the union affiliated with the Trades and Labour Council notified the manager of the theatre that they would strike unless their demands were complied with. The outcome of this demand was that other projectionists, properly licensed but not members of the union, were employed. The manager of the theatre had a legal right to employ these projectionists and to refuse to employ appellants.

In protest appellants donned yellow slickers bearing on the backs the legend:

> The Edison Theatre does not employ Union Picture Projectionists affiliated with the New Westminster and Vancouver Trades and Labour Council.

And so equipped walked up and down the adjacent street. They did not accost anyone, or interfere in any way with patrons going into or leaving the theatre. Some loss of business, however, followed, by reason of these activities. Upon the foregoing facts appellants were convicted.

Section 501 (*f*) of the Code reads as follows:

> 501. Every one is guilty of an offence punishable, at the option of the accused, on indictment or on summary conviction before two justices and liable on conviction to a fine not exceeding one hundred dollars, or to three months' imprisonment with or without hard labour, who, wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain, . . .
>
> (*f*) besets or watches the house or other place where such other person resides or works, or carries on business or happens to be.

It was submitted that appellants did not act "wrongfully and

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without lawful authority" because by the "Act relating to Trade-unions," R.S.B.C. 1924, Cap. 258, no civil liability follows the commission of the acts complained of. If it was sought by civil action to enjoin appellants from acting in the manner indicated or to recover damages in respect thereto section 3 of the Act referred to, in my opinion, would afford a complete defence. It provides, *inter alia,* that

> No . . . trade-union . . . or its officer, member, agent, or servant, or other person, shall be enjoined or liable in damages . . . for publishing information with regard to . . . [any] labour grievance or trouble.

The acts of appellants coupled with the facts, amounted to the publication of "information" concerning a labour dispute. It is submitted that criminal consequences cannot follow the commission of an act civilly permissible.

The point may be disposed of without reference to the Act referred to if under section 501 (*f*) of the Code the mere proof of the acts outlined involves the *sequitur* that they are "wrongful" and committed "without lawful authority." In *Reners* v. *Regem* (1926), 46 Can. C.C. 14, Idington, J. points out that justification for watching and besetting premises could be shewn, *e.g.,* by a sheriff or his officers in the discharging of official duties. After quoting the dissenting judgment of Clarke, J.A., in the judgment under review he says at p. 20:

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> The foregoing quotation from his judgment shews that all involved in this appeal, by reason of the dissent of Clarke, J.A., is the doubt he has as to the meaning of the words "wrongfully and without lawful authority" in the part of s. 501 which I have quoted above.
>
> He suggests, as has been suggested long ago by others, that "besetting and watching" a house or premises is not in law wrongful, and hence the basis of the said s.-s. (*f*) renders it absolutely inoperative.
>
> The answer to such an objection is that we must, if possible, give it some efficacy, and to do that we must ask ourselves if it is correct that the act of so besetting and watching never was, in law, wrongful.
>
> I answer that such a course of conduct always was at common law, wrongful, and might be the basis of a civil action and hence clearly wrongful.

However, Newcombe, J. (Duff, now Chief Justice, and Mignault, J. concurring) after reviewing the English Conspiracy and Protection of Property Act corresponding, with some variations, to section 501 (*f*) of the Code, and some of the authorities held that watching and besetting only if "carried on

in a manner to create a nuisance is at common law wrongful and without legal authority" (p. 28). He adds at the same page "or otherwise unlawfully" without defining what acts might be included in this phrase. On the facts in that case it was held that the acts complained of amounted to a nuisance. That is not so in the case at Bar. There is much to be said for the view of Idington, J. that the simple act of watching and besetting without overt acts of a character likely to create or actually creating a nuisance is a crime. It is not however the controlling judgment. Because therefore the "watching and besetting" was carried on without creating a nuisance and without violence or intimidation I think, without considering the effect, if any, of the provisions of the Trade-unions Act referred to, that appellants' acts were not "wrongful" at common law, nor committed "without lawful authority" within the meaning of section 501 (*f*) of the Code and that the appeal should therefore be allowed.

The Court being equally divided the appeal was dismissed.

Solicitors for appellants: *Farris, Farris, Stultz & Sloan.*
Solicitors for respondent: *W. G. McQuarrie & Company.*

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REX v. SIMMONS.

Criminal law—Dentistry Act—Incorporated company practising dentistry —Assisting corporation in so practising — Interpretation — R.S.B.C. 1924, Cap. 66, Sec. 71.

REX v. SIMMONS

The accused is a member of the College of Dental Surgeons of British Columbia, in the employ of one Doctor Coultas, a shareholder in the School of Mechanical Dentistry Limited, with dental office adjoining said School of Dentistry with door between. Three customers went to the School of Mechanical Dentistry to purchase plates of artificial teeth. When entering its place of business they were advised by an employee to have an impression of the gums taken, and for this purpose the accused was called from the adjoining office. For his services in taking the impressions a charge of $2.50 each was made. The charges for the plates and the service of the dentist were paid to the School of Mechanical Dentistry, but the receipts for the $2.50 were signed by the accused. Accused was convicted on a charge of unlawfully assisting the School of Mechanical Dentistry Limited in carrying on the practice of the profession of dentistry contrary to section 71 of the Dentistry Act.

Held, on appeal, affirming the decision of deputy police magistrate *McQueen*, that the School of Mechanical Dentistry Limited did, with the assistance and help of the accused, commit an act of the practice of dentistry, and as a participant in the operations of this company the accused brought himself within the provisions of said section.

Statement

APPEAL by accused from his conviction by deputy police magistrate *McQueen*, on the 8th of March, 1934, on a charge of assisting the School of Mechanical Dentistry Limited to carry on the practice of the profession of dentistry. Argued before HARPER, Co. J. at Vancouver on the 1st of May, 1934.

Nicholson, for appellant.
Maitland, K.C., and *Remnant*, for respondent.

8th May, 1934.

Judgment

HARPER, Co. J.: This is an appeal from a summary conviction. The accused, a member of the College of Dental Surgeons of British Columbia, was on the 8th of March, 1934, convicted by deputy police magistrate *McQueen* in that he did, unlawfully at the City of Vancouver between the 12th and 30th days of December, 1933, assist the School of Mechanical Dentistry

Limited, to carry on the practice of the profession of dentistry, *viz.*, to take impressions of the gums or jaws and to fit thereto artificial dentures for gain contrary to section 71 of the Denistry Act, R.S.B.C. 1924, Cap. 66.

The appeal is on the ground that the evidence does not disclose any assistance by the accused; that, at the most the evidence only suggests that, owing to the location of Dr. Simmons's office, he was able to extend his professional practice, through the fact that the services of a qualified dentist were needed to take the impressions of the gums or jaws of persons doing business with the School of Mechanical Dentistry Limited. It was submitted that though the operations of this corporation did tend in a financial sense to increase the income of Dr. Simmons, the most that could be said was that there was co-operation.

The facts are that three customers went to the place of business of the School of Mechanical Dentistry Limited at 716 Robson Street for the purpose of purchasing plates of artificial teeth. One witness (Dayman) stated that before she went to its place of business she had seen an advertisement (Exhibit 1) of this corporation offering plates at $7.50 each. It is clear that all these witnesses went to do business with the corporation. It was only after entering its place of business, that it was urged upon them by an employee of this company that it would be advisable to have an impression of the gums taken and for this purpose Dr. Simmons was called. His dental office was adjoining, a door leading to his office. Dr. Simmons was a salaried employee of Dr. Coultas, a shareholder at least of the School of Mechanical Dentistry Limited. For his services in taking this impression a charge of $2.50 was made. The charge for the plates and the services of the dentist were paid to the employee of the School of Mechanical Dentistry Limited, although the receipt for the $2.50 was signed by the dentist himself.

Judgment

The School of Mechanical Dentistry Limited was convicted under section 71 of the Dentistry Act of carrying on the practice of dentistry and no appeal has been taken therefrom. The taking of an impression of the jaw is made by the Dentistry Act one of the acts which shall be deemed to be practising the profession of dentistry.

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In the case of one customer (Kingston) Dr. Simmons took an active part both in advising the customer as to the necessity for the plates and in advising as to the charge as well as doing the work of taking an impression of the upper and lower gums. Considerable stress has been laid on the fact that the suite of the School of Dentistry was known as No. 6 and Dr. Coultas's office, where the appellant worked, was Suite No. 4. This is in my opinion not a circumstance of any weight as there were connecting doors and the appellant seems to have been always available to take an active part in the dealings with the customers of the School of Mechanical Dentistry Limited.

Each of the witnesses came to do business with the School of Dentistry; in each case the proposal was made by an employee of this corporation to have an act of dentistry performed, to facilitate the sale of its product and in each case as a part of that sale, the services of the appellant were procured.

Judgment

"Assisting" has been defined in the case of a charge of assisting an alien enemy to leave Canada, as doing "any act furthering to that intention." *Rex* v. *Oma* (1915), 8 Sask. L.R. 395; 25 D.L.R. 670.

The intention of the Legislature as expressed by section 71 of the Dentistry Act is to prevent corporations invading the field of a profession involving personal and confidential relationships. To effectuate this intention, not only is the corporation liable to a penalty, but any qualified dentist who takes any part in helping it to perform an act of dentistry, is also brought within the ambit of this section.

My conclusion on the facts here is that the School of Mechanical Dentistry Limited, to promote and extend the sale of these plates, did by the assistance and help of the appellant, commit an act of the practice of dentistry. As a participant in the mode of operation of this company the appellant brought himself within the meaning of section 71. The appeal is dismissed.

Appeal dismissed.

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MARTIN, J.A. (In Chambers)

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PRUDENTIAL SAVINGS & LOAN ASSOCIATION *v.* WHEATLEY

Practice — Appeal — Security for costs—Amount fixed by Court appealed from—Also time for giving same.

Security for the costs of appeal to the Court of Appeal should be fixed in amount by a judge of the Court appealed from, who may also fix the time for giving it.

MOTION for an order to fix the time within which the security for costs shall be deposited for the costs of the appeal to the Court of Appeal. Heard by MARTIN, J.A. in Chambers at Vancouver on the 25th and 29th of November and the 3rd of December, 1932.

Statement

A. Bruce Robertson, for the motion.
J. H. Macleod, contra.

MARTIN, J.A.: This is a motion in Chambers, by the respondent (plaintiff), for an order to fix the time within which shall be deposited the security for $150 for the costs of the appeal ordered to be given by Mr. Justice FISHER on the 24th of October last.

Several objections are taken against the motion and as the matter is of much practical importance and, owing to many changes in legislation, there is uncertainty upon the present proper practice, it is desirable to attempt at least to remove it, and therefore I have carefully reviewed all the statutes, Rules of Court, and cases relating thereto during the time of the old Full Court of the Supreme Court since I first became a member of it over 34 years ago, and of this Court.

Judgment

Without adverting to that Full Court or its practice it is, at present, sufficient to note that by proclamation of 31st August, 1909 (B.C. Gazette, Vol. 2, p. 4210, 2nd September, 1909) it was superseded by this Court of Appeal when it was established as a distinct appellate tribunal on the 1st day of September of that year, pursuant to the Court of Appeal Act, 1907, Cap. 10, and the Court of Appeal Act, 1907, Amendment Act, 1909, Cap. 9, and section 26 of the original Act of 1907 provided that

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Judgment

The Supreme Court, or any judge thereof, shall have jurisdiction in all questions and matters in relation to security for the costs of an appeal, pursuant to any Act or Rules of Court.

That section was, with section 9, given effect to by this Court in *Fyffe* v. *Loo Gee Wing* (1910), 15 B.C. 388, and it stood till the Revised Statutes of 1911 when its operation was entirely altered by section 29 of Cap. 51 thereof which in effect transferred that jurisdiction to the Court of Appeal, by enacting as follows:

29. Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed by the Court of Appeal or a judge of the said Court in Chambers, but the amount of such deposit or other security shall not exceed the sum of two hundred dollars.

The jurisdictional effect of this section was in its turn also completely reversed by the Court of Appeal Act Amendment Act, 1913, Sec. 6, which repealed it and provided that:

29. The appellant shall deposit with the registrar of the Court appealed from, as security for the costs to be occasioned by any appeal, such sum, not exceeding two hundred dollars, as may be fixed by a judge of the Court appealed from.

And the change was continued, *ipsis verbis,* by the present Court of Appeal Act, Sec. 29, Cap. 52, R.S.B.C. 1924, and so stands today, with the following addition by the Court of Appeal Act Amendment Act, 1931, Cap. 11, Sec. 2:

29A. (1.) When the security has been perfected and allowed, any judge of the Court appealed from may, subject to the Rules of Court, issue his *fiat* to the sheriff to whom any execution on the judgment appealed from has issued to stay the execution, and the execution shall be thereby stayed whether a levy has been made under it or not.

The first objection to this motion is that this Court of Appeal and consequently any judge thereof, has no jurisdiction to entertain it because the whole subject-matter of security for costs of appeal has been restored to the Supreme Court by said section 29, and therefore no other Court can deal with it; and reliance is placed on the decision of Mr. Justice D. A. MCDONALD in *Olsen* v. *Pearson* (1923), 32 B.C. 517, wherein he decided, upon objection taken to his jurisdiction, that:

Section 29 as amended [by Cap. 13 of 1913] refers the whole matter of security for costs to be occasioned by an appeal to the Court appealed from.

The result of my said review of the question brings me to the same conclusion, which may be supported by several reasons, a very strong, indeed to my mind an unanswerable one, being that by the said statutes constituting this Court the existing

original plenary jurisdiction of the Supreme Court over the whole subject-matter of "security for the costs of an appeal" was expressly continued and confirmed by said section 26, and when that jurisdiction was entirely taken from the Supreme Court (and also from the County Courts) by said section 29 of 1911 it was later just as completely restored to "the Court appealed from" by section 29 of 1913, because the language of final restoration in that section is just as ample in its scope and effect as was that of deprivation employed in 1911, the controlling expression used in both being identical, *viz.*, "security for the costs to be occasioned by any appeal," and as there is no reference in either section to fixing the time it follows that whatever jurisdiction was taken away from Courts below in 1911 was exactly restored to them (as "Courts appealed from") in 1913, and hence this distinct Court thereafter had no more jurisdiction over the subject-matter than it had at its establishment, *i.e.*, none at all, except perhaps in the exercise of an inherent jurisdiction in rare cases—*cf. J. H. Billington Limited* v. *Billington* (1907), 2 K.B. 106; *Bailey Cobalt Mines Limited* v. *Benson* (1918), 43 O.L.R. 321; *Rundle* v. *Stieman* (1926), 36 Man. L.R. 180; and *Chabot* v. *Modern Dairy Ltd.* (1932), 40 Man. L.R. 637. The situation, then, being one of complete restoration the said learned judge of the Supreme Court was also right in *Olsen's* case, *supra,* in fixing the time within which the security should be given pursuant to the power conferred by rule 981 of that Court (which, be it noted, is the same as in the Rules of 1906 and 1912) because the "cause or matter" had been remitted *pro tanto, i.e.,* to the extent of the subject-matter of giving security, to that Court, and therefore "proceedings" of that class were no longer in the Court of Appeal under section 9 of the Court of Appeal Act.

Judgment

It would, indeed, be an extraordinary thing that Parliament should have seriously contemplated creating a situation regarding the giving of security for costs that required two applications to two separate tribunals to give due effect to the attainment of one simple object, and so it would require the clearest possible language to compel me to hold that such an expensive and dilatory burden has been imposed upon litigants in this Province, because nothing is more aimed at by modern curial

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legislation than the avoidance of multiplicity of proceedings with their attendant costs; and the Court of Appeal in *"The Constantine"* (1879), 4 P.D. 156, *per* Jessel, M.R., emphasized its desire "to prevent the expense of unnecessary applications to the Court for security," and affirmed that decision in *Wille* v. *St. John* (1910), 1 Ch. 700 at 704.

In coming to this conclusion I have not overlooked the provisions of said section 9 of the Court of Appeal Act that:

> Subject to the Rules of Court and save as hereinafter provided, after notice of appeal has been given all further proceedings in relation to the appeal shall be had and taken in the Court of Appeal.

That section was in the said original Act of 1907 and it expressly excepts itself from having any application to the present subject-matter because that was specially "hereinafter provided" for by section 26 of the same statute, and by other statutes cited, *supra.*

Furthermore, additional support to this conclusion is to be found by the enactment, since *Olsen's* case, of the amendment to the very section in question, by section 2 of 1931, *supra,* which in a marked way treats the whole subject-matter of security as being under the control of "the Court appealed from," even to the extent of controlling the sheriff in enforcing any execution on the judgment appealed from "after the security has been perfected and allowed," despite the said provisions in said section 9 that "after notice of appeal . . . all further proceedings in relation to the appeal shall be had and taken in the Court of Appeal." It can only be inferred that when the Legislature was thus specially directing its attention to the section dealing with the subject-matter of security it must have adopted the construction clearly put upon it by the decision in *Olsen's* case since it added to the Supreme Court jurisdiction declared by that case a power which would otherwise in the ordinary course have been exercised by the Court of Appeal under said section 9: the further provisions, moreover, of section 2 of the Court of Appeal Act Amendment Act, 1930, Cap. 10, though not so direct, carry the same implication.

Judgment

It should be said that reliance was placed by respondent's counsel upon two decisions of the learned Chief Justice of this Court in *Canada Law Book Co.* v. *St. John* (1923), 32 B.C. 66,

and *Ewing* v. *Hunter* (1929), 42 B.C. 161, but when properly understood and confined to their special facts they do not present any obstacle to the adoption of the express decision in *Olsen's* case, because, in the first case, the present question of this Court having no jurisdiction at all over the subject-matter was not raised or passed upon, for the jurisdiction that the Chief Justice solely directed his attention to was, as he states, and his reference to *Langan* v. *Simpson* (1919), 27 B.C. 504, shews, that of "a single judge of the Court of Appeal in Chambers," under section 10 of the Court of Appeal Act, exercisable on behalf of the Court itself under the special circumstances defined by that section, and so the jurisdiction of the Court itself was assumed *sub silentio*: and in the second case, *Ewing's,* the only relevant question was the power of a single judge of this Court to dismiss an appeal from a County Court for default in giving security, and the learned Chief Justice held only (and I am entirely in accord with that holding), and in pursuance of his decision of said *Canada Law Book Co.* case, that "a motion to dismiss must be made to the Court" and not to a judge thereof. The present question did not arise nor was it passed upon nor debated because no counsel appeared to oppose the motion, and the motion was dismissed on the one ground aforesaid and "without prejudice to any further application," doubtless to afford an opportunity to enlarge the restricted scope of the motion and to hear argument upon other questions that might then be properly cognizable.

Judgment

It follows that the present motion should be dismissed upon the first objection raised that this Court of Appeal has now no jurisdiction over the subject-matter of security for costs which jurisdiction is alone possessed by "the Courts appealed from," but in view of the uncertainty in the practice the proper order to make as to costs is that they shall abide the result of the appeal.

It is, however, proper to add under the unusual circumstances that even if I had jurisdiction yet in the exercise of it I should refuse this motion as being wholly unnecessary seeing that the notice of appeal was given on the 5th of October last for the next sittings in January, and that though an order was made

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on the 24th of October directing the sum of $150 to be deposited yet it had not been complied with at the date this motion first came on to be heard, on the 25th of November, nor even now, the 3rd of December. The consequence of this is that the appellant is greatly in default in giving security (quite apart from the lack of any provision in the order fixing the time therefor) because much more than a reasonable time has elapsed to enable him to do so and therefore the respondent could have moved this Court at least a fortnight ago, and may do so now for it is still sitting (since the 4th of October) to dismiss the appeal for want of prosecution and the Court would doubtless make, in the exercise of its inherent jurisdiction, its usual order that the appeal should be dismissed forthwith, if no ground for indulgence appeared, or if it did appear, then to stand dismissed at a specific time unless the security be furnished beforehand. Such orders are not made, be it noted, in the exercise of an assumed jurisdiction over security for costs, but in that of a real inherent jurisdiction to control the abuse of its proceedings by dilatory tactics and secure finality of litigation without undue delay. The lapse of fourteen days has been for over 30 years deemed to be a reasonable time by the English Court of Appeal —Chitty's K.B. Forms, 16th Ed., pp. 611-2, note (*g*), and *cf. Wille* v. *St. John, supra*, p. 705; and Annual Practice, 1933, p. 1285; and Yearly Practice, 1933, p. 1227.

Judgment

Seeing, therefore, that the Court of Appeal was when this motion came on for hearing, and still is, in a position to deal adequately with the matter it would be a superfluity and an unjustifiable expense for me to intervene by making an order which would not only serve no useful purpose but tend to complicate a simple matter, and so this motion will be dismissed on this ground also.

Subsequently and on the 15th of December, 1932, *A. B. Robertson* moved the Court of Appeal to dismiss the appeal for want of prosecution in failing to comply with the said order of FISHER, J., after notifying the appellant that the motion would be made if default continued, and no cause being shewn to the contrary, the Court ordered that the appeal should be dismissed forthwith.

JOHNSON *ET AL.* v. NORTHERN PACKING COMPANY LIMITED.

MCDONALD, J. (In Chambers)

1934

Feb. 15.

JOHNSON v. NORTHERN PACKING CO. LTD.

Practice—Pleading—Action for breach of contract—Amendment of statement of claim—Substituting one plaintiff for another as party to contract—Costs.

In an action for breach of contract the examination of the defendants for discovery disclosed that the contract in question was entered into not by the plaintiff J. as set out in the statement of claim, but by the plaintiff M. The plaintiffs' application to amend the statement of claim by substituting M.'s name for J.'s name wherever it appeared in the statement of claim was granted with costs to the defendant in any event.

APPLICATION to amend the statement of claim in an action for damages for breach of contract, by substituting the name of one of the plaintiffs for that of another plaintiff, as the person who entered into the alleged contract with the defendant company. Heard by MCDONALD, J. in Chambers at Vancouver on the 14th of February, 1934. Statement

C. F. MacLean, for plaintiffs.
Griffin, K.C., for defendant.

15th February, 1934.

MCDONALD, J.: Plaintiff Johnson along with several other fishermen, including one Morsund, issued a writ claiming "damages for breach of contract." A statement of claim was duly delivered setting up *in extenso* a written contract purporting to have been made between the plaintiff Johnson and the defendant whereby the plaintiff Johnson contracted to supply a crew to operate a fishing-boat and equipment to be furnished by the defendant and whereby the plaintiff Johnson was to be paid at certain rates for fish to be caught, the plaintiff Johnson to pay the wages of his crew. Judgment

It was further set up that the plaintiff Johnson in engaging the said crew acted as the agent of the defendant and that the defendant having failed to supply a fishing-boat the plaintiffs suffered damages. Following delivery of the statement of defence denying any such contract, plaintiffs' solicitor proceeded to examine the defendant's manager for discovery whereupon it

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was disclosed that the contract in question was entered into not with the plaintiff Johnson but with the plaintiff Morsund.

Plaintiffs' solicitor now moves for leave to amend his statement of claim by substituting the words "Chris Morsund" for the word "Johnson" throughout the statement of claim. Plaintiffs' solicitor makes affidavit to the following effect:

"I have ascertained and the fact is that the contract . . . . . was entered into between the defendant and the plaintiff Chris Morsund and not the plaintiff Johnson."

It would seem quite obvious that when the writ was issued and the statement of claim delivered plaintiffs' solicitor had not been properly instructed and had not seen the contract in question. Defendant opposes the amendment except on the terms that plaintiffs pay forthwith all costs thrown away by reason of the amendment, the two contentions being: (1) That the plaintiffs' solicitor's affidavit cannot be read as it is on its face made on information and belief and the source of information has not been given; and (2) that the plaintiffs are really abandoning the cause of action originally set up and are now setting up an entirely new claim. As to the first contention I think this is not well founded. The solicitor does not purport to be swearing on information and belief but states that he has ascertained and knows the fact. I think it is not for me to enquire as to how he ascertained this fact but, as suggested in the argument, it is quite possible that he had before making the affidavit seen the contract himself. The second contention presents considerable difficulty in that there is not any doubt about the rule upon which defendant's counsel relies but that there is a doubt in my mind as to whether the rule applies to the present case.

Judgment

Upon consideration I am not able to hold that the plaintiffs are in fact setting up an entirely new cause of action. I think the difficulty has arisen simply through an error in the name of the person who entered into the contract and that the defendant cannot be really embarrassed by the amendment. The plaintiffs are admittedly impecunious and I do not think I ought to make so drastic an order as to oblige them to pay the costs forthwith. The order will go allowing the amendment with costs to the defendant in any event.

Application granted.

THE CORPORATION OF THE DISTRICT OF COLDSTREAM v. MACDONALD-BUCHANAN.

MCDONALD, J.

1934

May 26.

CORPORATION OF DISTRICT OF COLDSTREAM v. MACDONALD-BUCHANAN

Practice—Writ—Service ex juris—Former action touching matters in issue—Effect of—Taxes—Action for—Order XI., r. 1 (b).

In an action for payment of taxes upon lands, the defendant moved to set aside an order made on the 5th of April, 1934, for service of a writ *ex juris*. In a previous action the present defendant, as plaintiff, sought a declaration that the taxation imposed on the lands in question was invalid, the action was dismissed on January 26th, 1934, and on the 6th of April following the plaintiff appealed.

Held, that the claim sued upon is a claim to enforce an obligation affecting lands within the jurisdiction and so falls within Order XI., r. 1 (*b*), the previous action was not pending on the 5th of April, 1934, and the defendant's application to set aside the order for service *ex juris* should be dismissed.

MOTION by the defendant to set aside an order for service of a writ *ex juris* in England. Heard by MCDONALD, J. at Vancouver on the 23rd of May, 1934.

Statement

Donaghy, K.C., for plaintiff.
Crease, K.C., for defendant.

26th May, 1934.

MCDONALD, J.: Motion by defendant to set aside an order made on the 5th of April last for service of a writ *ex juris* in England. The defendant resides and is domiciled without the Province and is the owner of lands situate within the plaintiff municipality.

In a former action commenced in June last between the same parties, with their positions reversed, the present defendant sought a declaration that the taxation imposed upon lands in the municipality for the years 1932 and 1933 was invalid. That action came to trial in December, 1933, and judgment dismissing the action was handed down on January 26th, 1934. As stated the order now sought to be set aside was made on April 5th, 1934. On the following day notice of appeal was given in the former action. It is strongly urged, that as it was not disclosed on the motion for the order, that a former action, touching (at

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least to some extent) on the matters now sought to be litigated, was pending, the defendant is entitled *ex debito* to have the order set aside. The short and complete answer to that, I think, is that on April 5th, 1934, there was neither an action nor an appeal pending, and the plaintiff's counsel was guilty of no lack of candour in that regard.

In the present action the plaintiff claims payment of the taxes in question, and a declaration that such taxes are a special lien on the defendant's lands in respect of which they were imposed and for judgment enforcing said lien. It is contended that those claims should have been raised by way of counterclaim in the former action. The answer is that when the former action was brought such taxes were not due or payable.

Next it is said that the present action cannot in any event lie, for the reason that the defendant is neither resident nor domiciled within the Province. That contention is, I think, in direct conflict with the opinions of the learned judges of the Supreme Court of Canada in respect of a similar argument raised in *Smith* v. *Rural Municipality of Vermilion Hills* (1914), 49 S.C.R. 563; 6 W.W.R. 841.

It is further contended that the case does not fall within any of the rules contained in Order XI. relating to service *ex juris*. Reliance was placed by counsel for defendant upon many English cases. I think however this question is disposed of by the decision in *Canadian American Trust Co. Ltd.* v. *McMullen*, 24 Alta. L.R. 153; (1929), 2 W.W.R. 295, and that the claim sued upon is a claim to enforce an obligation affecting lands within the jurisdiction and so falls within Order XI., r. 1 (*b*).

On the whole I am of the opinion that this application must be refused with costs; nor do I think I ought to interfere with plaintiff's rights by staying the action.

Application refused.

MAY v. ROBERTS.

MCDONALD, J. (In Chambers)

1934

April 10.

MAY v. ROBERTS

Practice—Discovery—Action against trustee in bankruptcy of company—Right to examine officer of company.

In an action against the trustee in bankruptcy of a company, the plaintiff's application for leave to examine the president and general manager of the company was refused.

APPLICATION by the plaintiff for an order for leave to examine the president and general manager of Daybreak Mining Company, in an action against the trustee in bankruptcy of said company. Heard by McDONALD, J. in Chambers at Vancouver on the 9th of April, 1934. Statement

Hogg, for the application.
Craig, K.C., contra.

10th April, 1934.

McDONALD, J.: The plaintiff sues the trustee in bankruptcy of Daybreak Mining Company and now applies for an order for leave to examine one Roberts who was the president and general manager of the company.

It is objected that the plaintiff does not come within the rule for the reason that the company is not a party to the action and further that, if there be any doubt, the examination ought not to be ordered inasmuch as the trustee ought not to be bound by admissions made by one who was an officer of the company prior to the bankruptcy. In my opinion both objections are well taken and the application is refused. The plaintiff is not without a remedy inasmuch as a commission may be issued to Portland to take the evidence desired. Judgment

Application refused.

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1934

March 6.

THE KING v. THE MINISTER OF FINANCE.

Mandamus — Mines—Taxation — Depletion—Acquisition costs—Ascertainment of—Income Tax Act—B.C. Stats. 1932, Cap. 53, Sec. 6, Subsecs. 1 (o), 3 and 4.

THE KING *v.* MINISTER OF FINANCE

In 1924 the Pioneer Gold Mines Limited gave an option to one Sloan for its mining property for $100,000. In 1928 the Pioneer Gold Mines of B.C. Limited was incorporated with a capital stock of $2,500,000, divided into 2,500,000 shares of $1 each. Sloan then assigned to the new company his option above mentioned, on which certain payments had been made by him, together with a number of new claims acquired in the meantime, for 1,600,000 shares in that company. The new company made the payments under the option and acquired title to the mining claims therein mentioned, and the Pioneer Gold Mines Limited was wound up. On the assessment for taxes embodying the allowance for depletion for the year ending March 31st, 1931, the commissioner of income tax fixed the acquisition costs to the new company at $100,000, being the sum agreed to be paid by Sloan to the first company on the 1924 option. The company appealed to the Minister of Finance who, after a hearing dismissed the appeal. The company then appealed to the Lieutenant-Governor in Council under section 6, subsection (4) of the Income Tax Act, and the acquisition costs were increased to $200,000. The company then applied for an order directing that a writ of *mandamus* do issue directed to the Minister of Finance, commanding him to ascertain and take into consideration the acquisition costs to the Pioneer Gold Mines of B.C. Limited of the properties acquired by it under agreement of March 30th, 1928, as required by the Income Tax Act, 1932. The appellants contended that the appeal taken by them to the Lieutenant-Governor in Council was not authorized by said section 6, and that therefore such appeal was a nullity. The order for *mandamus* was granted by MCDONALD, J.

Held, on appeal, reversing the decision of MCDONALD, J. (MCQUARRIE, J.A. dissenting), that *mandamus* does not lie as there was no refusal, or conduct amounting to a refusal, on the part of the minister to exercise the jurisdiction conferred to determine the real point in dispute. The company sought two legal remedies provided by the statute and subsection (4) of section 6 of the Act declares that the appeal to the Lieutenant-Governor in Council shall be final, which prevents proceedings by *mandamus*.

Statement

APPEAL by the Minister of Finance from the order absolute for *mandamus* of MCDONALD, J. of the 13th of November, 1933, commanding said minister to ascertain and take into consideration the acquisition costs to the Pioneer Gold Mines of

B.C., Limited of the properties acquired by it under an indenture of agreement of the 30th of March, 1928, and made between one David Sloan and the Pioneer Gold Mines of B.C. Limited, as required by the Income Tax Act of British Columbia. By agreement of the 16th of July, 1924, the Pioneer Gold Mines Limited (since wound up and dissolved) granted an option to purchase unto David Sloan of Vancouver for the sum of $100,000, the Pioneer group of mineral claims (ten claims in all). Sloan carried on active operations from July 16th, 1924, until the 30th of March, 1928. On the 29th of March, 1928, the Pioneer Gold Mines of B.C. was incorporated with a capital of $2,500,000, divided into 2,500,000 shares of $1 each, and on the 30th of March, 1928, Sloan assigned the agreement and option aforesaid of the 16th of July, 1924, with seven additional mineral claims to the Pioneer Gold Mines of B.C. Limited for $1,600,000, which was paid and satisfied by the allotment to the assignor of 1,600,000 fully paid ordinary shares in the capital of the company. By letter of November 4th, 1931, the department of finance advised the Pioneer Gold Mines of B.C. Limited that the allowance for depletion in respect of income had been fixed at $100,000, being the price paid by Sloan to said Pioneer Gold Mines Limited under the agreement of July 16th, 1924. On protest by the Pioneer Gold Mines of B.C. Limited the Minister of Finance refused to increase the allowance for depletion to the Pioneer Gold Mines of B.C. Limited and advised said company that the allowance for acquisition costs would be based upon the price paid by Sloan for the property in 1924. An appeal was taken from the Minister of Finance pursuant to section 44 (4) of the Taxation Act in January, 1932, and the Lieutenant-Governor in Council decided that the cost of the mine be increased to $200,000. The appellants then claimed that the appeal taken by them to the Lieutenant-Governor in Council and the order made thereon by the Lieutenant-Governor in Council were not authorized by law and were a nullity, and applied for a writ of *mandamus* against the Minister of Finance.

Statement

The appeal was argued at Victoria on the 10th to the 15th of January, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

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Craig, K.C., for appellant: It is submitted that the minister properly fixed the acquisition costs. He was entitled to use the amount payable by Sloan on the option given to him by the first company in 1924 as the best available evidence of what the property cost the respondent, especially as there was no satisfactory evidence as to what the shares were worth when issued by the respondent to Sloan and his associates. The shares were in fact worth nothing. The issue of shares by the respondent to Sloan and his associates formed no basis for fixing the acquisition costs to the respondent, because Sloan and his associates, in exchange for the property, acquired all the then issued capital of the company. As they were the only shareholders it made no difference to them how many shares they received. Whatever they received represented the whole assets of the company. Therefore, the number of shares received by Sloan and his associates forms no basis at all for fixing acquisition costs to the respondent.

Argument

It is submitted *mandamus* will not lie, because the respondent has another remedy, which is provided by the Income Tax Act. That is an appeal to the Lieutenant-Governor in Council: *Rex* v. *City of London Assessment Committee* (1907), 2 K.B. 764 at pp. 782, 786-7. The respondent has availed itself of this remedy, and a *mandamus* to the minister is now futile. The minister has directed his attention to the proper point, namely, what was the acquisition cost to the respondent? Whether the minister's decision is correct or not is immaterial, as this is not an appeal from his decision. The fact that the minister has made a return to the writ does not prevent him appealing from the order directing the writ to issue: *Regina* v. *Powell* (1841), 1 Q.B. 352; 10 L.J., Q.B. 148; 5 Jur. 605; 113 E.R. 1166.

Lucas, K.C., on the same side: A *mandamus* does not lie against the minister who is a servant of the Crown. His responsibility is to the Crown and not to the subject. There is an appeal from the minister's decision as to certain clauses under section 6, subsection (4), and in all other cases an appeal lies under sections 37 and 38 of the Act. That *mandamus* does not lie see *The Queen* v. *Secretary of State for War* (1891), 2 Q.B. 326; *The Queen* v. *The Lords Commissioners of the Treasury*

(1872), L.R. 7 Q.B. 387 at p. 397; *In re Baron de Bode* (1838), 6 D.P.C. 776 at p. 792; *The King* v. *The Commissioners of Customs* (1836), 2 H. & W. 247; Halsbury's Laws of England, 2nd Ed., Vol. 9, p. 754, sec. 1281; *Clarke* v. *Chief Commissioner of Lands and Works* (1886), 1 B.C. (Pt. 2) 328; *The King* v. *The Minister of Lands* (1926), 37 B.C. 106; *Morin* v. *Perron* (1927), 44 Que. K.B. 181 at p. 184; *Rex* v. *Baker* (1923), 19 Alta. L.R. 623.

Clark, K.C., for respondent: First, the minister did not determine the acquisition costs of the mine to the taxpayer. Second, he refused to determine the acquisition costs incurred by the taxpayer. Third, what he did do was to determine the acquisition costs paid by the predecessor in title and not the respondent. Fourth, the minister was bound to determine the costs to the taxpayer under the mandatory provisions of subsection (3) of section 6 of the Act, and make allowance therefor. Fifth, he was bound to determine the acquisition costs before he exercised his discretion under subsection (1) of section 1 of the Act. Sixth, there is no statutory appeal from the minister's determination of acquisition costs. Seventh, even if an appeal is provided for, no appeal was taken in law and none could be taken until the minister had complied with the condition precedent. No other remedy is open to the taxpayer but *mandamus.*

Argument

The minister took as a basis the contract of 1924 with Sloan, whereas the sale of March, 1928, to the present company is the consideration under which the taxpayer acquired the property, and the consideration expressed therein, or the value thereof, is the basis upon which the acquisition costs to the taxpayer should have been determined. The minister is bound to obey the provisions of the statute. He cannot be relieved of this obligation by the Lieutenant-Governor, nor by the Courts: see *Eastern Trust Company* v. *McKenzie, Mann & Co.* (1915), A.C. 750 at p. 759.

In the absence of express authority the minister has no power to override and dispense with statutory requirements: see *McLean Gold Mines Ltd.* v. *Attorney-General for Ontario* (1926), 1 D.L.R. 11 at p. 17.

The provisions of subsection (3) are imperative or man-

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datory. Compliance by the minister with the directions given by subsection (3) is therefore a condition precedent to the exercise by him of the discretion given by subsection (*o*). If he attempts to exercise the discretion given by subsection (*o*) prior to determining the acquisition costs his action is a nullity and *a fortiori* an appeal based upon a nullity is in the same category: see *Heron* v. *Lalonde* (1916), 31 D.L.R. 151 at p. 153.

The taxpayer is not estopped from seeking relief in the Courts because of an appeal to the Lieutenant-Governor in Council: see *Toronto Railway* v. *Toronto Corporation* (1904), A.C. 809 at p. 815; *Nickle* v. *Douglas* (1875), 37 U.C.Q.B. 51 at p. 57.

That a *mandamus* will lie against a minister of the Crown see *Rex* v. *Baker* (1923), 19 Alta. L.R. 123; *Morin* v. *Perron* (1927), 44 Que. K.B. 181 at p. 184; *Regina* v. *Treasury Commissioners* (1851), 16 Q.B. 357 at p. 361; *The Queen* v. *Secretary of State for War* (1891), 2 Q.B. 326; *The Queen* v. *Lords Commissioners of the Treasury* (1872), L.R. 7 Q.B. 387 at p. 402; *In re Nathan* (1884), 12 Q.B.D. 461 at p. 464; *Reg.* v. *Commissioners for Special Purposes of the Income Tax* (1888), 21 Q.B.D. 313 at p. 317.

Argument

The minister on the passing of the statute became a tribunal charged with the performance of a public duty, and as such amenable to the jurisdiction of the Courts. The minister having declined the jurisdiction given him by the statute to determine the acquisition costs to the taxpayer, the Courts will intervene and direct that its provisions shall be carried out. In the light of the duty of the minister, and of the Crown to obey the law, and more particularly the law enacted by the Legislature to which the minister and Lieutenant-Governor in Council are responsible, the Courts will safeguard the interests of the public and of responsible Government by granting a *mandamus*: see *Rex* v. *Board of Education* (1910), 2 K.B. 165 at p. 178; *Rex* v. *Port of London Authority. Ex parte Kynoch, Ltd.* (1919), 1 K.B. 176 at p. 183; *Dyson* v. *Attorney-General* (1911), 1 K.B. 410 at p. 423.

Craig, in reply: The respondent, having appealed to the Lieutenant-Governor in Council, and having succeeded in get-

ting the amount allowed as deduction for acquisition costs increased, is now estopped from alleging that there was no such appeal allowed by law: *Royal Bank of Canada* v. *Skene and Christie* (1919), 59 S.C.R. 211; *Deare* v. *Attorney-General* (1835), 1 Y. & C. 197. On the true construction of the statute of 1932, section 6, subsection (4), an appeal to the Lieutenant-Governor in Council is allowed from any decision of the minister under clause (*o*) of subsection (1). The decision of the minister in question was made under clause (*o*), which is the section authorizing the order fixing acquisition costs. Subsection 3 (*a*) merely provides how the minister exercises the power conferred by clause (*o*). The order being made under clause (*o*), an appeal to the Lieutenant-Governor is authorized.

Argument

The Judicial Committee of the Privy Council had before them a question similar in principle arising under a different statute in *Merrill Ring Wilson, Ld.* v. *Workmen's Compensation Board* (1933), A.C. 727 at pp. 731-736.

Cur. adv. vult.

6th March, 1934.

MACDONALD, C.J.B.C.: This is an appeal against an absolute order for *mandamus* obtained by a mining company commanding the Minister of Finance to forthwith ascertain and take into consideration the acquisition costs to the Pioneer Gold Mines of B.C. Ltd., of the properties acquired by them.

The Taxation Act of the Province of British Columbia, Cap. 53, Sec. 6, Subsec. (1), clause (*o*) enables the commissioner of income tax to make certain deductions from the mine owners' income tax on account of depletion of the mine. This involves the fixing of the costs to the taxpayer of the acquisition of the mines which is an essential feature in arriving at the tax to be paid. The commissioner taxed the acquisition costs to the mining company (the respondent) at $100,000. The respondent being dissatisfied with this, appealed (under the Act) to the Minister of Finance who after a full hearing of the parties concerned dismissed the appeal. The respondent thereupon appealed under subsection (4) of said section 6 to the Lieutenant-Governor in Council before whom the dispute was

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again heard in full. The Lieutenant-Governor in Council increased the acquisition costs to $200,000, a gain for the respondent. Being still dissatisfied the respondent obtained this writ of *mandamus*.

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In my opinion it is unnecessary to consider the merits of the case. Both tribunals dealt with the question of acquisition costs, and while one or both may have been wrong it is not a case for a *mandamus*. There are at least several grounds upon any one of which that course is open, for instance it is open where a tribunal has refused or failed to adjudicate and if they have so refused or failed then *mandamus* may be the proper remedy. The granting of a writ is a discretionary one and if the applicant has so acted as to merit no exercise of discretion his application should be refused. In this case the respondent has sought two legal remedies provided by the statutes and failed in both. They now ask for an order for rehearing by

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the first of these tribunals which heard the case. The Minister of Finance in effect is to be ordered to give a judgment different from the one he has already given and also to ignore the order in appeal from him. The learned judge in the tribunal of first instance it is true exercised his discretion in respondent's favour, but without referring to the matters above mentioned. He considered merely whether a *mandamus* will lie against the Crown or a Crown officer. It may be in a proper case that it would, but in my opinion there is a matter of far greater importance involved in this case, the propriety of the multiplicity of proceedings taken as well as consideration of estoppel. Moreover said subsection (4) declares that the appeal to the Lieutenant-Governor in Council shall be final and that fact, I think, also prevents proceedings by *mandamus*.

The learned judge who granted the order for a *mandamus* I think was in error and the appeal should be allowed.

MARTIN, J.A.

MARTIN, J.A.: In concurring in the opinion that *mandamus* does not lie in the present case I do so for the three main reasons following, which, briefly put, are:

First: That in "determining the cost of the mine" (subsection (3)) to the Pioneer Gold Mines Co. the minister did, in con-

sidering its claim for "an allowance for depletion or exhaustion," in fact apply his mind to the question of "acquisition costs" and therefore even if he did come to a wrong conclusion nevertheless the requirement of the statute that he "shall take into consideration the following expenditures" was satisfied, and as he was in that "determination" acting in a judicial capacity, *mandamus* is not the remedy for any error that may have arisen from his "consideration" of the matter.

Second: By subsection (4) an appeal is given from any decision of the minister to the Lieutenant-Governor in Council, who, it is directed:

> After hearing the parties interested, may either confirm or amend the decision of the minister, and the decision of the Lieutenant-Governor in Council shall be final.

This confers an unusual appeal of the most plenary and final character, in fact and law, to a special and very high tribunal, no less that the Provincial representative of His Majesty in Council, which constitutes, under the B.N.A. Act, an appeal to the Provincial "foot of the Throne," and therefore to grant a *mandamus* when such exceptional facilities for the determination of the whole matter have been conferred by the Legislature would be without precedent.

MARTIN, J.A.

But not only was the appeal so conferred, but the company took advantage of it and brought an appeal to the nominated tribunal and secured a substantial success by having the determination of the minister "amended" by raising his allowance of $100,000 to $200,000; and no case has been cited that would warrant us in sanctioning proceedings that would enable a litigant to approbate and reprobate the jurisdiction and decision of any tribunal, much less such a very high one as that which the company deliberately invoked for adequate relief.

Third: Though to my mind there is no doubt that the said special tribunal had complete jurisdiction over the matter in controversy, yet even if it had not, the company is in no better position, as regards *mandamus* at least, than if it had, because the result of the company's actions and appeal was to put that tribunal in the position of an arbitrator to which both parties formally submitted their dispute for "determination" and having obtained a decision, or award, thereupon, neither of them

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can be permitted to avoid its consequences by seeking to invoke the jurisdiction of another and entirely distinct tribunal.

To the many cases referred to on the argument I add the very recent decision of the House of Lords in *Stepney Borough Council* v. *John Walker and Sons, Limited* (1934), 50 T.L.R. 287; *Rex* (*Spain*) v. *Income Tax Commissioners* (1927) reported in (1934), I.R. 27; and *Cave* v. *Mills* (1862), 7 H. & N. 913 at 927-8, in the last of which the Court said:

> We are of opinion that both these principles apply to the present case. Indeed they are but variations of one and the same broad principle, that a man shall not be allowed to blow hot and cold—to affirm at one time and deny at another—making a claim on those whom he has deluded to their disadvantage, and founding that claim on the very matters of the delusion. Such a principle has its basis in common sense and common justice, and whether it is called "estoppel," or by any other name, it is one which Courts of law have in modern times most usefully adopted.

MARTIN, J.A.

In the leading case of *The Queen* v. *Church-Wardens of All Saints, Wigan* (1876), 1 App. Cas. 611, Lord Chelmsford said, p. 620:

> Now there appears to me to have been some little confusion upon this subject, which can easily be removed. A writ of *mandamus* is a prerogative writ and not a writ of right, and it is in this sense in the discretion of the Court whether it shall be granted or not. The Court may refuse to grant the writ not only upon the merits, but upon some delay, or other matter, personal to the party applying for it; in this the Court exercises a discretion which cannot be questioned.

That language is most applicable to the present very unusual case, and as by our Court of Appeal rule 4 it is our duty to give the judgment and make the order which ought to have been given and made below, I would also, therefore, in the exercise of my discretion upon the whole case, refuse the application for *mandamus* that, with respect, the learned judge below granted upon insufficient grounds, and allow this appeal, despite the very commendable way in which respondent's counsel presented his side of it.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal is one by the Honourable the Minister of Finance from the order absolute for *mandamus* pronounced by MCDONALD, J. and dated the 3rd of November, 1933. The order absolute for *mandamus* reads as follows:

> THIS HONOURABLE COURT having been moved this day on the return of the order *nisi* for *mandamus* pronounced herein on the 30th day of October,

A.D. 1933, in the presence of Mr. *F. G. T. Lucas, K.C.*, and Mr. *E. Pepler*, of counsel for the Minister of Finance, shewing cause and Mr. *J. A. Clark, K.C.*, of counsel for Pioneer Gold Mines of B.C. Limited; UPON HEARING READ the order *nisi* herein, the affidavit of *Alfred Edwin Bull*, sworn herein the 25th day of October, A.D. 1933, and filed and the exhibits therein referred to and the affidavit of James William Jones sworn herein the 6th day of October, A.D. 1933, and filed and the exhibits therein referred to; AND UPON READING the cross-examination upon the said affidavits of *Alfred Edwin Bull* and James William Jones and upon hearing what was alleged by counsel aforesaid,

THIS COURT DOTH ORDER AND ADJUDGE that the order *nisi* pronounced herein on the 30th day of October, A.D. 1933, be and the same is hereby made absolute and that a peremptory writ of *mandamus* do issue directed to the Minister of Finance commanding him to forthwith ascertain and take into consideration the acquisition costs to Pioneer Gold Mines of B.C. Limited of the properties acquired by them under an indenture of agreement dated the 30th day of March, A.D. 1928, and made between one David Sloan and Pioneer Gold Mines of B.C. Limited, as provided by the Income Tax Act, section 6, Cap. 53, Statutes of B.C. 1932.

AND THIS COURT DOTH FURTHER ORDER that the within order be entered, notwithstanding that it is presented for entry after office hours.

The issue of the writ of *mandamus* followed and it reads as follows: [after setting out the writ of *mandamus* the learned judge continued].

MCPHILLIPS, J.A.

Now upon the facts it is perfectly clear that the Minister of Finance did find the acquisition costs of the mine and did discharge his statutory duty in that regard.

It is convenient to here set out the pertinent statutory provisions governing the Minister of Finance in determining the acquisition costs of the mine, being clause (*o*) of subsection (1) of section 6 of the Income Tax Act, Cap. 53, B.C. Stats. 1932, and it reads as follows:

Any allowance for depletion or exhaustion of a mine, except such proportional amount as may by the discretion of the minister be allowed to be deducted from the income from the mine in any year, having regard to the anticipated life of the mine and to the total cost of the mine as determined by the minister pursuant to the provisions of subsection (3); and where full effect cannot be given to any such deduction in any year owing to there being no income for that year in excess of expenditures, or owing to the income in excess of expenditures being less than the deduction, the deduction or part of the deduction to which effect has not been given, as the case may be, shall, for the purpose of ascertaining the net income for the following year, be added to the amount of the deduction for that year, and be deemed to be part of that deduction, or, if there is no such deduction for that year, be deemed to be the deduction for that year, and so on for succeeding years, but no deduction shall be allowed for any year if the

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deduction, when added to the deductions allowed to the taxpayer on that account for any previous years, will make the aggregate amount of the deductions exceed the total cost of the mine as determined by the minister.

It is also convenient to here set forth subsection (3) and clause (*a*) of section 6 and subsection (4) of section 6, all reading as follows:

(3) In determining the cost to any taxpayer of any mine in respect of which he claims an allowance for depletion or exhaustion under clause (*o*) of subsection (1), upon which cost any such allowance is to be computed, the minister shall take into consideration the following expenditures, whether incurred by the taxpayer or by any predecessor in title to the mine:

(*a.*) Acquisition costs incurred prior to the first day of April, 1928, together with all expenditures subsequent to the date of acquisition for exploration and development costs and any other expenses which the minister may consider as directly related to and forming part of the cost of the mine, subject, in the case of any mine which was in active production prior to the first day of January, 1915, to a deduction therefrom of an amount to be determined by the minister as representing the amount of depletion or exhaustion (if any) actually sustained prior to the first day of January, 1915: Provided that any sum representing the cost to the taxpayer of the acquisition of any mine in excess of the total expenditures and allowances included in this clause shall not, unless incurred prior to the first day of April, 1928, be included in the total cost upon which the allowance for depletion or exhaustion is computed, unless the predecessor in title of the taxpayer has paid income tax at the rates provided in the Taxation Act or in this Act on an amount of proceeds received by him from the disposition of the mine equal to the amount of such excess, or the taxpayer assumes liability for the payment of an amount equivalent to such income tax in a form and on terms satisfactory to the minister. Where the taxpayer assumes liability for the payment of the tax in respect of the amount of the excess, the minister in his discretion may permit the same to be paid in instalments, one instalment to be payable for each year during which ore is removed from the mine; and in determining the amount of the instalment payable for any fiscal year the minister shall have regard to the anticipated life of the mine and to the total amount of the liability so assumed; and the amount of instalment payable for any year shall for all purposes of this Act be deemed to be taxes of the taxpayer duly assessed and taxed for that year in respect of the mine in addition to all other taxes payable under this Act, and shall be deemed to be due and payable on the last day of that fiscal year.

MCPHILLIPS, J.A.

(4) An appeal from any decision of the minister under clause (*m*), (*n*), (*o*), (*p*) or (*q*) of subsection (1) may be taken to the Lieutenant-Governor in Council, who, after hearing the parties interested, may either confirm or amend the decision of the minister, and the decision of the Lieutenant-Governor in Council shall be final.

The facts shew that the Minister of Finance in plain pursuance of his statutory duty did fix the acquisition costs of the mine at $100,000 and an appeal was taken under the existent

statute law by the company to the Lieutenant-Governor in Council and it was decided on the appeal that the acquisition costs be increased by $100,000 more than that allowed by the Minister of Finance—that is, the Lieutenant-Governor in Council, following the hearing of the appeal, fixed the acquisition costs at $200,000.

With the appeal had and taken and considering the existent statute law, it would occur to me that it is idle to contend that any case could be made out for the issue of a writ of *mandamus*. In saying this I do so with the greatest respect for the learned trial judge who thought otherwise. Having chosen to appeal, it would seem to me that it is unanswerable in the face of the statute law, *viz.*, as above set forth: [subsection (4)].

This appeal was very ably presented and argued by learned counsel on both sides, but, with every deference to counsel and the industry displayed in the citation of the authorities thought to be relevant, I cannot refrain from saying that it is not a case for the application of cases but the plain application of the constraining and compellable statute law. I can quite see that for certainty sake the Legislature was desirous of settling at an early date what the acquisition costs should be allowed at as otherwise the Income Tax Act could not be speedily implemented and the taxes arrived at as against a large body of taxpayers coming within the purview of the Act, mining being a very considerable industry in the Province of British Columbia and contributing large sums to the revenue of the Province, and the acquisition costs being once settled are settled for all time and as set forth in the Act "the decision of the Lieutenant-Governor in Council shall be final." After all, the Legislature is the highest Court in the land when legislating within its constitutional powers and here under the British North America Act (Imperial Act 30 & 31 Vict., c. 3), Sec. 92, "(2) Direct taxation within the Province in order to the raising of a revenue for Provincial purposes: (13) Property and civil rights in the Province" is the statutory authority exercised.

MCPHILLIPS, J.A.

The company invoking by way of appeal the action of the Lieutenant-Governor in Council must, in my opinion, be held to be concluded and bound by the result of that appeal.

I would allow the appeal.

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MACDONALD, J.A.: Appeal from an order for a writ of *mandamus* to the Minister of Finance commanding him to ascertain the acquisition cost to Pioneer Gold Mines of B.C. Limited of the properties acquired by it under an agreement of March 30th, 1928, as directed by the Income Tax Act, Sec. 6, Cap. 53, B.C. Stats. 1932. The property was acquired from David Sloan for the consideration of $1,600,000 paid by the allotment of 1,600,000 fully-paid shares of the company at $1 a share. This it was submitted was, if not an undervaluation, the real acquisition cost of the property to the company. Sloan acquired the property under a working bond on July 16th, 1924, for $100,000 and the minister fixed this amount, paid by a predecessor in title, as the real acquisition cost to the company when it purchased from Sloan in 1928. He decided, rightly enough, that the issue of any special number of shares might not indicate actual cost and because the property was originally acquired by Sloan, representing a syndicate, and the syndicate in effect merely transferred their holdings to a new company, substantially the acquisition cost to the latter was $100,000.

MACDONALD, J.A.

We are not on the question of law arising concerned with his logic or the accuracy of his findings of fact. The point is—did he address his mind to the problem of ascertaining acquisition cost to Pioneer Gold Mines of B.C. Limited or merely to the cost to Sloan, a predecessor in title, a subject he was not concerned with under the wording of the Act? Mr. *Clark* recognized that from his viewpoint it was essential to shew that the minister did not in fact, or in substance, "take into consideration," as required in express terms by section 6, subsection (3) the acquisition cost to the company.

The evidence and the decision of the minister was fully reviewed by counsel. Without referring to it in detail my conclusion is that the minister did direct his mind to the proper point, *viz.*, acquisition cost to the company and decided, rightly or wrongly, that under the special circumstances the best *indicia* of actual cost was found in the amount paid by Sloan for the working bond. He might be entirely wrong in this conclusion —I think he was—but at least he applied his mind to the real point in issue. Nor, as a matter of law, are we affected by the

fact that he may have overlooked a new element, *viz.*, additional claims transferred to the company not included in the Sloan option or, rightly or wrongly, concluded that evidence of value in respect of them was not conclusive. We are not concerned with possible errors in findings of fact. He cannot be directed to make a finding that $1,600,000 in shares or any other sum represents the real acquisition cost to the company. If in fact he exercised *bona fide* the discretion given the Courts cannot interfere. There must of course be a real hearing directed to the point in issue not to some other point, *e.g.*, the cost to a predecessor. If his mind was directed to the latter point as an end in itself then the minister never entered upon the real inquiry.

This conclusion may be drawn from the decided cases, that there is no refusal to hear and determine unless the tribunal or authority has in substance shut its ears to the application which was made to it and has determined upon an application which was made to it:

Rex v. *Port of London Authority* (1919), 1 K.B. 176 at 183.

In *Rex* v. *Board of Education* (1910), 2 K.B. 165 at 179 Farwell, L.J. said:

If the tribunal has exercised the discretion entrusted to it *bona fide*, not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the Courts cannot interfere; they are not a Court of Appeal from the tribunal, but they have power to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to the tribunal by law, and also the refusal of their true jurisdiction by the adoption of extraneous considerations in arriving at their conclusion or deciding a point other than that brought before them, in which cases the Courts have regarded them as declining jurisdiction.

MACDONALD, J.A.

That the minister, however mistakenly, acted *bona fide* I have no doubt. Consideration too of the $100,000 paid for the working bond in its relation to the determination of the cost to the ultimate purchaser, was not extraneous or irrelevant.

The question, however, is settled beyond doubt inasmuch as appellant not satisfied with the decision of the minister, exercised its right of appeal to the Lieutenant-Governor in Council under subsection (4) of section 6. This appeal was successful to the extent of a $100,000 increase in the amount allowed, shewing again that attention was necessarily directed to the point in issue, *viz.*, cost to the company; not to the predecessor in title. By this subsection the decision of the Lieutenant-Governor in Council is final. Appellant, although invoking this

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right to appeal, now contends that it was in fact nugatory—that there is under the Act no appeal from a decision fixing once for all acquisition costs. I think there was a right of appeal. The minister acts, in arriving at a decision under section 6 (*o*) pursuant to, or in accordance with, directions given in subsection (3) and an appeal from any decision by the minister under (*o*) is given by subsection (4).

It follows that by vesting authority in the minister to determine acquisition costs subject to appeal to the Lieutenant-Governor in Council the legislation in itself "made provision for working out the system specified in that Act" and that the prerogative writ of *mandamus* is not available, assuming that otherwise it might be resorted to (*Rex* v. *City of London Assessment Committee* (1907), 2 K.B. 764 at 782). Even "assuming that there is no right of appeal that fact does not necessarily lead us to the conclusion that a *mandamus* ought to issue for the Legislature may well have provided that which it intended to be a sufficient and convenient remedy" (p. 786). Here once the right of appeal to the council is established, the matter ends as the decision of that body is final.

MACDONALD, J.A.

The conclusion is clear. There was no refusal, or conduct amounting to a refusal, on the part of the minister to exercise the jurisdiction conferred to determine the real point in dispute and for any error a convenient remedy by way of appeal was provided.

I would allow the appeal.

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

I am of opinion that the minister did not determine the acquisition costs to the respondent but to its predecessor in title. I do not think that the respondent was estopped from appealing from the decision herein.

MCQUARRIE, J.A.

In the answer of the Minister of Finance to the writ of *mandamus* he said:

> In deference to what I believe to be the reasons of the Hon. Mr. Justice D. A. MCDONALD for granting this writ, I hereby further state that if the basis for determining the said acquisition costs were not a matter for my personal judgment, but that I am legally bound to rule that the acquisition costs consisted of the value which the shares given in consideration for the

said mine acquired after the said Pioneer Gold Mines of B.C. Ltd. had received title to the said properties, then I would find the said acquisition costs of the said properties were the sum of $1,600,000.

Counsel for the minister during his argument stated that the minister did not wish to rely on technicalities but desired a decision on the merits.

I consider that the acquisition costs should be fixed at $1,600,000.

Appeal allowed, McQuarrie, J.A. dissenting.

Solicitors for appellant: *Lucas & Lucas.*

Solicitor for respondent: *J. A. Clark.*

BARKER v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED.

Practice — Action for damages — Statement of claim — Amendment after limitation period—New cause of action.

Where the period within which an action for damages for negligence is limited by statute and the suit was commenced and the statement of claim was delivered within the period of time limited, the plaintiff's application after the expiration of the period of limitation to amend the statement of claim so as to set up an entirely new obligation was refused.

APPLICATION to amend the statement of claim. The plaintiff, an infant, claimed damages for injuries sustained by reason of the "negligent operation of the defendant's street-car." By section 60 of the Consolidated Railway Company's Act, 1896, all suits for damages "sustained by reason of the . . . railway" shall be commenced within six months next after the time when such damage is sustained.

Statement

The suit was commenced and the statement of claim delivered within the period of time limited. The plaintiff, however, after the expiration of such period of six months, sought to amend

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his statement of claim by setting up an alternative claim, that the damage was caused by reason of the fact that the defendant had failed to keep the roadway between the rails of a temporary track in proper repair as it was required to do by its agreement with the city. It was objected that it was too late to allow such an amendment, as an attempt was being made not to modify an obligation already set out but to set up an entirely new obligation. Heard by MCDONALD, J. in Chambers at Vancouver on the 15th of May, 1934.

McKenna, for the application.
J. W. deB. Farris, K.C., contra.

Judgment

MCDONALD, J.: The objection must be sustained as the amended pleading would set up an entirely new ground upon which to base a cause of action, and the time limit has expired.

Application refused.

FIDELITY LUMBER COMPANY, LIMITED *ET AL.* v. ROOTE *ET AL.*

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Jan. 12.

FIDELITY LUMBER CO. LTD. v. ROOTE

Chattels—Agreement for sale—Delivery—Title not to pass to purchaser until paid for—Purchaser in arrears for rent to landlord—Bill of sale of chattels by purchaser to landlord—Landlord's knowledge of original agreement.

Where the purchaser under a bill of sale of chattels manufactured from lumber, knew that under the contract whereby his vendor had acquired the lumber that title was not to pass to vendor from seller thereof until the lumber was paid for:—

Held, that the purchaser must account to the seller of the lumber.

APPEAL by defendant Roote from the decision of HARPER, Co. J. of the 30th of June, 1933, in an action for damages for wrongfully depriving the plaintiffs of certain counters and shelving supplied the defendant Marshall under an agreement in writing of the 1st of September, 1932, whereby the plaintiffs agreed to supply and install 500 lineal feet of counters, one top flat counter, and approximately 250 feet of shelving in the Farmer's Market in the Roote Building, Pacific Street, Vancouver, the title to the lumber not to pass to the vendor until the lumber was paid for. The defendant Roote owned the building and leased the premises in question to the defendant Marshall. The counters and shelving were duly installed on the 2nd of September, 1932. Marshall failed to pay the plaintiffs as agreed, and in January and February following the plaintiffs demanded the return of the counters and shelving. The defendant Roote refused to deliver, claiming that Marshall not having paid the rent for the premises, had on the 6th of January, 1933, transferred to him by bill of sale in pursuance of the Bills of Sale Act, the counters and shelving in question. On the trial it was found the defendant Roote was not a *bona fide* purchaser without notice and judgment was given for the plaintiff for $337, as against Roote.

Statement

The appeal was argued at Vancouver on the 30th and 31st of October, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

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Argument

J. A. MacInnes (*Bucke,* with him), for appellant: Roote was landlord of the premises rented by Marshall, who ordered the installation of counters and shelving. The landlord stepped in for arrears in rent in January, 1933, and took a bill of sale from Marshall for the counters and shelving. The conditional sale agreement from Marshall to the plaintiffs was not filed under the Bills of Sale Act. They must comply with the Act in regard to filing. The goods in question were subject to distress for rent. It was the sale of a chattel to be manufactured and he cannot sue for the goods sold in respect of the materials used, for the contract is entire: see Benjamin on Sale, 7th Ed., 177; *Agricultural Development Board* v. *De Laval Co. Ltd. and Brown* (1925), 58 O.L.R. 35. It is not the sale of a chattel. They attempted to take a security that is not capable of being taken. They sold to Marshall and appellant did not come into the matter at all until January: see *Canadian Westinghouse Co.* v. *Murray Shoe Co.* (1914), 31 O.L.R. 11; *Hayward & Dodds* v. *Lim Bang* (1914), 19 B.C. 381; *Brandon* v. *Plimley* (1917), 24 B.C. 441; *Tidey* v. *Craib* (1883), 4 Ont. 696; Halsbury's Laws of England, Vol. 28, p. 38, sec. 71, and p. 186, sec. 376.

Skaling (*Spinks,* with him), for respondents: It was the manufactured article the plaintiffs sold to Marshall and Roote. The work was finished on September 2nd, 1932, and they are entitled to a mechanic's lien. The non-filing of the conditional sale agreement does not nullify the agreement. There is a sufficient description to bring it within the Bills of Sale Act: see *Brandon* v. *Plimley* (1917), 24 B.C. 441. By taking a bill of sale he lost his right to distrain.

MacInnes, replied.

Cur. adv. vult.

9th January, 1934.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: There is no cross-appeal by respondents in this case and the defendant Marshall has not joined in the appeal of his co-defendant Roote.

The only question, therefore, for our consideration is the correctness of the judgment against the appellant Roote. I do not inquire into the correctness of the judgment against Mar-

shall. The learned trial judge found that the appellant took his bill of sale by way of chattel mortgage with express notice of the prior claim of the respondents. The evidence as to the set off of $150 claimed by defendant is unintelligible and I cannot allow it.

I would, therefore, dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: This appeal should, I think, be allowed in part, *i.e.*, to the extent of allowing a credit of $150: in other respects I would not interfere with the conclusion arrived at by the learned judge below, without, however, adopting his reasons.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the learned trial judge arrived at a correct conclusion in this case. It is a case eminently of fact and the findings of fact disentitle the appellant's (Roote) success upon this appeal. He has been held to have had knowledge that the title to the property in question was not to pass to the defendant Marshall. This finding of the learned trial judge was upon the evidence, in my opinion, warranted. The learned trial judge in his reasons for judgment said this—a most pertinent observation:

> The defendant Roote had another remedy available to him as landlord, but did not choose to exercise his right as such but relied upon a bill of sale given by Marshall, his co-defendant.

With regard to the bill of sale the learned trial judge had this to say:

> I must find on the evidence of Marshall that the defendant Roote was not a *bona fide* purchaser without notice. The circumstances surrounding the execution of the bill of sale lead me to the conclusion that the defendant Roote [the appellant here] had knowledge of the claim of the plaintiff [the respondent here].

Upon a complete view of all the facts and circumstances and applying the relevant law governing in the matter, I have come to the conclusion as already stated that the learned trial judge arrived at a correct conclusion. I would therefore affirm the judgment and dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: The transaction disclosed by Exhibit 1 is not a conditional sale agreement under the Act. It was not the sale of equipment but of lumber to be converted into other products. It also relates to the supply of labour and that could

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not be the subject of a conditional sale agreement. There was, however, a contract between the plaintiffs and the defendant Marshall providing that until the plaintiffs were paid (and that time had not arrived) the counters and other fixtures contemplated to be produced from the lumber should remain the plaintiffs' property, Marshall also agreeing not to "sell, assign or remove the same from the premises." That created equities between the parties and anyone with notice thereof could only deal with the same property at his peril. The trial judge's findings that the defendant Roote had notice of the existence of this agreement and of its non-fulfilment is justified by the evidence. Roote knew that equitably Marshall could not execute a bill of sale to him of chattels manufactured from unpaid lumber furnished by the Fidelity Lumber Company and must account. I would not therefore disturb the judgment for damages. The plaintiffs, however, accepted a trusteeship jointly with Marshall to apply moneys received from rentals, etc., first to operating expenses including rents accruing due to the defendant and in breach thereof wrongfully withheld $150. The judgment therefore should be reduced by this amount. Subject to this adjustment the appeal should be dismissed.

MACDONALD, J.A.

MCQUARRIE, J.A.

MCQUARRIE, J.A.: I agree that this appeal should be dismissed.

Appeal dismissed, Martin and Macdonald, JJ.A. dissenting in part.

Solicitor for appellant: *H. W. Bucke.*
Solicitor for respondents: *A. C. Skaling.*

BALCOVSKE v. STANLEY THEATRE COMPANY LIMITED.

MCDONALD, J.

1934

Jan. 10.

BALCOVSKE v. STANLEY THEATRE CO. LTD.

Negligence—Damages—Independent contractors—Obstruction of sidewalk in carrying on work—Liability.

The defendant company operating a moving-picture theatre on the east side of Granville Street in Vancouver contracted with A. V. Lewis Ltd., to remove the old paint and repaint the ceiling of a canopy projecting over the sidewalk in front of the vestibule. A. V. Lewis Ltd., employed one Scoble to do the work and left it entirely to him to carry it out. When carrying out the contract ladders and scaffolding blocked the sidewalk for substantially the whole of its width. On the morning of 27th February, 1933, when the work was in progress snow fell and drifted on to the terrazzo floor in the vestibule of the theatre. At about 11 o'clock in the forenoon the plaintiff walking northerly along Granville Street found the sidewalk blocked in front of the theatre and on turning to his right into the vestibule in order to pass, he lost his footing on the vestibule floor and falling fractured his thigh.

Held, that under the contract the defendant retained no power of controlling the work. Scoble in charge of the work was a servant of A. V. Lewis Ltd., who were independent contractors and the action was dismissed.

ACTION for damages for injuries sustained by falling on the slippery floor of the vestibule of the theatre of the defendant company. The facts are set out in the head-note and reasons for judgment. Tried by MCDONALD, J. at Vancouver, on the 9th and 10th of January, 1934. Statement

E. R. Sugarman, and *Tufts,* for plaintiff.
Marsden, for defendant.

11th January, 1934.

MCDONALD, J.: On the 27th of February, 1933, at about 11 o'clock in the forenoon plaintiff while walking in a northerly direction on the east side of Granville Street in this city upon reaching the building in which defendant company operates a moving-picture theatre, found the sidewalk immediately in front of the cashier's window blocked for all practical purposes for the whole of its width by ladders and scaffolding. During the Judgment

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BALCOVSKE v. STANLEY THEATRE CO. LTD.

morning it had snowed and for some time preceding the time mentioned it had been raining and the sidewalks were covered with slush. When the plaintiff found his way obstructed he digressed to his right on to a terrazzo floor in the vestibule of the theatre with a view to passing the obstruction. This floor had a slight covering of snow which had blown in and upon the first step taken by plaintiff upon the floor he lost his footing and fell violently with the result that he suffered a fractured thigh. Some of these facts are disputed but upon the whole of the evidence I find them as stated.

The obstruction in question consisted of two ladders about 8 feet high each in the form of an inverted "V" over which a plank had been laid. This scaffolding (as we may call it) had been placed on the sidewalk by the firm of A. V. Lewis Ltd. with which company the defendant's manager, one Butler, had contracted, to remove the old paint from the ceiling of a canopy projecting over the sidewalk in front of the vestibule and to repaint such ceiling. There was no definite contract. Butler simply instructed the Lewis Company to do the work. Later

Judgment

the company rendered an account charging for the work at 90 cents per hour, which account was paid. The company employed to do the work their servant Scoble and left it entirely to him to execute the work. This would naturally involve the placing of a scaffolding and moving it from time to time as the work required. It was not necessary that the sidewalk at any time be obstructed so as to interfere with ordinary pedestrian traffic. Butler had no control over Scoble who it may be mentioned was paid by A. V. Lewis Ltd. 65 cents per hour the company supplying the equipment and retaining 25 cents per hour as its profit. Scoble to the knowledge of Butler had been engaged on the work in question for several days prior to the accident, but Butler paid no attention to how the ladders were placed, and gave no directions or instructions whatever.

Upon the facts stated I would hold that Scoble was not the servant of the defendant, but was the servant of A. V. Lewis Ltd., who were independent contractors. I think this conclusion follows from the decisions in the cases cited, particularly *Wilson* v. *Hodgson's Kingston Brewery Co.* (1915), 85 L.J.,

K.B. 270; *Overton* v. *Freeman* (1852), 11 C.B. 867 and *Peachey* v. *Rowland* (1853), 13 C.B. 182.

Applying the real test as laid down in the authorities, *viz.*: whether the defendant retained the power of controlling this work, I think that question must be answered in the negative.

The plaintiff, however, even though it be so held contends that Butler ought from moment to moment to have supervised the work which was being done by its contractor and ought to have insisted that the sidewalk be not obstructed. It is contended further that having failed in that duty it ought to be held that the defendant knew or ought to have known that the sidewalk was obstructed with the result that pedestrians were impliedly invited to pass the obstruction by way of the vestibule; in other words that pedestrians were invited to use the vestibule as a right of way and that the defendant is therefore liable because the terrazzo floor in question is dangerous and slippery when wet.

Judgment

Upon reflection I have concluded that if I am right in holding that A. V. Lewis Ltd. were independent contractors then no such *onus* lay upon the defendant as is contended for. Such contention could I think only prevail if the plaintiff brought himself within one of the exceptions to the general rule such for instance as is found in *Penny* v. *Wimbledon Urban Council* (1898), 67 L.J., Q.B. 754 and cases of like nature.

The question whether or not the plaintiff has a good cause of action against A. V. Lewis Ltd. I am not called upon to discuss. The present action must be dismissed.

Action dismissed.

ROBERTSON, J. (In Chambers)

1934

June 14.

DAVIES v. DAVIES

DAVIES v. DAVIES.

Divorce—Wife's costs—Costs of respondent wife ordered paid and secured by petitioning husband notwithstanding payment of separation allowance under deed if wife's separate estate insufficient to pay legal costs—Alleged inability of petitioning husband immaterial—Divorce Rule 91.

After the husband, the petitioner in a divorce action, set the petition down for hearing, and after the certificate of the district registrar as to the pleadings being in order was taken out, the respondent wife brought in her bill of costs for taxation under Divorce Rule 91. The bill was taxed and the district registrar then made an order under said rule directing the petitioner to pay the respondent her costs up to the hearing in the sum of $270 and pay into Court an additional $165 security on or before June 16th, 1934. The petitioner then applied to the judge for an order that he be exempted from payment of the respondent's costs as fixed by the district registrar on the grounds (1) That in fact the wife had sufficient separate estate; (2) that by reason of the separation agreement hereinafter referred to the wife has lost her right to the benefit of rule 91 because that right is only available to a wife who has implied authority as her husband's agent to make him liable for necessaries; (3) that the husband is unable to pay. Under the said separation agreement previously entered into the petitioner agreed to pay the respondent $45 per month for her maintenance.

It was held as to the first ground that "sufficient separate estate" means such an estate as would be sufficient not only to pay the ordinary expenses of living but the necessary fees to be paid in order to insure that the wife's case may be properly presented to the Court and it was found that in fact there was not "sufficient separate estate." Under rule 91 the wife's solicitor may obtain an order in divorce proceedings to cover all his costs and the second objection fails. As to the third objection the fact that the petitioner has no money is no reason why the respondent wife should be deprived of the power to make a proper defence.

The powers of the registrar under rule 91 are discretionary and are not subject to review unless he has clearly proceeded on a wrong basis.

An application by the respondent wife for a stay of proceedings pending compliance with the registrar's order was refused but without prejudice to the right of the respondent to make further application for a stay should there be non-compliance with the order by the petitioner within the time fixed.

Statement

APPLICATION by the petitioner in a divorce action that he be exempted from payment of the respondent's costs as ordered by the district registrar at Vancouver under Divorce Rule 91 directing that "petitioner do pay to respondent or her solicitor

on or before June 16th, 1934, the sum of $270, and pay into Court $165 as security on or before June 16th, 1934." The husband petitioned for a decree of dissolution of marriage from his wife. After the husband set his petition down for hearing and after the certificate of the district registrar as to the pleadings being in order was taken out the wife brought in her bill of costs for taxation under Divorce Rule 91. The bill was taxed by the district registrar on the 5th of June, 1934, and he then made the above order. The application was heard by ROBERTSON, J. in Chambers at Vancouver on the 12th of June, 1934. Statement

G. Roy Long, for petitioner.
Marsden, for respondent.

14th June, 1934.

ROBERTSON, J.: On the 6th of June, 1934, the respondent, having filed an answer to her husband's petition, obtained a direction from the registrar, under Divorce Rule 91,—

That the petitioner do pay to the respondent or her solicitor on or before June 16th, 1934, the sum of $270 and pay into Court $165 as security for costs on or before June 16th, 1934.

The trial is set for the 21st day of June, 1934.

Rule 91 provides:

After the registrar's certificate that the pleadings are in order has been given, or at an earlier stage of a cause by order of the judge to be obtained on summons, a wife who is petitioner or has filed an answer may file her bill or bills of cost for taxation as against her husband, and the registrar to whom such bills of costs are referred for taxation shall ascertain what is a sufficient sum of money to be paid into Court or what is a sufficient security to be given by the husband to cover the costs of the wife of and incidental to the hearing of the cause, and may thereupon, unless the husband shall prove to the satisfaction of the judge that the wife has sufficient separate estate or shew other good cause, issue an order upon the husband to pay her costs up to the setting down of the cause, and to pay into Court or secure the costs of the hearing within a time to be fixed by the registrar. The registrar may in his discretion order the costs up to setting down to be paid into Court. Judgment

It will be seen that the rule provides that the registrar may issue an order

unless the husband shall prove to the satisfaction of the judge that the wife has sufficient separate estate or shew other good cause.

And the present application on behalf of the petitioner is,—

that he be exempted from payment of the respondent's costs as set out by the registrar.

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There are three grounds for the application:

(1) That, in fact, the wife has sufficient separate estate.

(2) That by reason of the separation agreement hereinafter referred to the wife has lost her right to the benefit of rule 91 because that right is only available to a wife who has implied authority, as her husband's agent, to make him liable for necessaries.

(3) That the husband is unable to pay.

It appears that on the 25th of January, 1933, the petitioner and respondent entered into a separation agreement under which the petitioner agreed to pay the respondent $45 a month for her maintenance, and, I assume, not to pledge his credit.

As to the first point I think the words "sufficient separate estate" means such an estate as would be sufficient, not only to pay the ordinary expenses of living, but, for the payment of the legal fees, necessary to be paid, in order to insure that the wife's case may be properly and adequately presented to the Court, and as I think the amount provided by the separation agreement would be required by the respondent for her ordinary living expenses, she would have nothing left for litigation, I therefore find, as a fact, that she has not sufficient separate estate.

Judgment

In support of the second point, counsel for the petitioner refers to *Ottaway* v. *Hamilton* (1878), 3 C.P.D. 393 in which the facts were that a solicitor was employed by a wife to take divorce proceedings against her husband, which he did successfully, and he afterwards brought an action at common law against the husband for the extra costs, reasonably incurred by him beyond the costs taxed and allowed in the divorce proceedings, and it was held that he was entitled to succeed, on the ground, that the wife was entitled to pledge her husband's credit because the divorce proceedings were "a necessary."

There are two ways in which a solicitor may recover his costs for defending a wife in divorce proceedings:

(1) By an action of common law for costs reasonably incurred over and above those awarded to her in divorce proceedings on the common law ground that, in certain cases, a wife living apart from her husband is an agent to pledge his credit as a necessary. See generally on this point Browne & Latey on Divorce, 11 Ed., p. 205 *et seq.*

(2) Under rule 91, *supra*. In *Trueb* v. *Trueb and Blake* (1933), 47 B.C. 443 I held that in this Province solicitor and client costs might be awarded in divorce proceedings, differing in this way from the English practice, where only party and party costs may be awarded, and, therefore, in my view, it is possible for the solicitor to get an order in divorce proceedings which will cover all his costs.

An action, at common law, must be decided on the common law principles above mentioned with regard to necessaries but these have no application to the special powers, with regard to costs, given by rule 91, *supra,* which is the same as the English rule. See Browne & Latey, *supra,* pp. 573-4.

The rule itself is founded, not on the common law doctrine of necessaries, but on the principle referred to by Bankes, L.J. in *Durnford* v. *Baker* (1924), 2 K.B. 587 at p. 598:

> But in the Divorce Court one finds a doctrine based on the old idea that on marriage the husband becomes possessed of all the wife's property, and that if she requires support he must provide it. Hence where the wife was called upon to defend herself the Court regarded the costs of her defence as a necessary. Originally, the proctor drew the means of litigation almost from day to day. He carried in his costs of the day and had them taxed and paid. That must have been done on the assumption that the proceedings were properly taken. Then came the stage when costs were no longer taxed as accruing from day to day, but at the end of every term. Under these circumstances the husband was ordered to give security for the wife's costs, and the solicitor was considered entitled to his costs up to the amount of the security on the ground that he had been induced to act for the wife in reliance on that security.

Judgment

It is quite true that Hill, J. in *Williams* v. *Williams* (1929), P. 114 at p. 118, says:

> The old basis for the rule, namely, that all the wife's property on marriage passes to the husband, and therefore the husband alone can foot the bill. . . .

has gone altogether, but these remarks were made because of the difference in a wife's position, by reason of the Married Women's Property Act, but, nevertheless, the rule remains, and is in full force and effect, and the common law principle of necessaries has, and had, nothing to do with it.

In *Arnold and Weaver* v. *Amari* (1928), 1 K.B. 584, in a common law action by the wife's solicitors against the husband for costs of her defence in a divorce proceeding, Sankey, J. said at pp. 586-7:

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Now the solicitor is not left unprotected or at risk, because he can always apply to the Divorce Court for security for costs and so he is not left at any risk; indeed, *Franklin* v. *Franklin* (1921), P. 407 shews that the Divorce Court will grant costs where the amount secured is not sufficient to meet the sum expended. This, however, is a jurisdiction peculiar to that Court and does not alter the rights, whatever they may be, at common law.

I, therefore, hold the second objection fails.

As to the third objection, it is sufficient to say that the fact that the petitioner has no money is no reason why the respondent should be deprived of the power to make a proper defence.

Finally, the powers of the registrar under rule 91 are discretionary, and are not subject to review, unless he has clearly proceeded on a wrong basis which has not been argued here. Hill, J. speaking of this rule in *Williams* v. *Williams, supra,* p. 116, said:

> Divorce Rule 91 directs that the registrar shall deal with the costs and ascertain what is a sufficient sum of money to be paid into Court or sufficient security to be given by the husband to cover the costs of the wife of and incidental to the hearing, and may thereupon, unless the husband shall prove to the satisfaction of the registrar that the wife has sufficient separate estate or shew other good cause, issue an order upon the husband to give security. To my mind that is a matter for the registrar's discretion, and by old established principles, the judge does not interfere with matters which are in the discretion of the registrar, unless it is pretty clear that the registrar has proceeded upon some wrong principle or has completely overlooked matters which he ought to have taken into account.

Judgment

The application is refused with costs.

During the course of his argument the respondent's solicitor asked for a stay pending compliance with the registrar's order. I see no reason, at present, for granting the stay but this is without prejudice to the right of the respondent to make further application for a stay should there be non-compliance with the order.

Application refused.

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CARLTON HOTEL CO. LTD. v. GARDINER

CARLTON HOTEL COMPANY LIMITED v. GARDINER.

Company—Hotel—Owners sole shareholders in company—Lease of hotel to company—Agreement to sell shares—Purchaser to manage hotel and retain profits—Company privy to agreement—Estoppel.

Jack, Joe and Theresa Tonelli were the sole shareholders in the plaintiff company. The company owned the furniture and furnishings of the Carlton Hotel and a beer licence. The hotel and the land belonged to Jack and Joe Tonelli. On the 8th of October, 1931, the three Tonellis agreed to sell all the shares in the company to the defendant for $16,500. Seven thousand dollars was paid in cash and the balance was to be paid at $200 per month. The agreement provided that Jack and Joe Tonelli should lease the hotel to the company for five years at $500 per month for 24 months and $550 per month for the balance of the period. One share in the plaintiff company was transferred to the defendant and he was appointed managing director and the agreement further provided that any profits made by the company during the period should belong to the defendant, to be used by him as he saw fit. The defendant carried on the business at his own expense for sixteen months, when owing to his being in default, he was turned out by Joe Tonelli and all rent and cash payments were forfeited. In an action by the plaintiff company for an accounting of all moneys coming into the hands of the defendant as managing director of the company, the plaintiff recovered judgment for $3,416.

Held, on appeal, reversing the decision of McDONALD, J. (McPHILLIPS, J.A. dissenting), that the company is estopped from saying that the profits do not belong to the defendant. It by various acts implemented and affirmed the agreement between the Tonellis and the defendant and cannot in good conscience be heard to say that it is not bound even though without direct contractual relationship. The company was privy to the agreement that any profits made "during the period that Gardiner was managing director should belong to him to be used by him in any manner he saw fit" and it cannot maintain this action.

APPEAL by defendant from the decision of McDONALD, J. of the 17th of January, 1934, in an action for delivery up of the books, records and vouchers of the plaintiff company, for a full account of the company's business carried on by the defendant, for judgment for all moneys due on such accounting, and damages. On October 14th, 1931, the plaintiff company leased from Jack Tonelli and Joe Tonelli the Carlton Hotel for

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five years at a rental of $500 a month for two years and $550 per month afterwards. The defendant on the same day was appointed managing director of the company. All the stock in the company was held by the Tonellis. The defendant was managing director until the 16th of February, 1933, when he was removed. While managing director the defendant had control of the beer-parlor business and rooming-house business of the hotel. During this period the defendant took in all the moneys realized from the operations of the beer parlor and rooming-house, and the plaintiff claims he has failed to account for the moneys he has received and has not paid over to the plaintiff any moneys so received by him. The defendant claims that on the 14th of October, 1931, he entered into an option agreement with the Tonellis to purchase the capital stock of the company for $16,500, and the Tonellis and himself were the sole directors of the company. He claims that the agreement with the Tonellis was that he could carry on the business as manager with his own money, the only money that went into the business being his own and his partner's and any profits during the period he was manager should belong to him. He paid the Tonellis $9,600 and interest on the purchase price and the rent payable under the lease, but owing to the depression he was unable to continue payment of the rent and the Tonellis cancelled the option and purported to forfeit all rights of the defendant in the said shares. The defendant claims the plaintiff cannot be considered apart from the acts and conduct of the shareholders, and what was done was a fraud on the defendant. Judgment was given for the plaintiff for $3,416.12.

The appeal was argued at Vancouver on the 4th and 5th of April, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Argument

Nicholson (*Gonzales*, with him), for appellant: The moneys received by the defendant were taken from the operations of the Carlton Hotel, which included a beer parlor. He received the option to purchase the shares from the Tonellis, and in sixteen months he paid them $18,000 which included the monthly rent. He received only $3,400 in excess of all payments that he made.

It was understood between Gardiner and the shareholders that he was to get the profits. If he was not entitled to these profits he would not have worked sixteen months without salary. The company knew this and lived up to it. The company never looked at the books during this period. The company is estopped from claiming profits; it must be implied from the conduct of the parties: see Cababe on Estoppel, 10; Everest & Strode on Estoppel, 3rd Ed., 10-11; *Pickard* v. *Sears* (1837), 6 A. & E. 469; *Freeman* v. *Cooke* (1848), 2 Ex. 654 at p. 662; *Cave* v. *Mills* (1862), 7 H. & N. 914; 158 E.R. 740 at pp. 745-7; *Ewing* v. *The Dominion Bank* (1904), 35 S.C.R. 133 at p. 143; *Fraser* v. *Imperial Bank of Canada* (1912), 47 S.C.R. 313. The company is in the same position as an individual on estoppel: see *Holt* v. *Markham* (1922), 92 L.J., K.B. 406; *Ashmore* v. *Trans-Canada Finance Corp. Ltd.* (1930), 3 D.L.R. 488, and on appeal (1930), 4 D.L.R. 982. The company here is responsible for the acts of its agents: see Palmer's Company Law, 15th Ed., 68-9; *Burkinshaw* v. *Nicolls* (1878), 3 App. Cas. 1004; *Erlanger* v. *New Sombrero Phosphate Company* (1878), *ib.* 1218 at pp. 1231-2; *Robinson* v. *Montgomeryshire Brewery Company* (1896), 2 Ch. 841; *Bloomenthal* v. *Ford* (1897), A.C. 156 at pp. 170-1; *In re Florence Land and Public Works Co.* (1885), 29 Ch. D. 421.

Argument

MacInnes, for respondent: As to the agreement for purchase of the shares, the company is distinct from that agreement. It is a separate entity: see Wegenast on Canadian Company Law, p. 324; *In re Spanish Prospecting Company, Limited* (1911), 1 Ch. 92. The Court is bound to recognize the company: see *In re George Newman & Co.* (1895), 1 Ch. 674. The principle of estoppel does not apply to the set of circumstances here: see Halsbury's Laws of England, Vol. 13, p. 378, sec. 534; p. 379, sec. 537; p. 385, sec. 544; *Associated Growers of B.C.* v. *Edmunds* (1926), 36 B.C. 413. It is the duty of a managing director to keep proper accounts, and as managing director he was trafficking in company stock. An *ultra vires* act can not be disposed of by estoppel.

Nicholson, replied.

Cur. adv. vult.

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MACDONALD, C.J.B.C.

5th June, 1934.

MACDONALD, C.J.B.C.: All the shares in the plaintiff company were owned by the Tonellis, Jack, Joe and Theresa, and they constituted the board of directors of the plaintiff company. The plaintiff owned the furniture and furnishings of the hotel and a beer licence. The hotel itself belonged to Jack and Joe Tonelli.

The Tonellis and the defendant entered into an agreement on the 8th of October, 1931, by which the said Tonellis agreed to sell all the said shares to the defendant. Seven thousand dollars was paid in cash and the balance was to be paid in monthly instalments of $200. On default the agreement was to be forfeited together with the money paid under it. It was also provided that Jack Tonelli and Joe Tonelli the owners of the hotel should lease to the plaintiff company, for a term of five years, the said hotel, at a rental of $500 per month for the first twenty-four months and $550 per month thereafter. In the event of default of payment of rent the lease should come to an end and all rent paid by the defendant, who was to pay it, should be forfeited to the lessors whereupon the defendant might be deposed from the managership of the hotel hereafter referred to, and the licence should remain in the name of the plaintiff.

The defendant was to be appointed managing director of the company, one share was transferred to him to qualify him for that position, and the other shares were placed in escrow in the Royal Bank where all rents and the instalments of purchase-money were to be paid to the credit of the said Jack and Joe Tonelli.

Though the defendant was appointed managing director of the company he was left to carry on the hotel at his own expense. The company and the said lessors were to supply nothing and the profits were to belong to the defendant to be used in any manner he saw fit.

The defendant, having carried on the business for sixteen months, was by reason of default in the payment of the rent and instalment of the purchase-money turned out of the hotel by Joe Tonelli and all rent paid by the defendant and all instalments

including the cash payment of $7,000 were forfeited to the Tonellis.

After the defendant took possession of the hotel Theresa Tonelli resigned from the board of directors and the defendant was appointed in her place so that during the whole sixteen months the board consisted of the two Tonellis and the defendant.

Now the plaintiff says "You [the defendant] as managing director of the company must account to us for any moneys you have made." Under the circumstances of this case the word "profits" was used not in its strict legal sense but meant that the defendant should retain for his own use the excess of the receipts of the hotel over his disbursements and since the plaintiffs were not liable for disbursements it was evident that that is what the agreement meant.

It was pressed by plaintiff's counsel that an account was not opened, as agreed by the defendant, with the Royal Bank. This is important only on the question of estoppel to be hereafter referred to, but it appears that an account called the Thomas H. Gardiner Trust Account was opened in the said bank to take the place of the said plaintiff's account for the reason known to all parties that the plaintiff was garnisheed by a creditor of the company or of the Tonellis for a debt which they themselves owed, the property having been turned over to the defendant free from all past obligations. It was, therefore, thought desirable that defendant's money should be protected from garnishment by paying it into the said trust account. Again, it was pointed out by the plaintiff's counsel as a circumstance in his client's favour, that the beer licence was to remain in the name of the company. This, while to my mind is of no significance, was explained as providing for the convenience of the plaintiff, in case of default in payment of the rent or the instalments to obviate an application for a new licence. Estoppel is set up as a plea which may not be a necessary one, but if it be, it is proved by the standing by of the Tonellis and the plaintiff who was controlled by them when they must have been aware of the fact that the rent and the instalments of purchase-money were all paid out of the receipts of the com-

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pany by cheques drawn upon the said trust account, and which cheques were received by the Tonellis both as to the rent payable by the plaintiff under the said lease and as to the instalments of purchase-money.

Now, in my opinion, these instalments of purchase-money were paid out of the private funds of the defendant, that is to say out of the money received in the operation of the said business and were paid by the defendant to the said trust account and treated as his own moneys. The defendant was to pay the rent to the Tonellis in fulfilment of his obligations to the company. I further find that two of the three directors, *viz.*, Jack and Joe Tonelli were aware during the whole period of defendant's occupancy of the hotel that defendant was paying the instalments of purchase-money out of the proceeds of the hotel as I think he had a right to do; that this occurred on his contention that he had a right to do it. If defendant had any doubt, which I think he had not, that these moneys were its own, these doubts would be dissipated by the conduct of the two Tonellis when they never demanded an account for their company or objected to the payment made to themselves out of the moneys in the trust account.

The trial judge referred it to the registrar to take an account and we find in his report that he credits to the plaintiff these moneys paid on account of the purchase of the shares, amounting to $3,286.72, that is to say he regarded these moneys as moneys of the plaintiff for which the defendant must account to it. He further found that the receipts of defendant were used by him to the extent of the sum above mentioned in payment of said rents and instalments and the learned trial judge adopted the account, and if that finding be allowed the Tonellis will receive the amount of their instalments twice over in addition to the cash paid at the beginning, but I think they are estopped from claiming this. They are the agents of the company and received money by cheque shewing this source and I think the company is also estopped from claiming that the balance of the moneys over and above the disbursements which he himself paid was not his own money.

The registrar held that the amount for which defendant was

responsible was $129.40 more than the said $3,286.72. Plaintiff cannot obtain this sum in an action for an account. If plaintiff is entitled to anything it is for debts left by defendant for which the company is ostensibly liable, and none such is proven in this action.

Therefore *in toto* the appeal should be allowed.

MARTIN, J.A.: Under the exceptional circumstances of this case I agree in allowing the appeal: the real substance of the transaction and not its mere form must be the determining factor in deciding the rights of the parties.

MARTIN, J.A.

MCPHILLIPS, J.A.: I think it well in considering this appeal to set forth the agreement entered into relative to the contemplated acquirement of the capital stock of the company and the furniture, etc., of the Carlton Hotel, City of Vancouver, and the escrow agreement between the parties to the action, which read as follows: [After setting out the agreements (Exhibits 7, 19, 9 and 8) the learned judge continued].

Now following the execution of the above documents, the appellant went on as managing director of the company and carried on for some considerable time the hotel and made substantial payments, but in the end defaulted and possession was taken by the company of the hotel premises and the goods and chattels so agreed to be transferred to the appellant upon his carrying out the obligations made and entered into. It is to be observed that the Tonellis contracted personally and in their individual names, but I do not think anything really turns upon this. The agreement come to was unquestionably by and on behalf of the company. The Tonellis assumed as many wrongly assume, that property of a company in which they held all the stock was their individual property. Nothing turned upon this in the course of the trial and in my opinion it was assumed throughout that the appellant had contracted with the company and the company resumed possession consequent upon the appellant's default in payment under the terms of the agreement. It is clear that the appellant being appointed managing director of the company was to carry on the hotel business in and for the

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company and in the name of the company which he proceeded to do for some considerable time. It is clear that the appellant was in every respect acting for the company throughout and carrying on the hotel business in the name of the company and what the appellant contemplated was, of course, to in the end become the sole owner of all the shares of the company and in such event all the profits made would be the profits of the company and enure to his advantage, he then being the sole and only owner of the shares of the company. Nevertheless, though, in law the profits so made would be the profits of the company to be declared by the company after all proper audits made. No doubt had things turned out as the appellant contemplated he would be in control of the company. This was the case that the learned trial judge had developed before him in the Court below with the appellant contending that under the agreement that notwithstanding he defaulted under the said agreement and did not fully carry out the same, nevertheless, certain profits are claimed by the appellant to have been made during the time he was carrying on the hotel business and those profits he appropriated to himself and has not accounted therefor or paid over those moneys to the company. It would appear that the action came on for trial first before Mr. Justice W. A. MACDONALD and a reference was directed to the district registrar relative to the receipts and disbursements of the Carlton Hotel Company during the time the appellant was carrying on the business of the hotel for and on behalf of the company and that report here follows: [After setting out the report (Exhibit 3) the learned judge continued.]

The trial came on as above stated before Mr. Justice D. A. MCDONALD and that learned judge found the appellant to be indebted to the company (the respondent) in the sum of $3,416.12, and it is that judgment which is under appeal now and must be considered.

It was contended upon the argument in this appeal that the amount found to be due by the learned trial judge by the appellant to the company (the respondent) was profits and as such the property of the appellant not the property of the company

and reliance was placed on the initial agreement above set forth of the 8th of October executed by the Tonellis and witnessed by the appellant wherein is to be read this language:

> Any profits made by the company during the period that Thomas H. Gardiner is managing director shall belong to the said Thomas H. Gardiner to be used by him in any manner he sees fit.

It is to be noted that the profits contemplated under the terms of the agreement are "any profits made by the company" not by the appellant; further, the profits of the company in any case would have to be arrived at in due course after proper audit and be declared by the company which admittedly is not the case here. What the appellant claims he had the right to do was to put into his pocket any sums of money over and above outgoings and without any proof whatever. Cavalierly, in effect, he says:

> I carried on the business for a time, later defaulted in my payments, but all debts incurred are paid and the balance claimed by the company from me was profits and I have rightly appropriated the moneys.

This is a most startling proposition and one that cannot be countenanced in a Court of law. Whatever may be the legal rights of the appellant it can only be determined in accordance with the law governing companies, and it is an astounding position taken by the appellant, one, with every respect to any contrary opinion, that I cannot accede to for a moment. It might be suggested why was the "profits" provision inserted as it was if it could only be implemented upon the proper taking of the accounts after there was full compliance with the agreement and escrow? The answer might well be this: It was a provision that would disentitle the "profits" being taken or shared in by the Tonellis as the shares, until the escrow agreement was fully taken up, would be standing in the names of the Tonellis and they might advance a claim to these "profits" earned whilst they were the owners of the shares. Further the appellant, in my view, whilst managing director in doing what he did was guilty of misfeasance. The law does not admit of any such proceeding—the abstraction of moneys from the treasury of the company and paying himself alleged profits, never ascertained and, quite possibly, illusory profits, to the detriment of the creditors of the company. It is only necessary to call up the situation of

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things as here enacted to see the enormity of that which has been done and still persisted in before this Court. It is interesting at this stage of review of the case to read paragraph 7 of the amended statement of defence of the appellant:

> 7. In further answer to paragraph 8, the defendant says that from the consummation of the agreement particularly mentioned in paragraph 3, that the said Tonellis aforesaid removed all books of accounts, records and vouchers of the plaintiff company prior to the defendant taking possession thereof or being appointed managing director, and further says that the books kept by the defendant were his own records and the property of himself or the said Davidson up to the time that the said Davidson surrendered any interest in and to the said business to the defendant, and further says that the business carried on by him was carried on at a loss.

Thus we see that instead of reaping profits the business was being carried on "at a loss." Then upon examination for discovery—adduced in evidence—the appellant under examination was asked the following questions and made the following answers:

> You didn't pay those taxes either Dominion or Provincial?
> *Gonzales*: The taxes for 1932?
> *Arnold*: This is paid in 1932.
> That is the wage tax, I am telling you.
> That was not your own tax? No, I didn't have any, because I didn't have any profits to pay on. There was always a loss; no, I did not, but that is the wage tax.

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Now, what the company asked in this action was the following:

> (1) Delivery up of the books, records and vouchers of the company. (2) A full, true account of the company's business carried on by the defendant and all proper directions in that behalf. (3) Judgment for any and all moneys found due on such accounting. (4) Damages.

It is illuminating to note what the report of the district registrar was in this case in regard to the business carried on by the appellant.

Here we have the appellant saying that the moneys he has failed to account for represent "profits" when he has said that he was carrying on the business at a loss. It is indeed difficult to give any credence to any of his testimony and I do not wonder it made no impression upon the trial judge. The appellant in an off-hand and cavalier manner says "The moneys were profits. I took them." Now can it for a moment be said that there was justification for what he did? It is instructive to

read what Fletcher Moulton, L.J. (afterwards Lord Moulton) said on the question of "profits" at pp. 98-101 in *In re Spanish Prospecting Company, Limited* (1911), 1 Ch. 92.

Can it be said in this case that the appellant has shewn that there were "profits" to which he was entitled? If there were any profits they were never ascertained and that is an essential element in the case. As it is he has taken money that should be in the treasury of the company (the respondent) not in the pocket of the appellant. I would refer to *In re George Newman & Co.* (1895), 1 Ch. 674. There it was held that directors cannot pay themselves for their services or make presents to themselves out of the company's assets unless authorized so to do by the instrument which regulates the company or by the shareholders at a properly convened meeting. Here the appellant was the managing director and he presumes to say there were "profits" and without more abstracts the money and attempts in this case to justify and maintain his right to do this. In this I think he signally failed. What the appellant did here was a breach of trust and I fail to be at all impressed by the elaborate argument that there is estoppel here of any nature or kind and after full consideration dismiss it from consideration. It is an untenable submission and devoid of legal warrant and certainly devoid of merit.

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We have Lindley, L.J. who delivered the judgment of the Court (Lord Halsbury, Lindley, L.J., and A. L. Smith, L.J.) saying in *In re George Newman & Co., supra,* at p. 685:

> The transaction was a breach of trust by the whole of them; and even if all the shareholders could have sanctioned it, they never did so in such a way as to bind the company. It is true that this company was a small one, and is what is called a private company; but its corporate capacity cannot be ignored. Those who form such companies obtain great advantages, but accompanied by some disadvantages. A registered company cannot do anything which all its members think expedient, and which, apart from the law relating to incorporated companies, they might lawfully do. An incorporated company's assets are its property and not the property of the shareholders for the time being; and, if the directors misapply those assets by applying them to purposes for which they cannot be lawfully applied by the company itself, the company can make them liable for such misapplication as soon as any one properly sets the company in motion. All this is familiar law and must be borne in mind in deciding the present case.

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The position in law is unquestionably this—that the appellant wrongfully allocated to himself and took $3,416.12 moneys of the company alleging that the amount represented "profits" that he is entitled to, that is, "profits" made by the company during the period that he, the appellant, was managing director and to which he was entitled. Even if it were to be conceded that all necessary legal steps were had and taken to bind the company to comply with such a contract, which I do not assent to, it would be incumbent upon the appellant to shew that the profits were legally ascertained and declared before he would be entitled to them. The agreement was "any profits made by the company" and there is no evidence to establish that any profits were made by the company. In truth, there is the testimony of the appellant himself that the business was running at a loss. In my opinion the learned trial judge arrived at a correct conclusion and I would affirm the judgment and dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: Appeal from a judgment obtained by respondent Carlton Hotel Company Limited against its manager Gardiner for misfeasance and breach of trust in failing to account for profits. It is necessary to review the facts to appreciate the true situation.

Jack, Theresa and Joe Tonelli were the only shareholders and directors of the respondent company. On October 7th, 1931, they, as shareholders, entered into an agreement with Gardiner to transfer to him the entire issued capital stock of the company for $16,500. The company owned the furniture, furnishings and the licence of the Carlton Hotel but not the land. It was owned by the Tonellis. Gardiner paid $500 on the execution of the agreement; $6,500 was payable when certain documents were executed and the balance of the purchase price, *viz.*, $9,500 in monthly instalments of $200 each, starting from the date of a directors' meeting at which it was intended to appoint Gardiner manager of the company. The agreement provided that a lease would be given by the Tonellis to the respondent company for five years at a rental of $500 a month for the first 24 months and $550 for the balance of term.

The beer licence was held in the name of that company; it was desirable that it should always be retained in the name of a company rather than an individual. It also provided that one share of stock should be transferred to Gardiner for qualification purposes and that he should be appointed by the shareholders sole manager of the business for the period mentioned. Also

> that so long as the monthly payments are paid and the rent does not fall in arrear for more than 30 days, and so long as the said Thomas H. Gardiner does not make any breach of the Liquor Control Act whereby the beer licence of the Carlton Hotel is cancelled, they will not remove him from the office of managing director

and that

> Any profits made by the company during the period that Thomas H. Gardiner is managing director shall belong to the said Thomas H. Gardiner to be used by him in any manner he sees fit.

The purpose of this agreement, the lease and the steps taken to implement it was to sell out to Gardiner, the method, as outlined, followed to meet the circumstances of the case.

The shares of the company in the name of the vendors were to be endorsed and placed in escrow in the bank where all the monthly payments by Gardiner, including the rentals, were to be deposited to the credit of the vendors. The bank was instructed that upon completion of all payments under the agreement and lease it was to deliver to Gardiner the shares so deposited in escrow or upon breach or default return them to the Tonellis. To carry out the arrangement made it was necessary that the Tonellis and the company should act in concert, each performing assigned parts.

Pursuant thereto the directors of the company passed a resolution on October 13th, 1931, appointing appellant managing director and transferring one share to him. This was done to implement in part the agreement for the acquisition of the shares by Gardiner. On the 14th of October the question of taking a lease from Jack and Joe Tonelli (the realty being in their name) to the company was discussed and agreed upon and a lease duly executed. Substantially for the time being the lessee was Gardiner; the rentals were to be paid by him. The lease was signed by the company as lessee *per* Thos. H. Gardiner, managing director. As intimated the real transac-

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tion was a purchase by appellant of the Carlton Hotel premises through acquiring the stock of the company together with a lease of the freehold.

However, after paying the larger part of the purchase price, Gardiner made default: the agreement was rescinded and payments made forfeited. He was by resolution deposed as managing director of the company and the shares held in escrow were returned to the Tonellis. Not satisfied with the forfeiture the company brought this action against Gardiner to compel him to account for the profits (while he was in possession) which by the agreement with the Tonellis were to belong to him, treating him as if a stranger to the arrangements made and as an ordinary manager of a company who must give an account of his stewardship. If his vendor had been the company instead of the shareholders and directors it could not maintain this action; the profits would belong to the appellant. Because, however, the company is not the vendor but rather the Tonellis who own all its shares the former asserts that it is not affected by the agreement. The company, it is submitted, was at all times an existing entity; Gardiner was its manager in the ordinary way—true without salary—and must account for profits.

There is only one point in the case. If, as intimated, the respondent company was privy to the agreement that any profits made "during the period that Thomas H. Gardiner is managing director shall belong to the said Thomas H. Gardiner to be used by him in any manner he sees fit" it cannot maintain this action. Because of conduct and association ordinary corporate rights cannot be relied upon. The company is estopped from saying that the profits do not belong to the appellant. It by various acts implemented and affirmed the agreement between the Tonellis and respondent and cannot in good conscience be heard to say that it is not bound even though without direct contractual relationship. The company by its acts led appellant to believe that as against it he was entitled to the profits. Certainly he altered his position. He would not act as manager without salary were it not for the special arrangement in respect to profits. I think the facts support these conclusions.

Before looking at the facts in detail to see if the principle of estoppel applies I refer briefly to the law familiar enough but often difficult in application. In *Pickard* v. *Sears* (1837), 6 A. & E. 469 Lord Denman, C.J., at p. 474, said:

> Where one by his words or conduct wilfully causes another to believe the evidence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.

That is, when he is "standing by and giving a kind of sanction to the proceedings."

In the well-known case of *Freeman* v. *Cooke* (1848), 2 Ex. 654 Baron Parke at p. 663 commenting on the word "wilfully" as used by Lord Denman, C.J. said:

> By the term "wilfully," however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth and conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect.

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In *Ewing* v. *The Dominion Bank* (1904), 35 S.C.R. 133 by the principle of estoppel a person was compelled to pay a promissory note which he never signed where, as in the case at Bar, no contractual relationship existed.

Two propositions outlined by Brett, J. in *Carr* v. *London and North Western Railway Co.* (1875) L.R. 10 C.P. 307 at 317 may be referred to:

> Another recognized proposition seems to be, that, if a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.
>
> And another proposition is, that, if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented.

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I refer also to 2 Sm. L.C., 13th Ed., 812 where in notes to *The Duchess of Kingston's Case* (1776), 20 St. Tri. 355 the author says:

> The truth is, that the Courts have been, for some time, favourable to the utility of the doctrine of estoppel, hostile to its technicality. Perceiving how essential it is to the quick and easy transaction of business, that one man should be able to put faith in the conduct and representations of his fellow, they have inclined to hold such conduct and such representations binding in cases where a mischief or injustice would be caused by treating their effect as revocable.

Estoppel is a rule of evidence preventing one from denying what he has in effect once said: He is put in the same position (but not worse) as if the statement were true. These principles apply to a company. It acts through its directors (agents) and may be estopped by their acts or statements—

> [For] although it may not have eyes to see what is going on, has agents who can see:

Crook v. *Corporation of Seaford* (1871), 6 Chy. App. 551 at 554.

A further principle was relied upon by Mr. *MacInnes*. One cannot by making a representation create by estoppel a situation which by law it is not permitted to create. (Halsbury's Laws of England, Vol. 13, p. 329). If the act which by estoppel the company is compelled to perform is *ultra vires* the principle does not apply. It could not, for example, be estopped from disputing that it entered into an *ultra vires* contract because in no way can it be bound to perform an act beyond its powers.

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Turning to the facts we find that a week after the agreement of the Tonellis with Gardiner was executed a meeting of the company's directors was convened to implement its terms. By resolution Gardiner was made managing director and one share was to be transferred to him as the agreement stipulated. By another resolution the company was given the usual banking authority. Pursuant to the agreement on October 14th, 1931, at a meeting of directors, Gardiner being present, it was resolved that the company should enter into the lease provided for with Jack and Joe Tonelli for five years, etc., and that it should be executed on behalf of the company by Gardiner. A later meeting of shareholders confirmed these resolutions. On the 10th of March, 1932, at a directors' meeting Gardiner was appointed

managing director of the company. All these steps were taken by the company to facilitate the carrying out of the whole (not part) of the agreement made by its agents the Tonellis (directors) with Gardiner. The Tonellis could not sell their shares on the terms outlined in the contract. They had to rely on the company's sanction and assistance in carrying out its terms. Further, it was the duty of the directors, as the company's agent, before securing the assent of the company in carrying out the terms of the agreement to communicate to it the conditions under which Gardiner was in possession and it must be assumed that the agents did so. The company by its agents did not sanction and implement a contract without becoming aware of all its provisions including the term that Gardiner was to receive the profits. The company's agents and Gardiner's vendors were identical. On that basis it stood by and consented to Gardiner altering his position by going into possession without salary.

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There is to my mind no doubt on the foregoing facts that the company so conducted itself that it wilfully, in the sense described in the cases, caused Gardiner to believe that the profits of the business which otherwise, as determined by the directors, would be distributed among the shareholders should go to him. He acted on that belief and altered his position accordingly.

But it was urged that the company could not traffic in its own shares; in other words enter into the agreement in question. The result of the application of the doctrine is not, that the company would be compelled to sell its shares. That is not the situation. We are concerned only with the question of profits. The simple answer is that the company would have power to pay for the services of its manager by permitting him to take profits in lieu of salary.

I would allow the appeal.

MCQUARRIE, J.A.

MCQUARRIE, J.A.: I have had the privilege of perusing the judgments of my brothers the Chief Justice and M. A. MACDONALD and agree with them that the appeal should be allowed.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellant: *Milton Gonzales.*
Solicitor for respondent: *C. S. Arnold.*

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Criminal law—Minimum Wage Act—Order of Minimum Wage Board—Maximum hours of work fixed—Employment for longer hours—Mens rea—R.S.B.C. 1924, Cap. 173, Secs. 8 (2) and 13.

L. was employed to take charge of the kitchen in a restaurant, her duties including the buying of food, preparing the menus and culinary arrangements. Her hours of work were not fixed at the time of her employment, and there was no stipulation as to when she was to come to work or when she was to go, the hours of work within which she was to perform her duties being left to her own discretion. No record was kept by the employer of her hours of work nor was any authority exercised over her as regards her hours of work. In order to perform her duties L. found it necessary to work and did actually work for longer hours than the maximum number of hours fixed by the order of the Minimum Wage Board governing housekeeping occupation. The employer was convicted for an infraction of the Minimum Wage Act for employing L. for longer hours than the maximum fixed by the Minimum Wage Board. On appeal by way of case stated, mainly on the ground that the Crown did not prove that the appellant knew that L. worked for longer hours than the order allowed:—

Held, that the offence charged comes under that portion of section 8 (2) of the Minimum Wage Act which provides "It shall be unlawful for any employer . . . to require or to permit employees to work for longer hours . . . contrary to the terms specified in the order." The mere working for longer hours is not made an offence, the offence being the requiring or permitting by the employer that the employees work for longer hours. This language can have no other meaning than that the employer knowingly requires or permits, etc. The doctrine of *mens rea* applies and the appeal should be allowed.

APPEAL by way of case stated from a conviction for an infraction of the Minimum Wage Act in employing a cook for longer hours than the maximum fixed by order of the Minimum Wage Board governing the public housekeeping occupation. The case stated was as follows:

Statement

1. Upon an information preferred under the Minimum Wage Act, I did convict Mrs. E. Brearley being an employer within the meaning of said Act, for employing one Mrs. Lewis, an employee for whom maximum hours were then fixed under said Act for longer hours than the maximum so fixed contrary to the statute and to the order of the Minimum Wage Board governing the public housekeeping occupation.

2. Upon the hearing of the said information it was proved before me:

(a) The appellant was, at the times material to the information, the managing director of Coffee Ann Limited, a body corporate operating a restaurant at street number 754 Robson Street, in the City of Vancouver.

(b) One Earl Nagle was in charge of the said restaurant, being employed by the appellant and acting for and on behalf of and under the authority of the appellant. On or about the 17th day of April, 1930, one Mrs. Lewis, after a joint interview with the appellant and said Earl Nagle, was employed to take charge of the kitchen of the said restaurant as regards the food, the buying of the food, the preparing of the menus, and the culinary arrangements. She was described by the said Earl Nagle in his evidence as the "Cook."

(c) The said Mrs. Lewis was employed at a weekly wage of twenty-five dollars ($25.00). Neither at the time of her employment nor during her employment were her hours of work set or fixed by the appellant or by the said Earl Nagle. No stipulation was made as to when she was to come to work or as to what time she was to go off work. The hours of work within which she was to perfom the duties required by her were left to her own discretion.

(d) No record was kept by the appellant or by said Earl Nagle of the hours of work of the said Mrs. Lewis, nor did either of them exercise any authority over said Mrs. Lewis as regards her hours of work.

Statement

(e) In order to perform her duties, the said Mrs. Lewis found it necessary at the times material to the charge, and set forth in the said conviction, to work and did actually work for longer hours than the maximum number of hours fixed by the order of the Minimum Wage Board (being forty-eight hours a week), governing public housekeeping occupation, which came into force on and from the 16th day of August, 1919.

3. On behalf of the appellant it was contended that the Minimum Wage Act did not apply in a case where the terms of employment were as above set forth.

4. On behalf of the respondent it was contended that on the above facts a duty was placed upon the appellant by the Minimum Wage Act to see that the said employee did not work for longer hours than the maximum number of hours fixed by the said Board, and that she should be convicted as aforesaid.

The question submitted for the opinion of this Honourable Court is whether, upon the above statement of facts, I came to a correct determination in point of law, in convicting the appellant as aforesaid, and, if not, what should be done in the premises.

Argued before GREGORY, J. at Vancouver on the 21st and 28th days of October, 1930.

D. J. McAlpine, for appellant.

W. M. McKay, for the Crown.

5th November, 1930.

Judgment

GREGORY, J.: This is an appeal, by way of a case stated, from a conviction of the appellant on an infraction of the Mini-

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mum Wage Act (Cap. 173, R.S.B.C. 1924) for employing one Mrs. Lewis, for longer hours than the maximum fixed by the Minimum Wage Board.

The objections to the conviction are two: (1) That the Crown did not prove that the appellant knew that Mrs. Lewis worked or would have to work for such longer hours. In other words *mens rea* was not proved. (2) That the conviction was made on the assumption that Mrs. Lewis was a cook and the facts set out in the case stated shew that she was not a cook.

It will not be disputed I think that as a general rule there is a presumption that *mens rea,* a knowledge of the facts which renders the Act unlawful, is an essential ingredient in every criminal offence. That presumption is, however, liable to be displaced by the words of the statute creating the offence of the subject-matter with which it deals and both must be considered: Russell on Crimes, 7th Ed., Vol. 1, p. 102.

In considering whether that presumption has been displaced the language, object and scope of the Act must be looked at. The intention of the Act before me must be gathered from its lan-

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guage as it has no preamble.

The doctrine of *mens rea* is very fully discussed by our own Court of Appeal in *Rex* v. *McKenzie* (1921), 29 B.C. 513 with respect to a different statute but, as the language of statutes varies, decisions on other statutes than that in question are only helpful to gather the general principle governing their interpretation.

The Minimum Wage Act consists of sixteen sections; only two of them (sections 8 and 13) refer to the offence charged here. Section 8 creates the offence and section 13 fixes the penalty.

Section 8 (2) provides:

> It shall be unlawful for any employer . . . to employ or pay employees less than the minimum wage or to require or to permit employees to work for longer hours or under conditions of labour and employment contrary to the terms specified in the order.

Overlooking grammatical difficulties of construction this section creates two offences—(1) employing for less than the minimum wage fixed by the board with which we are not concerned in this case, and (2) requiring or permitting employees

to work for longer hours than those fixed by the board. The effective language with reference to offence No. 2 is:

> It shall be unlawful for any employer . . . to require or to permit employees to work for longer hours, . . .

The mere working for longer hours is not made an offence—the offence is the requiring or permitting by the employer that the employees work for longer hours.

In the absence of some interpretation clause in the statute (and there is none) this language can have no other meaning than that the employer knowingly requires or permits, etc. How can a person be said to require or permit something to be done that he does not know is being done? *Rex* v. *Stokes* (1925), 1 D.L.R. 274.

In interpreting section 13 of the Act, which fixes the penalty, it seems to me that one must refer back to section 8 to see just what the offence is which is penalized, but if it is contended that section 13 creates an entirely new offence then the language of that section must be carefully studied. It is "every employer who employs an employee . . . for longer hours" than the maximum fixed by the board shall be liable, etc. Surely the word "employs" in this sentence is used in the sense of "contracts with." By so construing the section, the scope and object of the Act would appear to be well guarded for it would prevent an employee from entering into a contract for longer hours or, in the absence of a contract, permitting or requiring an employee to work for longer hours, etc.

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The contract of employment is set out in the case stated as follows: [(b), (c), (d) and (e), already set out in statement].

This does not appear to me to be a contract of employment for any number of hours specified or not but rather a contract or an employment to do certain things which for all the Court knows might easily have been performed within the hours fixed by the statute. It might well be that the appellant could reasonably expect any competent person to perform the work required within the statutory hours. Or it may be (although of course I do not suggest it) that Mrs. Lewis deliberately loafed on the job or dragged it over the statutory period. In either of these cases it surely would be unfair to punish the

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appellant unless the statutory provisions made her clearly liable. Had there been evidence that the appellant knew or must, from her experience, have known that it would require more than the statutory hours to perform the work the case would be very different and there would be no difficulty in finding that, notwithstanding the form of the contract, it was a contract of employment for excessive hours.

Counsel for the Crown cited a number of English cases but I shall only refer to one of them as he said it was "on all fours" with the present case. That was the case of *Graves* v. *Duncan* (1899), 1 F. (Just. Cases) 72. The contract of employment was very similar to that here and the woman employed was mistress of her own hours and could go and come as she chose. She was the manageress of the business. That also was a case stated by a magistrate under the Imperial Factory and Workshop Act, 1878 (Cap. 16), and amended Acts and the occupier of a factory had been convicted of employing a woman for excessive hours. The only question submitted to the Court was: "Was the woman employed within the meaning of the Act?" And the Court unanimously decided that she was so employed by virtue of section 94 of the Act which provided that a "woman who works in a factory . . . shall . . . be deemed to be employed therein within the meaning of this Act." There is no even remotely similar interpreting section in our Act. The Imperial Act is very different from ours. Originally it had over 100 sections and many have been added since by amendment. There are many sections indicating the drastic nature of the Act and the intention of Parliament to make the owner or occupier responsible for the carrying out of its provisions and it contains provisions enabling the owner when unwittingly liable under the statute to escape liability by bringing into Court the person really responsible for the infraction. In *Graves* v. *Duncan* it was only necessary to consider three sections of the Act. Section 10, which enacted that "no woman shall be employed," etc.; section 94, already referred to, saying that "A . . . woman who works, . . . shall be deemed to be employed," etc.; and section 83 which provided that "Where . . . a woman is employed, . . . the occupier

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of the factory or workshop shall be liable to a fine." The chain was complete—the woman worked—therefore she was employed —being employed the occupier was liable to be fined. There is not a single word in any of those sections indicating that knowledge or want of knowledge on the part of the occupier shall affect his liability and section 87 clearly indicates that want of knowledge can only excuse him when he actually brings into Court the guilty person and satisfies the Court that he used due diligence to enforce the execution of the Act. The case of *Prior* v. *Slaithwaite Spinning Company* (1898), 19 Cox, C.C. 54 at p. 62 under the same statute, and also cited by the Crown, illustrates this very clearly. Wills, J. makes it very clear that it is by virtue of the language of the statutes that the respondent (in that case) was made liable and in his very last sentence he says it is not necessary that there should be an employment by the respondents.

Judgment

Our statute expressly provides that it is every employer who employs, etc., who shall be liable. It is unnecessary to deal with the second point argued.

My answer to the question submitted is that the magistrate came to a wrong determination and that the conviction should be quashed.

Conviction quashed.

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CARLTON HOTEL COMPANY, LIMITED v. GARDINER. *IN RE* WILLIAMS, MANSON, GONZALES & TAYLOR.

Judgment—Consent order setting aside—Client's undertaking to deposit security with solicitor—To cover second judgment if obtained—"Final disposition of action"—Solicitor's letter in confirmation—To be read together—Interpretation.

The plaintiff having recovered judgment in default of appearance, the defendant obtained a consent order setting aside the judgment upon payment of costs and furnishing security in a stated sum for payment to the plaintiff in the event of judgment being given against the defendant at the trial of the action. Correspondence ensued as to the form of the security, and on the 8th of May, 1933, the defendant's solicitor delivered to the plaintiff's solicitors an undertaking signed by one Andrew and Louisa Gardiner to lodge with the defendant's solicitor security for plaintiff's claim for the agreed amount, to be paid to the plaintiff in the event of its being successful in the action, upon the final determination thereof. At the same time he delivered a letter of his firm stating that they had received security to pay the amount to the plaintiff in the event of judgment being obtained against the defendant. The plaintiff recovered judgment for a sum in excess of the stated amount, and the defendant appealed. A petition for an order for enforcement of the undertaking was dismissed on the ground that the undertaking was not enforceable until the end of the litigation.

Held, on appeal, affirming the decision of MCDONALD, J. (MACDONALD, C.J.B.C. dissenting), that both letters delivered to the plaintiff's solicitors constitute the undertaking and the defendant's solicitor had no intention of incurring an obligation inconsistent with the terms upon which they received the securities from their client. Reading the two letters together they should be taken to mean after "final determination" of the matter. It was upon this basis the securities were deposited with defendant's solicitor and the plaintiff's solicitors by accepting the two letters must be taken as assenting thereto. But assuming that the proper construction of the undertaking was that payment should be made on the plaintiff obtaining judgment, the affidavits filed on the application suggested a possible case for rectification of the undertaking, and in such circumstances the Court might properly refuse a disciplinary order against the solicitors and leave the parties to their remedies at law on a civil action.

Statement

APPEAL by plaintiff from the decision of MCDONALD, J. of the 1st of February, 1934, dismissing a petition for an order to enforce an alleged undertaking by the defendant's solicitor

to pay the plaintiff such sum as may be recovered in the action against the defendant up to $3,065. The plaintiff recovered judgment against the defendant for said sum in default of appearance and defence on March 27th, 1933. On the application of the defendant on April 12th following, a consent order was made setting aside the judgment upon condition that the defendant pay $259 costs and furnish sufficient security up to $3,065, payable to the plaintiff in the event of judgment being given against the defendant at the trial of the action. Correspondence then took place settling the form of the security, and on May 8th, 1933, the defendant's solicitor delivered to the plaintiff's solicitors an undertaking signed by Joseph J. Andrews and Louisa Gardiner to lodge with *Williams, Manson, Gonzales & Taylor* sufficient security up to the sum of $3,065, to be paid to the plaintiff in the event of its being successful in the action after final determination thereof; and at the same time he delivered to the plaintiff's solicitors a letter stating that he had received sufficient security to pay the plaintiff $3,065 in the event of judgment being obtained against the defendant, and he undertook to pay the plaintiff such sums as would be recovered against the defendant up to $3,065. The plaintiff recovered judgment for $3,416.12 on January 17th, 1934, and the defendant gave notice of appeal on the 29th of January, 1934.

Statement

The appeal was argued at Vancouver on the 15th and 16th of March, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

J. A. MacInnes, for appellant: Judgment was obtained by default, but by consent order it was reopened on the undertaking of the solicitors to pay the costs and the amount of the judgment up to $3,065, if the plaintiff recovered judgment on the trial. The letter from Andrews and Louisa Gardiner who gave the security for the defendant recited "final determination of the action." We submit that "final determination" means judgment at the trial. There is no mention of appeal: see *Carroll* v. *Provincial Natural Gas Co.* (1894), 16 Pr. 518; *Sunder Singh* v. *McRae* (1922), 31 B.C. 67; Halsbury's Laws of England, Vol. 1, 2nd Ed., p. 7, sec. 8; *Small* v. *Attwood*

Argument

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(1838), 3 Y. & C. 105; *Huntly (Marchioness of)* v. *Gaskell* (1905), 2 Ch. 656 at p. 667. When a solicitor gives an undertaking the Court will enforce it in a summary manner: see *Swyny* v. *Harland* (1894), 1 Q.B. 707 at p. 709. The learned judge should not have allowed in the letter from Andrews and Louise Gardiner to the plaintiff of May 8th, 1933. This letter alone contains the words "final determination" but it should not have been given effect to: see *Western Power Co. of Canada* v. *District of Matsqui Corporation* (1934), [A.C. 322]; 1 W.W.R. 483 at p. 487; *In re Killam & Beck* (1916), 23 B.C. 442. The remark that "This money would have been lost if paid over" should not be listened to. The undertaking is clear and unequivocal and should be carried out.

Craig, K.C., for respondents: The cases cited by counsel for the appellant shew that "final determination" may be construed to mean the end of the litigation. When judgment was given on the trial the defendant could, by taking the appropriate steps, have obtained a stay of execution until the determination of his proposed appeal to the Court of Appeal. The undertaking was intended to protect whatever rights the plaintiff might obtain under the judgment to be given on the trial. As the judgment itself would on proper terms have been stayed until the final determination of the litigation the undertaking should be construed in the same sense. The two letters were delivered together and should be read together. The solicitor intended that his final letter should be in accordance with his first letter. If the Court is of opinion that the undertaking should be construed to mean that payment would be made immediately after the trial, it is submitted that the facts in evidence establish a *prima facie* case for reforming the undertaking to make it agree with the intention of the parties, which was that payment should be made at the end of the litigation. In these circumstances the judge below exercised a proper discretion in refusing to enforce the undertaking summarily against the solicitors and in leaving the applicants to their remedy by action on their undertaking. In the summary proceeding the question of reforming the undertaking could not be considered, but if the solicitors were sued on the undertaking they could defend that action by a counter-

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claim for reformation of the undertaking to make it conform to the intention of the parties. The solicitors were not bound to bring an action for reformation of the undertaking before they were sued on it, because for all it appears the plaintiffs might not have taken any proceedings to enforce the undertaking summarily, but might have let matters stand until the appeal was determined, in which case there will be no necessity for an action to reform the undertaking.

MacInnes, in reply, referred to *Dotesio* v. *Biss* (1912), 56 Sol. Jo. 736. Argument

Cur. adv. vult.

5th June, 1934.

MACDONALD, C.J.B.C.: The dispute arises in relation to a consent order (Exhibit 3) dated the 12th day of April, 1933, opening up a default judgment obtained by the plaintiff against the defendant Gardiner. It was ordered that the judgment be set aside upon the condition that defendant pay the costs of said judgment (which have been duly paid) and lodge a good and sufficient security up to the sum of $3,065 "to be payable to the plaintiff in the event of the judgment being given against the said defendant at the trial of this action up to the aforesaid sum." That order appears to be plain enough. The security is payable when judgment is given against the defendant at the trial. MACDONALD, C.J.B.C.

The dispute now is as to when the security is payable, *viz.*, whether, as the defendant's solicitor contends on the final determination of the action, *i.e.*, after the last appeal, or as the plaintiff's solicitors contend forthwith on judgment in the action at the trial. In accordance with the said order (Exhibit 3) the plaintiff's contention would appear to be the correct one unless the parties had agreed to vary the terms of it thereafter. There is only one submission as to this. The solicitors met on the 8th of May, 1933, when the defendant's solicitor produced the following letter:

We beg to advise you that we, the undersigned, Joseph John Andrews and Louisa Gardiner, undertake to lodge with Messrs. *Williams, Manson, Gonzales & Taylor*, Barristers and Solicitors, 716 Hall Building, Vancouver, B.C., sufficient security by way of bonds and cash up to the sum of $3,065

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to be paid to you in the event of you being successful in the above action after final determination thereof as follows:

That so much of the said security lodged with the said firm of solicitors will be turned over to you or realized in cash upon satisfactory proof of a judgment having been obtained against the above Gardiner, in order to pay the said judgment in full up to the sum of $3,065.

and claimed that that satisfied Exhibit 3. The plaintiff's solicitors declared that they would have nothing to do with that so-called undertaking whereupon the defendant's solicitor tendered his firm's undertaking, the one now insisted on, which was accepted and which is the undertaking referred to in the petition herein. There was no further correspondence or interviews between them affecting the matter. Therefore I take it that the undertaking set forth in the petition is the one to which effect must be given since the burden of proving a variation was upon the defendant and the evidence of that was distinctly met by the plaintiff's solicitors' affidavit.

MACDONALD, C.J.B.C.

I cannot follow the learned judge's reasoning to the effect that if the money had been paid into Court it would remain there until the final determination of the action and therefore that the undertaking should be read in the same sense and that he might take that into consideration in deciding the question. On the contrary I think the question must be decided on the evidence before the Court, not on suppositions. I would, therefore, allow the appeal and give judgment for the enforcement of the undertaking Exhibit 12 to Mr. *Arnold's* affidavit.

MARTIN, J.A.

MARTIN, J.A.: This appeal should in my opinion be dismissed because, to put the point briefly, it was, under the circumstances, fairly open to the learned judge below to place the construction that he did upon the crucial expression "final determination" of the action, occurring in one of the undertakings in question. At the close of the argument before us it was conceded that the two letters (Exhibits 11 and 12) relating to the undertaking must be read together and that the question came down to the meaning of the said expression, and therefore as that it has no technical meaning its use by the two laymen persons who gave it as a matter of business must, as Lord Sumner said in the House of Lords in an insurance policy case, *Lake* v. *Simmons* (1927), A.C. 487, 509,—

be interpreted with regard to the circumstances of commerce with which they deal, the language used by those who are parties to them, and the objects which they are intended to secure. This, however, is not a case in which the appellants propose to read the policy as if they were arguing an old-fashioned indictment, nor do I think it fair to discuss their contention as if it involved "technicalities of the criminal law."

This supports the learned judge's view, and furthermore it is apparent that there has at least been an unfortunate misunderstanding, a "mistake," in the giving of the undertaking and therefore the case is also brought within the principle of the well-known decision of Jessel, M.R. in *Mullins* v. *Howell* (1879), 11 Ch. D. 763.

It follows that under all the particular circumstances before him, which it is unnecessary to specify, the learned judge appealed from has, in my opinion, reached the right conclusion.

McPHILLIPS, J.A.: In my opinion the learned judge in the Court below arrived at the proper conclusion. In the first place it is a discretionary matter (*Mullins* v. *Howell* (1879), 11 Ch. D. 763; 48 L.J., Ch. 679, Jessel, M.R.) and the facts as I view them are clear to demonstration that Mr. *Taylor* made it plain to Mr. *Arnold* that the bonds held as security were only available —if necessity required—upon the final disposition of the case.

It is unthinkable that any order should be made as asked against solicitors when it was known that the security was only available upon the final result of the action, and that would only be when further appeal would be at an end and there is abundant authority to so hold.

I would dismiss the appeal.

MACDONALD, J.A.: Appeal from an order of Mr. Justice D. A. McDONALD refusing to grant the prayer of a petition to enforce by attachment, payment or otherwise an undertaking given by solicitors to secure a judgment.

I think it was conceded by Mr. *MacInnes* at the close of the argument that Exhibits 11 and 12 constitute the undertaking. Both, of even date, were given by the undertaking solicitor to appellant's solicitors and were retained by them. The undertaking therefore in Exhibit 12 is based upon and was intended to carry out the conditions set out in Exhibit 11. Thus viewing

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it a question of interpretation arises. Must the undertaking be implemented after judgment was obtained in the action or as respondents contend after final determination of the controversy by the Court of last resort? Demand was made by appellant on the solicitors who gave the undertaking to implement it after judgment at the trial while the present solicitor for the defendant in that action demands that they refuse to do so until the litigation is finally settled.

Exhibit 11 was written by laymen on behalf of the party primarily concerned and by it the undertaking is given addressed to the appellant: [already set out in the judgment of MACDONALD, C.J.B.C.].

I think the words "final determination" (not a legal term) was intended by the writers to mean the determination of the controversy. It was not their intention that the securities (or proceeds thereof) should be turned over to possibly an impecunious opponent when judgment was first obtained without provision for their return if the judgment should be reversed on appeal. There is no undertaking to return the money in that event. In the argument any intention to do so was disclaimed. True the word "judgment" alone is used in the last clause dealing however with details, but it must be read as controlled by the words "final determination" in the preceding paragraph. Exhibit 12, based upon Exhibit 11, and forming part of it, addressed by respondents' solicitor to appellant's solicitors, reads as follows:

MACDONALD, J.A.

> On instructions from Mr. J. J. Andrews we have this day received sufficient security to pay you or your clients, the Carlton Hotel Co. Ltd. the sum of $3,065 in the event of a judgment being obtained against the above Thomas H. Gardiner, and we hereby undertake to pay you or your clients such sum as may be recovered against the said Gardiner up to the sum of $3,065.

That this is carelessly written, if respondents' contention is correct must be conceded. I do not think they meant to incur an obligation inconsistent with the terms upon which they received the securities from their client. Reading the two exhibits together, such sum "as may be recovered" may, and I think ought to be taken to mean after the "final determination" of the matter. It was upon that basis that the securities were deposited with the respondents' solicitor and appellant's solici-

tors by accepting and retaining Exhibit 11 as part of the contract must be taken as assenting thereto.

My brother MARTIN referred during the argument to *Lake* v. *Simmons* (1927), A.C. 487 where a principle of construction applicable to such a contract is referred to at p. 509:

> Every one must agree that commercial contracts are to be interpreted with regard to the circumstances of commerce with which they deal, the language used by those who are parties to them, and the objects which they are intended to secure.

External evidence in the form of a Court order and the implications arising therefrom, letters exchanged and affidavits filed shew that what was really desired by appellant's solicitors was security for the judgment, not I take it, a judgment that might disappear on appeal.

However, if wrong in the foregoing views there is an alternative consideration. Even if a strict and literal interpretation points to an undertaking to pay after judgment at the trial the judge on a summary application of this nature, where a disciplinary order was sought, might properly dismiss it. If there was doubt on the question of interpretation, or if the real intention of the parties was not fully disclosed in the documents (calling therefore for rectification) he might properly leave the parties to their remedy at law in a civil action and on these summary proceedings hold, as he did, that he should not issue a writ of attachment or make any order in the terms of the prayer of the petition. MACDONALD, J.A.

Only two affidavits (without cross-examination) together with some letters and documents were before the judge who heard the petition. The material disclosed at least a *prima facie* case for rectification should that be necessary and it would be manifestly unjust to make the order asked for when fuller consideration with all the facts properly elicited might lead to another conclusion. At all events the judge was justified in exercising his discretion in this way and we should not interfere.

I would dismiss the appeal.

MCQUARRIE, J.A.: I would dismiss the appeal. I agree with the reasons for judgment of the learned trial judge. It seems to me that Exhibits 11 and 12 must be read together and there- MCQUARRIE, J.A.

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fore payment under the undertaking is not due until the final determination of the action. An appeal was taken from the original judgment and was heard at the same sittings of this Court as this appeal. I think the learned trial judge was correct in his refusal of the appellant's application to enforce payment under the undertaking prior to the conclusion of the appeal from the original judgment.

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

Solicitors for appellant: *MacInnes & Arnold.*
Solicitor for respondents: *C. W. Craig.*

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Property—Adjoining owners—Boundary lines on foreshore—Accretion—Division of ownership—Mode of ascertaining—Survey.

In an action between proprietors of adjoining properties on the shore of a bay of the sea, as to the proportion of the accretion between the properties and the foreshore to which they are entitled, it was held that this accretion belonged to the owners of the adjoining lands and the mode in which it should be divided is to take a line representing the line of the shore drawn at such distance seawards as to clear the sinuosities of the coast and let fall a perpendicular from the end of the land boundary dividing the properties in dispute. This does not mean a line representing the whole coast of the bay but a line fairly representing the average line of the shore extending on either side of the disputed land boundary.

ACTION to recover possession of certain lands at Kye Bay near Courtenay, B.C., which the plaintiff claims the defendant took possession of and for an injunction restraining the defendant from interfering with the plaintiff's use and enjoyment thereof. The facts are set out in the reasons for judgment. Tried by ROBERTSON, J. at Victoria on the 28th and 29th of March, and 3rd of April, 1934. Statement

Arthur Leighton, and *P. R. Leighton,* for plaintiff.
Cunliffe, for defendant.

27th April, 1934.

ROBERTSON, J.: The plaintiff and the defendant are the registered owners of adjoining lands at Kye Bay near Courtenay, B.C., and the plaintiff claims that the defendant has taken possession of part of his land and brings this action to recover possession thereof and for an injunction restraining the defendant from interfering with the plaintiff's use and enjoyment thereof and from interfering with the plaintiff's right of access "over the foreshore," and for damages for trespass. Judgment

The plaintiff's title commenced with a conveyance (Exhibit 1) dated the 1st of December, 1908, from Essie Moore to Mai L. Lawrence by the following description:

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ALL AND SINGULAR that certain parcel or tract of land and premises situate lying and being in Comox District, in the Province of British Columbia, and being part or portion of lot 208, known and described as follows: commencing at the South East corner of said lot 208; Thence North 65° 45′ West 2500 links; Thence North 2065 links; Thence East 1500 links. Thence running in a South Easterly direction 1060 links, more or less, along the shore line, Thence South 2370 links to the point of commencement, and containing fifty-five and ninety-three one-hundredths (55.93) acres, more or less, as shewn on the map or plan hereto annexed.

The plan referred to in Exhibit 1 was prepared by H. Neville Smith, C.E., B.C.L.S., in February, 1908, and is signed by Essie Moore and shews that lot 208 ran to the "Strait of Georgia," that is, I take it, to high-water mark on the said Strait and the north boundary is 15 chains in length. Mrs. Lawrence's title became vested by transmission in her husband Jerrold who on the 20th of April, 1927 (Exhibit 2), conveyed to Edith J. P. Wilson who on the 14th of September, 1921 (Exhibit 3) conveyed to the plaintiff that part of lot 208, for which the plaintiff now holds a certificate of indefeasible title dated 19th September, 1931, in which the property conveyed to him is described as parcel "A."

Judgment

The defendant's title starts with the conveyance dated the 18th of May, 1909 (Exhibit 13), from the said Essie Moore to Francis R. F. Biscoe in which the land conveyed is described as follows:

ALL AND SINGULAR that certain parcel or tract of land and premises situate lying and being in Comox District, in the Province of British Columbia, being part or portion of lot Two hundred and eight (208) described as follows: commencing at a point situate South 65° 45′ East (Astl) Twenty-five chains from a post at the North East corner of Section 82 and being also the South West corner of lot 93, Comox District, in the Province aforesaid; thence due South 20.65 chains thence due West 15 chains to sea beach; thence along sea beach North 57° 30′ West (Magnetic) 18.36 chains; thence South 37° West (Magnetic) 31.95 chains more or less to Western boundary of lot 208; thence due South along said Western boundary of lot 208 10.42 chains; thence along Southern boundary of said lot 208 North 89° East (Magnetic) 25.25 chains more or less to place of commencement containing by admeasurement 64.75 acres more or less and more particularly described by the map hereto annexed coloured red . . .

The plan attached to the said conveyance (Exhibit 13) which was prepared by a surveyor, E. Priest, and signed by Essie Moore, shews the common boundary, 15 chains in length, and

shews a post placed at high-water mark. The boundary in said description (Exhibit 13) namely "thence due west 15 chains to the sea beach" is the same as the boundary "thence east 15 chains" in the description in Exhibit 1, and it is apparent from Exhibit 1 and Exhibit 13 that in 1908 and 1909 the defendant's common boundary line ran to high-water mark.

In May, 1913 (see certificate on plan Exhibit 14), Biscoe subdivided the south-eastern corner of parcel "C" into two lots. Cokely was the surveyor and he prepared a subdivision plan dated May 1st, 1913, and on the 9th of July, 1913, Biscoe conveyed the lot in parcel "C" immediately adjoining parcel "A," now belonging to the plaintiff, to G. R. Bates (Exhibit 14) and the plan attached to the said conveyances shews the common boundary of 15 chains above mentioned, and shews a post placed at high-water mark at the east end of the said boundary, which post, Cokely says, was pointed out to him by Biscoe. Cokely says it was the only post there and he checked back the 15 chains. The description in, and plan on, Exhibit 14 also shew that the said post was at high-water mark, and the plan attached thereto is signed by the said G. R. Bates as well as by Cokely. On the 12th of April, 1926, G. R. Bates conveyed the said parcel "C" to the defendant F. H. Bates, who holds a certificate of indefeasible title thereto in which his land is described as parcel "C."

Judgment

The area in dispute is a triangular shaped piece, shewn on Exhibit 19, lying to the East of the line MG on the composite plan thereto.

It is common ground that neither the plaintiff nor the defendant's certificate of indefeasible title includes any part of this area. This is clear from the evidence of Cokely and Schjelderup. Were it not for this express evidence I would be inclined to hold that this post which Cokely says is the common corner post of the parties' lands as registered, was not that, but was a post placed some distance back from the high-water mark, to mark the property line, because the evidence shews that it was the custom of land surveyors not to place a post at high-water mark, for the obvious reason that the Spring and Neap tides would likely wash it away. It then becomes necessary to con-

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sider whether the area in dispute, or any part thereof, is dry land, accretion or foreshore.

The plaintiff alleges it is either foreshore or accretion, and if foreshore the defendant has no right to prevent his access thereto and, if accretion, it should be divided between the parties by a line drawn at right angles to the seashore, commencing at the "old corner post." The defendant says the land in question was always dry land or alternatively (1) he is in possession thereof; or (2) entitled thereto by conventional boundary; or (3) that he is entitled to all land to the north of the common boundary line produced in a straight line to the foreshore.

Now as to accretion, Cokely says that when he made his survey in 1913, he did not think the old corner post was at high-water mark, but as far as he can remember, it was not very far from it and that the red line on Exhibit 5 marked as the high-water mark, was not the exact high-water mark in 1913; so that it appears that there was dry land east of parcel "C" in 1913, although Cokely says it was not the intention to leave any land between the east boundary of parcel "C" and high-water mark.

Judgment

In 1932 Cokely made a survey (Exhibit 8) of that part of parcel "A" immediately adjoining parcel "C" and he then found, as is shewn on said Exhibit 8, that the high-water mark was 70 feet east of parcel "C" and he shews the same high-water mark on Exhibit 5, marked "present high-water mark," and he says this land is accretion and that seawards, of this present high-water mark, is foreshore. In 1929 Cokely had made a survey (Exhibit 7, plan 3739) of part of parcel "A" south of the survey shewn on Exhibit 8, and upon this plan he shewed the high-water mark of this part to be considerably farther seaward than the high-water mark on Exhibit 8, and Wilhelm Schjelderup who prepared Exhibit 19 says the latter high-water mark as shewn on Exhibit 7 is the same, *i.e.*, on the same line as the high-water mark shewn in red on the said Exhibit 19. The defendant says that the area between the line MM and the red line on Exhibit 19 is dry land.

Dealing first with the area shewn on Exhibit 19, between the line MM and the fence, I may say I have carefully considered all the evidence as to accretion and upon the whole of this evi-

dence I find this area was dry land. I shall only refer to part of the evidence. G. R. Bates who bought parcel "C" in 1912, built a fence along the shore line, but back from it, so that the tides would not injure it, and that fence was within a few feet of the present fence as shewn on Exhibit 19. He says that he put in a garden, rose trees, etc., in the area to the west of the fence and that in 1912 he and Lawrence, who then owned parcel "A," agreed to build a fence along their common boundary, Lawrence to supply materials and Bates to do the work, and that he did build this fence in 1912 and the junction of the two fences, as shewn on Exhibit 19, is practically the same as the junction of these two fences which he built in 1912.

The plaintiff says he moved the shore-line fence 6 to 8 feet seawards in 1926.

Schjelderup examined this area shortly before the trial and he found grass, bulbs, garden, buildings and trees 60 years old, and he says this area has been dry land for 100 years. Mulholland, chief forester for the Province, examined this property a week before the trial and he gave evidence as to the age and size of the fir trees, now growing, and the stumps of trees which have been cut down on the said area. He found fir trees 60 years old. He further states that fir trees will not grow on tidal lands and that it was impossible for this area to have been tidal land within the past 26 years. In addition, as I have mentioned *supra,* admittedly there was land east of parcel "C" when Cokely made his survey in 1913.

Next, as to the area seawards of the fence on Exhibit 17. I may say that I have also carefully considered all the evidence on this question and I find that the land in this area is accretion. Again I refer to only part of the evidence. The strongest feature is that Cokely actually surveyed the land immediately adjoining this area in 1929 and he found the high-water mark to be in line with the present fence on Exhibit 19. Then there was only one tree on this area, *viz.,* a fir about 12 years old. Knight says the accretion would be 30 to 40 feet. Further the defendant (Exhibit 19) places the old boat-house on the high-water mark found by Cokely in 1929, where one would expect to find it. I, of course, have carefully considered Mul-

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holland's evidence upon this point. He says there is a permanent drift line on the area of logs thrown up there "any time the last 100 years" and some logs have been there 50 years, and that there is a line of grass along the land where high-water mark is shewn on Exhibit 19, and that there are two kinds of land grass growing on this area and that he thinks there has been no accretion within the past 26 years. I have further considered the fact that on Exhibit 7, Cokely indicated high-water mark on part of parcel "A" was on the same line as high-water mark on Exhibit 19, but it must be remembered that the land shewn on Exhibit 7 is some distance away from parcel "C." It is quite possible for the accretion to have taken place since 1929, after which one would find the grass and shrubs, etc., which are there.

I find that the defendant was in possession of the area between the line MM and the fence on Exhibit 19. The evidence shews, as above mentioned, that he built the fence along the common boundary line in 1912, pursuant to an agreement with Lawrence and although this fence may have fallen into disrepair the defendant says this fence in 1925 was practically in the same position as it is today, and this line fence continued, to join an old fence which ran north and south along the front of parcel "C" as shewn on Exhibit 19. Further the plaintiff negotiated with the defendant to acquire this further area, inside the defendant's fence, which he is now claiming in this action. As neither party has title to it, the defendant being in possession, is entitled to retain possession thereof.

Judgment

There was considerable evidence led, in an endeavour to shew the position of an old fence which was supposed to be on the line MG on Exhibit 19. No one was able to place the position of this fence accurately, nor could anyone say that it was a boundary-line fence and as I have come to the conclusion that the fence along the south boundary was built in 1912 as G. R. Bates says, it is not necessary to make any finding with regard to this old fence, but if such old fence had existed it only goes to confirm the defendant's submission that the area between the line MM and the fence was dry land.

The defendant also relied upon the foregoing facts with

reference to the fence along the boundary line as enabling him to establish a "conventional boundary." See *Grasett* v. *Carter* (1884), 10 S.C.R. 105. It does not appear to me that this case is in point for there was never any dispute in the case at Bar, about the boundary, at the time it was agreed to build the fence. Both parties thought, no doubt, that it was a common boundary and if there was any mistake about this, the plaintiff would not be debarred from recovery on that account. See *Les Sœurs de Misericorde* v. *Tellier* (1932), 40 Man. L.R. 351, particularly at p. 360.

The defendant has never been in possession of the area seaward of the fence. Three posts were put in by the defendant on the line, 83.8 feet in length shewn on Exhibit 19, lying eastward from the old boat-house and the next summer defendant says they were gone. Probably they were washed away by the sea. He then put up three more posts. Afterwards the plaintiff brought this action. There was no wire or boards on these posts so that no one was prevented from going upon this area.

Judgment

There is no doubt that the accretion belongs to the owners of the adjoining lands and the mode in which the accretion should be divided has been laid down in *M'Taggart* v. *M'Douall* (1867), 5 M. 534, in which Lord Justice-Clerk (Inglis) said at p. 540:

> . . . because where the shore is upon the open sea, and there is no opposite coast or opposite bank, a different rule must be adopted. What, then, is the rule that would be adopted in that case, following as near as possible the analogy and the principle of *Campbell* v. *Brown*. I think it is extremely well stated by the Lord Ordinary. In one passage of his note he says: "The true question to be solved was how to strike the boundary line as to properties on the shore of the open sea. Using the analogy of the case of *Campbell* v. *Brown*, the Lord Ordinary was disposed to think that the proper method was to take a line representing the line of the shore drawn at such distance seawards as to clear the sinuosities of the coast, and let fall a perpendicular from the end of the land boundary. Of course he does not mean a line representing the whole coast of the Bay of Luce, but a line fairly representing the average line of the shore, extending on either side of the land boundary. . . .

In that case, as in this, there was no evidence before the Court upon which a division could be made and accordingly the Court directed (p. 541):

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. . . that we should have a line laid down by a man of skill, representing the average line of this coast upon which the two properties are situated, and shewing in what way perpendiculars let fall from that average line upon the land boundary will divide the shore between these two properties. The precise terms of the remit may require some little attention, and I should also be very much inclined, with a view to keeping open anything that it is not at present necessary to determine, to give the parties on either side an opportunity of asking the reporter to lay down any other line that he thinks may illustrate the position of the properties, and the claims upon both sides of this action.

Judgment

Perhaps the parties will be able to agree upon the proper line. In any event further consideration of the case is adjourned so that the parties may have an opportunity of supplying such evidence on this point as they may care to offer. All questions of costs are reserved.

Order accordingly.

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Courts—Deserted Wives' Maintenance Act—Magistrate—Jurisdiction over husband resident abroad—Order for service abroad—Validity—R.S.B.C. 1924, Cap. 67.

Upon the complaint of a wife under the Deserted Wives' Maintenance Act against her husband who was resident and domiciled in New Zealand, the police magistrate at North Vancouver issued a summons and made an order for service upon the defendant in New Zealand. The defendant's application for a writ of prohibition directed to the police magistrate prohibiting him from proceeding further with the complaint, was dismissed.

Held, on appeal, affirming the decision of McDONALD, J., that the scope of the Act may be gathered from its subject-matter. It was passed to afford as effectively as possible, relief to deserted wives. Desertion always involves removal by the offending party to a place usually distant. The offence was committed within the magistrate's jurisdiction and there was jurisdiction to issue the summons and order service *ex juris*.

APPEAL by defendant from the order of McDONALD, J. dismissing the defendant's motion for a writ of prohibition directed to the police magistrate in North Vancouver, prohibiting him from proceeding further with a complaint laid by his wife under the Deserted Wives' Maintenance Act, heard by him at Vancouver on the 30th of January, 1934. On the 10th of November, 1933, a summons was issued by the said police magistrate to the defendant in Cambridge, New Zealand, requiring him to appear at the City of North Vancouver Police Court on the 16th of January, 1934, to shew cause why he should not be ordered to pay his wife a sufficient sum for her maintenance and for the maintenance of their child. On the same day on the application of the plaintiff, an order was made by said police magistrate that the sending of a true copy of the summons, together with a copy of the order, by registered mail addressed to him at Cambridge, New Zealand, shall be deemed to be good and sufficient service of the said summons upon the said Harry Gagen.

Statement

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Clyne, for the motion.
Henderson, K.C., contra.

31st January, 1934.

MCDONALD, J.: The defendant being the husband of the complainant and being resident and domiciled in New Zealand, moves for a writ of prohibition directed to *R. A. Sargent*, Esquire, police magistrate in and for the city of North Vancouver, prohibiting said magistrate from proceeding further with this complaint laid under the Deserted Wives' Maintenance Act, R.S.B.C. 1924, Cap. 67. The objection taken is that the magistrate has no jurisdiction to issue a summons and to make an order for service upon the defendant in New Zealand. Reliance is placed upon the rule laid down in cases such as *Ex parte Blain*. *In re Sawers* (1879), 12 Ch. D. 522; 41 L.T. 46; and *Berkley* v. *Thompson* (1884), 10 App. Cas. 45; 54 L.J., M.C. 57, to the effect that our Courts have no jurisdiction over one who is resident without the jurisdiction, save and except in certain specified cases where the person is "brought by statute within the jurisdiction."

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In reply it is said that the statute in question does in its terms, though possibly not too aptly, bring this defendant within the jurisdiction of the magistrate's Court. With some hesitation I have reached the conclusion that the statute must be so read. Section 2, "magistrate," provides as follows:

> "Magistrate," where the husband . . . resides within the Province, shall mean . . . ; and, where the husband resides without the Province, shall mean any stipendiary magistrate, . . . having jurisdiction in the locality in which the wife resides, or in the locality in which the cause of complaint wholly or in part arose.

Now some meaning must, if possible, be given to every part of a statute and if the words "where the husband resides without the Province" do not convey the meaning that the magistrate has jurisdiction over such a husband, then these words together with their context have no meaning whatever.

As to service itself I think there is no great difficulty as section 3, subsection (3) provides that:

> In case it is made to appear to the magistrate by whom any summons has been issued under this section that prompt personal service of the summons cannot be effected, the magistrate may make such order for substituted or other service, or for the substitution of notice for service, by letter, public advertisement, or otherwise, as may be just.

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It is argued that this does not advance the matter inasmuch as this section can have effect only if the magistrate is already possessed of jurisdiction. This is so, of course, but I think it must be read along with the other section with a view to ascertaining what was the legislation which the Legislature really intended to enact.

The application is dismissed.

From this decision the defendant appealed. The appeal was argued at Vancouver on the 14th and 15th of March, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Macrae, K.C., for appellant: The defendant Harry Gagen lives in New Zealand. First there is no extra-territorial jurisdiction unless expressly given by statute. Secondly, in an inferior Court no jurisdiction is presumed and it must be shewn on the face of the proceedings (*i.e.*, the summons) what jurisdiction there is. Thirdly, there is no power under the Act for service *ex juris*. That there is no extra-territorial jurisdiction unless given by statute see *Berkley* v. *Thompson* (1884), 10 App. Cas. 45 at pp. 48-9; *Sirdar Gurdyal Singh* v. *Rajah of Fairdkote* (1894), A.C. 670. That jurisdiction must shew on the face of the proceedings see *Farquharson* v. *Morgan* (1894), 1 Q.B. 552 at p. 556; *Camosun Commercial Co.* v. *Garetson & Bloster* (1914), 20 B.C. 448; *In re Nowell and Carlson* (1919), 26 B.C. 459; *Hull* v. *Schneider* (1893), 3 B.C. 32; *City of Vancouver* v. *Richmond* (1928), 40 B.C. 170 at 173. They must shew that the wife resided in North Vancouver or that the offence arose there: see also *Attorney-General* v. *West Riding of Yorkshire County Council* (1907), A.C. 29.

Argument

Henderson, K.C., for respondent: The Act is a code in itself and subsection (3) of section 3 of the 1924 Act covers all forms of service. It provides for "notice for service" which must apply to service outside the jurisdiction: see *Smelting Co. of Australia* v. *Commissioners of Inland Revenue* (1896), 65 L.J., Q.B. 513 at p. 514; *Baumwoll Manufactur von Carl Scheibler* v. *Furness* (1893), A.C. 8 at p. 20; Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., pp. 310 and 322;

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Turquand v. *Board of Trade* (1886), 55 L.J., Q.B. 417 at p. 419; *Nuth* v. *Tamplin* (1881), 51 L.J., Q.B. 177 at p. 180; *Cope* v. *Doherty* (1858), 27 L.J., Ch. 600 at p. 601; *Berkley* v. *Thompson* (1884), 54 L.J., M.C. 57.

Macrae, replied.

Cur. adv. vult.

5th June, 1934.

MACDONALD, C.J.B.C.: This is a proceeding by a deserted wife for maintenance under the Deserted Wives' Maintenance Act, R.S.B.C. 1924, Cap. 67. Under the definition of magistrate, it is provided that where the husband of a deserted wife resides within the Province, any stipendiary magistrate or police magistrate having jurisdiction where the cause of complaint wholly or in part arises and where the husband resides without the Province having jurisdiction in the locality in which the wife resides may entertain the application. It appears from the evidence that the defendant deserted his wife in this Province some six years ago and that these proceedings are taken in North Vancouver where the wife resides. The defendant proceeded to New Zealand where he has since resided. He is a British subject and claims now to have domicil in New Zealand. I think it appears from this that the magistrate had jurisdiction to entertain the wife's complaint since the desertion really took place in British Columbia and has been merely continued since by his residence in New Zealand. The present appeal is from an order of a Supreme Court Judge refusing to prohibit the magistrate from proceeding with the case. The decision of the case, I think, depends upon whether or not the Legislature had power to pass the said Act. By the British North America Act local Legislatures are given exclusive powers in respect to the administration of justice and procedure in civil cases. They are also given exclusive powers over property and civil rights in the Province so that whether this is regarded as a case of breach of the contract of marriage or the enforcement of a civil right the general power of legislation belongs to the local Legislature. It is claimed in this case that the Legislature had no power to enact extra-territorial legislation, but as I see the case it is really not one of that kind, but even assuming it to be of that

character I think the Legislature had jurisdiction to authorize the proceedings in the case before the magistrate, the offence having been committed here. The right of the Dominion Parliament to legislate "extra-territorially" is recognized by section 2 of the Statute of Westminster, 22 Geo. V., Cap. 4, but no mention is there made of the powers of the Provinces in this regard. That statute does not, I think, limit any rights theretofore enjoyed by Provincial Legislatures. The local Legislature has exercised a limited right to deal with British subjects residing in foreign parts for a long time and the procedure is pointed out in Order XI. of the Rules of the Supreme Court which have statutory force.

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It may be that the proceedings attacked do not come within the order, but they do come under the Deserted Wives' Maintenance Act, both as to the right of the magistrate to entertain the proceedings and as to the procedure applicable to them. The Privy Council in *Attorney-General for Canada* v. *Cain* (1906), A.C. 542, at pp. 545-6, where it dealt with the power of the Imperial Government, said:

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> Upon that event [*viz.*, the Cession of Canada] the Crown of England became possessed of all legislative and executive powers within the country so ceded to it, and, save so far as it has since parted with these powers by legislation, royal proclamation, or voluntary grant, it is still possessed of them.

And further:

> The Imperial Government might delegate those powers to the Governor or Government of one of the Colonies, either by royal proclamation which has the force of a statute . . . or by a statute of the Imperial Parliament, or by the statute of a local Parliament to which the Crown has assented. If this delegation has taken place, the depositary or depositaries of the executive and legislative powers and authority of the Crown can exercise those powers and that authority to the extent delegated as effectively as the Crown could itself have exercised them.

And at p. 547, they refer to the language in *Hodge* v. *The Queen* (1883), 9 App. Cas. 117, where it was decided that:

> A colonial Legislature has within the limits prescribed by the statute which created it "an authority as plenary and as ample . . . as has the Imperial Parliament . . ."

These powers have been delegated to the Province by the Deserted Wives' Maintenance Act which was assented to by His Majesty the King. But there is a limitation which must not be overlooked. Extra-territorial legislation must not

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encroach upon the rights and powers of the Sovereign State in which the offence was committed. This question came up for consideration in a special case, *viz., In re Criminal Code Sections Relating to Bigamy* (1897), 27 S.C.R. 461, referred by the Governor-General in 1897 to the Supreme Court of Canada in connection with sections 275-276 of the Criminal Code where it was held with only one dissentient that where the offence was committed in Canada our Courts had jurisdiction. There the accused left Canada with the intent to commit the offence in a foreign country. In the present case the defendant deserted his wife in British Columbia, and then left here and has continued his desertion for the last six years in New Zealand. *Macleod* v. *Attorney-General for New South Wales* (1891), A.C. 455, deals with a case where the offence occurred wholly in a foreign country and it was held that the country where the offence did not take place had no power under these circumstances to punish the accused. That case is referred to by the learned judges in the special reference, *supra,* and is distinguished on the ground that in *Cain's* case, *supra,* the offender left the country with the criminal intent to commit the offence in a foreign country which distinguished it from *Macleod's* case, *supra.*

In the special case, *supra,* King, J., at p. 484, quoted from Bishop on Criminal Law, as follows:

> "If a material part of any crime is committed upon our soil, though it is the lighter part, legislation with us may properly provide for the punishment of the whole of it here."

And he proceeds at p. 485:

> It does not seem reasonable that a British subject who should change his domicil to different colonies should continue to be followed by the criminal law of each colony in which he was successively domiciled; but on the other hand it seems reasonable and in accordance with considerations of public convenience, and not, as it seems to me, covered by authority to the contrary, that, where a material part of a prohibited act is committed in this country, a British subject domiciled here, and only temporarily absent, might well continue to owe to Her Majesty in relation to her government of Canada an obligation to refrain from the completion of the prohibited conduct whilst absent without any *animus manendi.*

In Dicey's Conflict of Laws, 5th Ed., I find it is said that in matters of procedure the parties are not affected by foreign law. There is also the Deserted Wives' Maintenance Act which provides the procedure.

On the whole case I think the learned judge came to the right conclusion. The appeal is dismissed.

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MARTIN, J.A.: This is an appeal from the judgment of Mr. Justice D. A. McDONALD refusing to prohibit the police magistrate for the City of North Vancouver from further proceeding with a complaint laid by a wife under section 3 of the Deserted Wives' Maintenance Act, Cap. 67, R.S.B.C. 1924, on the ground that the magistrate "has no jurisdiction to hear the said complaint, or to make an order under the said Act, or to issue a summons (thereunder) for service upon the said Harry Gagen in New Zealand," where he has been domiciled since 1927 and living apart from his wife, the complainant: this order for substitutional service was made under section 3 (3) of said Act providing for the same where "prompt personal service of the summons cannot be effected," as is admittedly the case herein.

It is first to be noted that we were expressly informed by the appellant's counsel that no objection was raised against the constitutionality of said Act, so that position simplifies its present consideration and we must deal with it as though all its provisions are valid and operative.

The learned judge below was of opinion that, as set out in his reasons, a fair construction of section 2 gave the magistrate jurisdiction over the subject-matter of the complaint "where the husband resides without the Province," and I think such a view may well be supported, and it necessarily follows that if the husband is "brought by the statute within the jurisdiction" then the magistrate may make such an order for service to enforce that jurisdiction as the statute authorizes under said subsection (3).

The summons which was issued upon the wife's complaint complies exactly with the form prescribed by the schedule as fulfilling the requirements of section 3, consequently the magistrate's jurisdiction to issue it was *ex facie* under the statute which, as already noted, is conceded to be a valid enactment, for the purposes of this appeal at least.

If then, the magistrate had jurisdiction to hear the complaint and has duly proceeded to exercise it the fact that in such exer-

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cise he may exceed it is not sufficient to constrain the Court to interpose by prohibition in cases at least where, as here, an appeal is specially provided by section 15 from any order made under the provisions of this Act.

It is well said in Short & Mellor's Crown Office Practice, 2nd Ed., 256 on the basis of Lord Justice Thesiger's observations in *Martin* v. *Mackonochie* (1879), 4 Q.B.D. 697 at 732, approved by Earl Cairns in the House of Lords (1881), 6 App. Cas. 424 at 440, that:

> Prohibition deals with jurisdiction, and questions which are the proper subjects of an appeal cannot be dealt with in prohibition. In fact, it may be stated broadly that where an appeal lies prohibition does not, unless "something" has been done "contrary to the laws of the land," or "so vicious as to violate some fundamental principle of justice."

Under the present unusual and, I feel, somewhat unsatisfactory circumstances, I am, though not wholly free from doubt, not prepared to overrule the view taken by the learned judge below, and the more so because it does unquestionably to my mind receive substantial support from the observations of Lord Chancellor Selborne and Lords Blackburn and Watson, in *Berkley* v. *Thompson* (1884), 10 App. Cas. 45, 49, 53-6, and therefore I would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The subject-matter of this appeal is a case arising under the provisions of the Deserted Wives' Maintenance Act and it is certainly an Act which comes within the area of Provincial authority under the British North America Act, 1867 (Imperial Act 30 & 31 Vict., Cap. 3).

Section 92, under the heading "Exclusive Powers of Provincial Legislatures," subsection (13) "Property and civil rights in the Province," in the complainant here we have the case of a deserted wife, the husband a British subject at present in New Zealand. It would appear that an order for substitutional service upon the husband (defendant-appellant) was made under the Act by the police magistrate in and for the City of North Vancouver. Following the making of the order service was made on the husband on the 2nd day of December, 1933, by his being in pursuance of the order served by registered mail with a summons that he (the husband) be ordered to pay to his

wife a sum sufficient for her maintenance and for the maintenance of his infant child. Then followed an application for a writ of prohibition which coming on before Mr. Justice D. A. McDONALD was refused. The learned judge dealt with the matter in a considered judgment with which I entirely agree. I see no ground whatever upon which the proceedings had and taken can be said to be without jurisdiction. The statute plainly indicates that there may be proceedings where the husband resides without the Province, the wife being within the Province which is the case here. In that my view so completely accords with the judgment of the learned judge I see no useful purpose in elaborating the matter.

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I would dismiss the appeal.

MACDONALD, J.A.: A Provincial Act, *prima facie,* is territorial in its operation and does not apply to one domiciled and actually resident abroad. If, however, a contrary intention is expressly stated in the statute or may be implied as a necessary inference Courts will give effect to it. In *Berkley* v. *Thompson* (1884), 10 App. Cas. 45 at 49 it will be observed that the decision turned upon the absence of any indication of intention in the Act considered that the putative father residing abroad should be affected by it. He was "not brought by any special statute or legislation within the jurisdiction." If therefore the statute says that the Court shall have jurisdiction over one residing abroad, if service is effected in a special way, the Courts will give effect to it. The statute for the Courts is supreme (*In re King & Co.'s Trade-mark* (1892), 2 Ch. 462 at 483). We must look therefore to the statute itself to find "the area within which a statute is to operate and the persons against whom it is to operate" bearing in mind that

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> if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting. That is a rule based on international law by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory:
> *The Queen* v. *Jameson* (1896), 2 Q.B. 425 at 430.

The act we are concerned with, however, was not committed outside this Province; desertion occurred here.

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Is it clear from the wording and purview of the Act that it is not limited territorially? It should be so construed that "if it can be prevented no clause, sentence or word shall be superfluous, void or insignificant" (*The Queen* v. *The Bishop of Oxford* (1879), 48 L.J., Q.B. 609 at 620). And to arrive at the real meaning it is necessary to understand the aim, scope and object of the Act and "the intent of them that made it" (Maxwell on the Interpretation of Statutes, 7th Ed., p. 1). Wood, V.C., in *Cope* v. *Doherty* (1858), 27 L.J., Ch. 600 at 601 states the principle in this way:

> But I think that in construing any Act of the Legislature the actual verbal construction of the clause itself, if plain and simple, must govern the Court. If there is any degree of doubt or difficulty upon the wording of the section itself, one is entitled to look first at the circumstances attending the passing of the Act, next to the preamble, so far as it affords any indication as a key to the interpretation of it, and next, I may also say, to the whole purport and scope of the Act, to be collected from its various clauses, and beyond the question which may arise upon the construction of the clause itself which is in dispute.

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These are familiar canons of construction and may be enlisted in support of the respondent's case. The scope of the Act may be gathered from its subject-matter. It was passed to afford, as effectually as possible, relief to deserted wives. Desertion always involves removal by the offending party to a place usually distant. The further he withdraws the greater the desertion. He committed the offence within the magistrate's jurisdiction and it is in respect to that act that the proceedings were launched. By section 2 of the Act (R.S.B.C. 1924, Cap. 67) "magistrate" is defined as follows:

> "Magistrate," where the husband of a deserted or destitute wife resides within the Province, shall mean any stipendiary magistrate, police magistrate, or two justices of the peace having jurisdiction in the locality in which the husband resides, or in the locality in which the cause of complaint wholly or in part arose; and, where the husband resides without the Province, shall mean any stipendiary magistrate, police magistrate, or two justices of the peace having jurisdiction in the locality in which the wife resides, or in the locality in which the cause of complaint wholly or in part arose.

This, although an interpretation clause, may be looked at with at least as great assurance as a preamble might be regarded. It cannot be rejected as void or superfluous and unless meaningless it assigns to magistrates jurisdiction "when the husband

resides without the Province." Clearly the Legislature contemplated making provision for desertion not in a restricted, but in the popular sense. It was the "aim, scope and purpose" of the Act to reach deserters wherever found in respect to causes of complaint arising in this Province. Appropriate provision is made by section 3, subsection (3) for substituted service where it is made to appear "that prompt personal service of the summons cannot be effected." It is significant too that by section 9 (1) orders for the payment of money made under the Act may be registered in the Land Registry office forming a lien or charge on the lands, if any, of the husband, thus providing a means of realization where the delinquent husband absconds leaving property within the jurisdiction. This section discloses intention. It would be a serious defect if a wife deserted by a husband who leaves the country could not if he had property here secure a charge against it based upon an order. I share the view of the learned trial judge that the ear-marks of intention are not as clear and satisfactory as one would wish, but as Wood, V.C. said in *Cope* v. *Doherty, supra,* "if there is any degree of doubt or difficulty" we should look at the circumstances attending its enactment, and it would destroy the basic purpose of an Act dealing with the subject-matter of desertion generally involving withdrawal to parts near or far to restrict it in the way suggested.

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A further point was raised, *viz.,* that prohibition will lie because it was not shewn on the face of the proceedings that the magistrate had jurisdiction on the principle that only matters expressly alleged are within the jurisdiction of an inferior Court. True the proceedings do not shew that the deserted wife resided in North Vancouver within the jurisdiction of the magistrate or that the offence was committed there. The summons however bears the designation "County of Vancouver" and requires attendance in North Vancouver before the police magistrate in and for that city. In any event the forms given in the Schedule to the Act were followed and it cannot be said that where the statute authorizes the use of forms it is necessary to make additions thereto to disclose jurisdiction.

I would dismiss the appeal.

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McQUARRIE, J.A.: I agree that the appeal should be dismissed.

Appeal dismissed.

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Solicitors for appellant: *Macrae, Duncan & Clyne.*
Solicitor for respondent: *Alexander Henderson.*

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WHIELDON *ET AL.* v. MORRISON *ET AL.*

Practice—Discovery—Examination for—Separate claims against two sets of defendants—Examination confined to issues in which defendant examined is involved—Rule 370c.

WHIELDON *v.* MORRISON

The plaintiff sued four defendants for conspiracy in that they induced by threats two other defendants, namely M. and N. to break certain contracts. The defendants M. and N. were not charged as parties to the conspiracy but only with breach of contract. On the examination of N. for discovery he admitted the breach but refused to answer questions as to his reasons for breaking the contract. At the instance of the plaintiffs an order was made that N. must answer the questions.

Held, on appeal, reversing the decision of MCDONALD, J., that discovery is limited to that which is relevant to the matters in question between the applicant and the party examined, and does not extend to discovery relevant to matters in question between the applicant and other parties to the action.

Statement

APPEAL by defendants other than the Fraser Valley Milk Producers Association from the order of MCDONALD, J. of the 1st of February, 1934 (reported *ante*, p. 317), compelling the defendants Morrison and Norrish to answer certain questions put to them upon examination for discovery. The action is based upon an allegation that these defendants being under contract with the plaintiffs, broke the contract by reason of inducements by threats and otherwise of the other defendants. Upon the examination of Norrish for discovery he admitted breach of the contracts but refused to answer any questions as to his reasons for the breach. It was ordered that these defend-

ants attend for examination and answer the questions they had refused to answer.

The appeal was argued at Vancouver on the 6th, 7th and 8th of March, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Maitland, K.C., for appellants: The learned judge below took the wrong view of *Hopper* v. *Dunsmuir* (1903), 10 B.C. 23. On discovery you cannot go beyond the four walls of the pleadings: see *Bank of British Columbia* v. *Trapp* (1900), 7 B.C. 354. The *Trapp* case has come down to the present time. You can examine for discovery to the fullest extent on the issues raised in the pleadings: see *The Trustee of Blue Band Navigation Co.* v. *Price Waterhouse & Co* (1933), 47 B.C. 258 at 261.

J. A. MacInnes (*C. F. MacLean*, with him), for respondents: This examination is under rules 370e and 370t. The issues between the co-defendants are material to the plaintiff: see *Alexander* v. *Diamond et al.* (1882), 9 Pr. 274; *Whieldon* v. *Fraser Valley Milk Producers Association* (1933), 3 W.W.R. 377. An adverse party is subject to discovery and on examination you have the same limit within the pleadings as an adverse witness on the trial: see *Kennedy* v. *Suydam* (1915), 8 O.W.N. 65; *Molloy* v. *Kilby* (1880), 15 Ch. D. 162 at p. 164; *Bacon* v. *Campbell et al.* (1875), 6 Pr. 275; *Moore* v. *Boyd* (1881), 8 Pr. 413. Where there are co-defendants whose interests are adverse one can be examined by the other. It is the adverse of interest that creates the right to examine: see *McFarland* v. *McFarland* (1881), 9 Pr. 73; *Bradley* v. *Clarke* (1883), *ib.* 410; Holmested's Ontario Judicature Act, 4th Ed., 799; *Henderson* v. *Blain* (1891), 14 Pr. 308; *Bulst* v. *Currie* (1897), 33 C.L.J. 622; *Lindsay* v. *Imperial Steel and Wire Co.* (1909), 14 O.W.R. 240; *Kennedy* v. *Suydam* (1915), 8 O.W.N. 65; *Spokes* v. *Grosvenor Hotel Co.* (1897), 2 Q.B. 124; *Menzies* v. *McLeod* (1915), 34 O.L.R. 572 at p. 575; *Mack* v. *Dobie* (1892), 14 Pr. 465. Rules 343 and 354 were adopted from the English rules. He suggested that examination for discovery could not be used to find out whether an amendment was necessary, but see Holmested's Ontario Judicature Act, 4th Ed., p. 817.

Argument

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Argument

Maitland, in reply: He cannot go outside the issues pleaded: see *Welch* v. *McArthur* (1917), 1 W.W.R. 1343; *Winnipeg Granite &c. Co.* v. *Bennetto* (1911), 21 Man. L.R. 743 at p. 744. He cannot ask questions that do not involve the person examined: see *Fraleck* v. *Johnstone* (1920), 3 W.W.R. 805; Bray on Discovery, 58; *Shapiro* v. *Toronto Council K. of C.* (1926), 29 O.W.N. 416; *Shaw* v. *Union Trust Co. Limited* (1915), 35 O.L.R. 146; *Graydon* v. *Graydon* (1921), 51 O.L.R. 301; *Mexican Northern Power Co.* v. *Pearson Ltd.* (1914), 5 O.W.N. 648; *Playfair* v. *Cormack and Steele* (1913), 4 O.W.N. 817; *Hennessy* v. *Wright* (1888), 24 Q.B.D. 445; *Clarke* v. *Robinet* (1915), 8 O.W.N. 263.

Cur. adv. vult.

5th June, 1934.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The plaintiffs sued the defendants Clark Morrison, John MacKinnon, Ran Appleby, H. Conley and Matto Anderson for conspiracy for inducing the defendants Gibb Morrison and F. C. Norrish to break their contracts with the plaintiffs. The action was originally commenced without the last-mentioned defendants but subsequently those were added and the statement of claim was amended so as to set up the said cause of action, *viz.,* a contract to truck milk to Vancouver and for damages for breach therefor. This is the only cause of action alleged against the said Gibb Morrison and F. C. Norrish as shewn by a letter written by the plaintiffs' solicitors to the defendants' solicitors on the 13th of November, 1933, in which they say:

> The only claim which is being made against the defendants G. M. Morrison and F. C. Norrish is that set forth in paragraph (c1) of the plaintiffs' prayer for relief contained in the amended statement of claim herein.

That prayer deals exclusively with the plaintiffs' claim against those two defendants. The defendant Norrish was examined for discovery by the plaintiffs. He was asked as to the contract for hauling milk and said:

> I switched to another truck.
>
> And you have refused to allow them [the plaintiffs] to haul your milk further since that time? Yes.

Plaintiffs' counsel asked this question of the defendants' counsel:

You refuse to let the witness answer any questions as to his reasons for refusal?

Hutcheson: Yes.

MacLean: And as to conversations leading up to the signing of Exhibit 1? [This was relevant but was not complained of in the appeal.]

Hutcheson: Yes.

MacLean: And all matters alleged in the statement of claim exclusive of paragraphs 10-A, 10-B, and 10-C [prayer (c1) of the statement of claim]?

Hutcheson: Yes, . . .

A successful application was made to a Supreme Court judge to order the witness to answer, and from this order this appeal has been taken. The learned judge founded his judgment on *Hopper* v. *Dunsmuir* (1903), 10 B.C. 23. His conclusion was that this case settled the point between the parties. I think, with deference, he was in error.

The following question is propounded in Bray on Discovery, p. 57:

> Whether the discovery which may be had from a party is limited to that which is relevant to the matters in question between the applicant and the party or whether it extends to discovery relevant to matters in question between the applicant and another party to the action.

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This question is the very question we are asked to decide in this appeal. The meaning of "opposite party" is dealt with in *Molloy* v. *Kilby* (1880), 15 Ch. D. 162, where it was said that a co-defendant of the examiner was not an opposite party. In that case the discovery was asked for by one defendant from a co-defendant which was held not to be permissible. I think that case touches the real distinction between the English rule—Order XXXI., r. 1 and our rule 370c. In the case at Bar the parties are opposite parties and adverse only to the extent pleaded. At p. 59 Bray says:

> Here again, on the principle that a party is a witness as to matters which are not in question between himself and the applicant, it would seem that he cannot be required to give discovery which is relevant only to matters in question between the applicant and some other party to the action.

This language draws the distinction between a witness at trial and a party examined on discovery.

The authorities under our rule are not consistent. Some appear to shew that if the applicant and the party examined are on opposite sides of the record discovery within the pleadings must be given not necessarily confined to those direct issues

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between those parties, but on all the issues raised in the pleadings generally, while other authorities would confine discovery to those issues between the applicant and the party examined.

The latter is, I think, the reasonable and true reading of our rule and conforms to what was intended to be given by way of discovery. The answer of the defendant in this case would, I think, give the respondent the advantage of having answers relevant to the hearing of the case at trial, but which on discovery would not be answers of a party having "an adverse interest."

The following cases, I think, support that view: *Fraleck* v. *Johnstone* (1920), 3 W.W.R. 805, Walsh, J., in Chambers; an attack upon a sale made under a mortgage in which the defendants were the mortgagor, a purchaser, the sheriff and the bailiff. The action was against the two former for conspiracy to prevent bidding and against the other two for negligence in the conduct of the sale. It was held that the latter were not examinable as adverse parties under a similar rule in Alberta to ours. *Welch* v. *McArthur* (1917), 1 W.W.R. 1343, where it was held that where there was no issue between the plaintiff and one of the several defendants that defendant was not bound to make discovery. In *Shapiro* v. *Toronto Council K. of C.* (1926), 29 O.W.N. 416, Grant, J. in Chambers said:

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> The questions which the defendant Gallagher refused to answer were questions which could have no other object than to obtain information to support the claim of the plaintiffs against the Council—information not affecting the plaintiff's claim against the defendant Gallagher—and he should not be required to answer these questions.

The same is true here. The question asked could have no other purpose than to prove that the defendant had not been induced by his co-defendants to break his contract with the plaintiffs. The breach of the contract was material, but the cause of it was not, and was not an issue between the parties and himself. Many authorities were cited by respondents' counsel to shew that the questions were proper to be asked on discovery, but I do not find it necessary to canvass them here since I think they do not cover the case of distinct issues between plaintiffs and defendants such as are the ones here. I need only refer to the two cases in the Full Court of this Province—*Hop-*

per v. *Dunsmuir, supra,* and *Bank of British Columbia* v. *Trapp* (1900), 7 B.C. 354, in both of which the Court was of the opinion that the issues between the questioner and the questioned were also relevant to other questions between the parties. The Court therefore allowed the questions to be asked.

In this case the appeal should be allowed.

MARTIN, J.A.: This appeal raises for the first time in this Province the meaning of the expression "party adverse in interest" in the second paragraph of rule 370b (1):

> A party to an action or issue, whether plaintiff or defendant, may, without order, be orally examined before the trial touching the matters in question by any party adverse in interest, and may be compelled to attend and testify in the same manner, upon the same terms, and subject to the same rules of examination of a witness except as hereinafter provided.

And rule 370i (3) provides that:

> Any one examined orally under these Rules shall be subject to cross-examination and re-examination; and the examination, cross-examination, and re-examination shall be conducted as nearly as may be as at a trial.

And rule 370v further provides that:

> Where an infant is a party, the opposite party may examine the next friend or guardian of the infant, or, at his option, the infant, if he is competent, to give evidence.

This in effect shews that the same meaning is to be given to the expression "opposite party" as to "party adverse in interest," which latter is used also in rule 370c (1) as "adverse in interest to the corporation."

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Nearly 34 years ago it was held by the judgment of the old Full Court (affirming one of my own) in *Bank of B.C.* v. *Trapp* (1900), 7 B.C. 354, 357-8, given on old rule 703, as then lately amended, that:

> This rule imports an examination of a searching character, limited to the issues raised. It does not give the right to the person examining to go into questions of character and credit unless such evidence is directly in issue. This order is a transcript of the Ontario rules, and the decisions of Ontario Courts are a useful guide to us in interpreting them, as well as the object for which the rules were adopted.

Three years later the same Court further considered the same rule and its scope in *Hopper* v. *Dunsmuir* (1903), 10 B.C. 23, and Chief Justice HUNTER said, IRVING, J. concurring, pp. 26-7:

> It has been decided that the examination must be confined to matters which are relevant to the questions raised by the pleadings, that is, for example, that questions going only to the character or credit of the party

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examined are not permissible: *Mack* v. *Dobie* (1892), 14 Pr. 465; although no doubt a question, the answer to which might be relevant to the issue, cannot be left unanswered merely because the answer might tend to shake the credit of the party. In British Columbia the rules bearing on this question (703 and 712) were practically identical with those in force in Ontario until June, 1900, when the following proviso was tacked on to r. 703: "And such examination shall be in the nature of a cross-examination, limited, however, to the issues raised by the pleadings."

So far as I can see, this amendment really effected nothing, as it merely emphasizes the fact that the examination is to be a cross-examination, which was already provided for by r. 712, and interprets the expression "matters in question in the action" to mean "issues raised by the pleadings."

And the learned judge went on to say:

It is clear, on the one hand, that the decisions as to the latitude which may be allowed in the matter of administering interrogatories can throw little or no light on the question as to the latitude permissible in cross-examination, for, as already stated, cross-examination has no place in a system which provides only for interrogatories; and it is, I think, equally clear that in a cross-examination on the issues raised by the pleadings any question is permissible the answer to which may be relevant to the issues.

After the change in the Rules of 1906, I, in 1908, applied these views in *McInnes* v. *B.C. Electric Ry. Co.*, 13 B.C. 465, and it has ever since been followed without question, to my knowledge, and I have always regarded the said decisions in the *Trapp* and *Hopper* cases as being in complete accord (*cf. The Trustee of Blue Band Navigation Co.* v. *Price Waterhouse & Co.* (1933), 47 B.C. 258, 261) and indeed this was conceded during the present argument.

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What happened in the case at Bar was that two of the eight defendants, *viz.*, G. Morrison and F. Norrish, being the two present appellants, were being examined by the plaintiff for discovery on their pleadings as "parties adverse in interest," and they both refused to answer questions which were irrelevant to the issues on the particular cause of action for breach of contract alleged against them, and therefore were not in issue between the plaintiff and themselves but only in issue between the plaintiff and the other defendants on other distinct causes of action set up against such others, and therefore it is submitted that the appellants could not be, within the meaning of the rule, "parties adverse in interest" as regards issues whereon they were not in conflict with the examining party.

In support of the order appealed from, plaintiff's (respondent)

counsel submitted that it was warranted by subrule (3) above cited, as being a "cross-examination" to the fullest extent "conducted as nearly as may be as at a trial" and cited many authorities from Ontarian Courts, as to which it is to be observed that though, as was truly said in *Trapp's* case, *supra,* "the decisions of Ontario Courts are a useful guide to us in interpreting" rules of practice which we have taken from that Province, yet after such rules so impressed have become incorporated with ours, then their subsequent interpretation is a matter solely for the Courts of this Province, though always, of course, continuing to give respectful attention to the views of the Courts of origin, as they, doubtless, would to ours.

I have therefore examined carefully all the cases so cited with the result that none of them, when their distinctive circumstances are fully understood, is of assistance to the respondent, and only two of them require notice, *viz., Bradley* v. *Clarke* (1883), 9 Pr. 410, of which it is sufficient to say that it is based on the introduction of a third party and the "spirit of legislation," p. 416, that

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> the defendant in an action should have the same right against a third party that he has brought into the action against him, as if they were respectively plaintiff and defendant in an independent action.

In the second case, *Menzies* v. *McLeod* (1915), 34 O.L.R. 572, Chancellor Boyd held that one defendant could examine another where, p. 575, "there is a manifest adverse interest in one defendant as against another defendant," and he pointed out that:

> This testamentary action discloses really two sets of litigants who are adverse—those who seek to uphold the will and those who seek to invalidate it. No doubt as to which side McGuire is on; if the will stands, she gains $10,000; if it falls, she loses all. She might well have been made a co-plaintiff; her whole interest in the litigation is with the executor and in his success.

And in the statement of facts in the report, p. 573, it is said that the other defendants "would be entitled to larger shares of the estate in the event of an intestacy being declared" against the interests of the plaintiff and said defendant McGuire, the plaintiff seeking to establish the will to the detriment of her co-defendants, who sought to invalidate it for her and the plaintiff's undue influence over the testator.

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Under such unusual circumstances there is to my mind no doubt that the learned Chancellor took the correct view in holding that the defendants were parties "adverse in interest" within the rule (which principle pertains to defences between fellow-prisoners in criminal cases—*e.g., Reg.* v. *Burditt et al.* (1855), 6 Cox, C.C. 458), and, hence, with every respect, as that adverseness was disclosed by the pleadings I do not see the necessity for his proceeding to make further observations which do not appear to have so sound a basis, particularly in regard to the distinction between the "characteristic phrase . . . opposite party" in the English rule and "party adverse in interest" in the Ontario rule (and ours), and the more so because it either escaped the learned judge's notice that the phrase "opposite party" is in fact employed in the Ontario rule 332 (Holmested's Ontario Judicature Act, 4th Ed., 810) as it is in our identical rule 370v, *supra,* or else at the time of his judgment (9th November, 1915) that rule had not come into force, which may be the fact as it is noted as "new" in Holmested, *supra,* though the date of its "newness" is wanting. But whether the phrase was overlooked or came later, the same result is that it is now employed in the rules as being identical with "adverse in interest," as already noted.

I have not cited the English decisions because, as was held by the old Full Court in *Hopper's* case in the passage cited *supra,* that they are not of real assistance being based on a different "system" of discovery.

No decision in Ontario or elsewhere has been cited that throws any doubt upon the leading Ontario judgment of Street, J. in *Mack* v. *Dobie* (1892), 14 Pr. 465, which was adopted by our Full Court in *Trapp's* case, *supra,* p. 358 as holding that:

> Questions must be confined to matters raised by the pleadings, but a fair amount of latitude was to be allowed.

Appellant's counsel cited many cases and derives much support from *Fonseca* v. *Jones* (1909), 19 Man. L.R. 334; *Winnipeg Granite &c. Co.* v. *Bennetto* (1911), 21 Man. L.R. 743; *Playfair* v. *Cormack* (1913), 4 O.W.N. 817; *Clarke* v. *Robinet* (1915), 8 O.W.N. 263; *Welch* v. *McArthur* (1917), 1 W.W.R. 1343; *Fraleck* v. *Johnstone* (1920), 3 W.W.R. 805; *Graydon*

v. *Graydon* (1921), 51 O.L.R. 301; and *Shapiro* v. *Toronto Council K. of C.* (1926), 29 O.W.N. 416; which speak for themselves, and I shall only particularly refer to *Clarke's* case because it was apparently overlooked by Chancellor Boyd in his decision in *Menzies'* case, *supra,* later in the same year, though in it Middleton, J., said, in refusing to allow three defendants to examine a fourth co-defendant:

> Discovery is in aid of the case as pleaded, and there is no right to seek information for the purpose of founding some other complaint.

This is also in effect an affirmation of *Mack* v. *Dobie, supra.*

It follows, in my opinion, as the result of all the authorities cited that the appellants are not compelled to answer the questions they refused to answer because as regards them they are not "adverse in interest," and the questions are directed to "the founding of some other complaint" than that which is in issue between the plaintiff and them alone. While it is true that by rule 370i the cross-examination on discovery "shall be conducted as nearly as may be as at a trial" yet that rule only defines the "position" in which the examinee is placed as being the same as if he were a witness at a trial (*Chambers* v. *Jaffray* (1906), 12 O.L.R. 377, 382) while the scope of the examination as distinguished from its "conduct" is restricted by rule 370b (1) to issues upon which the party examined is "adverse in interest" to the party examining: in other words, such an adverse party can be examined on discovery in the usual forensic way, but only *qua* a party in particular on his own issues and not *qua* a witness in general on those of another party.

MARTIN, J.A.

The appeal therefore should be allowed.

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

MCPHILLIPS, J.A.

MACDONALD, J.A.: The plaintiffs' claim against one set of defendants is that they maliciously and wrongfully and with intent to injure the plaintiffs procured and induced by threats another set of defendants Norrish and Morrison to break certain contracts, and to refuse to perform them. That is a charge of conspiracy. By paragraphs 10-A, 10-B and 10-C of the statement of claim breach of contract only is charged against the two defendants Norrish and Morrison. It is charged that

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they agreed to ship their milk through the plaintiffs exclusively for a certain consideration and wrongfully refused to carry it out; in other words breach of contract from which loss ensued. These two defendants are not charged as parties to the conspiracy referred to. What is claimed against them is "Damages for breach of the contracts referred to in paragraph 10-A hereof." To remove uncertainty it was stipulated by letter between the solicitors that the only claim against Morrison and Norrish is that set forth in the pleadings referring to them. It is now sought under rule 370c to examine Norrish and Morrison for discovery not only on the contract to which they were parties and the breach thereof, but also as to any knowledge they may have on matters which may assist the plaintiffs in establishing conspiracy against the other defendants, about which we would assume from the pleadings they have no knowledge—at all events they were not implicated in it—and with which they have no concern. The point was put clearly by plaintiffs' counsel when he claimed the right to examine Morrison outside the ambit of paragraphs 10-A, 10-B and 10-C.

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In my opinion there is no such right under rule 370c. Norrish and Morrison may be examined only on matters in respect to which they are adverse in interest to the plaintiffs, and that can only be determined by the pleadings. I have examined the cases referred to by Mr. *MacInnes* and none of them fits the facts of this case. In *Menzies* v. *McLeod* (1915), 34 O.L.R. 572, strongly relied on, a decision by a single judge, Boyd, C. said at p. 576:

> In probate actions especially the Court exercises a wider latitude in ordering discovery than in other actions not *in rem*, owing to the nature of the issues raised.

I am not prepared to agree with him in saying that "adverse interest" may mean "pecuniary interest, or any other substantial interest in the subject-matter of the litigation," unless the learned judge means as defined by the pleadings in accordance with the decisions in our own Courts. I think it manifestly unjust and bad practice likely to lead to abuse to permit the plaintiffs to go on a fishing expedition, so to speak, by questioning a defendant in respect to matters with which, as shewn by

the pleadings, he has no concern, and thus perhaps secure evidence from one not fitted to give it, which may be useful in establishing a case against another set of defendants. There is no adversity of interest between the plaintiff and these defendants on the subject-matter of conspiracy as the pleadings reveal, and it is only in respect to matters where that adverse interest exists that they may be questioned.

I would allow the appeal.

Appeal allowed.

Solicitors for appellants: *Maitland, Maitland, Remnant & Hutcheson.*

Solicitors for respondents: *Fleishman & MacLean.*

DUNHAM v. BRADNER.

Bastardy—Children of Unmarried Parents Act—Evidence of corroboration—Acknowledgment of paternity—R.S.B.C. 1924, Cap. 34, Sec. 8—B.C. Stats. 1926-27, Cap. 9, Sec. 8.

The appellant was charged under the Children of Unmarried Parents Act on complaint preferred by the respondent with being the father of a child of the respondent born out of wedlock. The child was born on August 29th, 1929. The respondent's sister testified that in April, 1929, she knew her sister was pregnant and she went with her sister to Seattle with the object of getting rid of the baby, but just before going to Seattle there was a conversation on the street between herself, the appellant and respondent. They spoke of the trip to Seattle and the appellant gave respondent the money with which to go there. No operation was performed on the respondent in Seattle. On June 6th, 1933, upon receipt of a letter from respondent's solicitors, charging him with being the father of the child, the appellant arranged to meet the respondent, expressed willingness to pay bills for an operation on the child, offered to pay the mother's travelling expenses East, and expressed a desire to have the child adopted by someone. The complaint was made on the 19th of June, 1933, and the magistrate made an order requiring the appellant to pay $5 per week for maintenance of the child. On a case stated the decision of the magistrate was affirmed.

Held, on appeal, affirming the decision of MCDONALD, J., that there was sufficient corroboration of the respondent's evidence as required by section 14 of said Act as amended by B.C. Stats. 1926-27, Cap. 9, Sec. 8.

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Held, further, that there was evidence of the doing within one year of an act on the part of the appellant which afforded evidence of acknowledgment of paternity as required by section 8 of said Act, and there was jurisdiction to make the order.

APPEAL by defendant from the decision of MCDONALD, J. on appeal by way of case stated by *George R. McQueen*, Esquire, deputy police magistrate for Vancouver, on a complaint made by Annie Dunham for an order against George E. Bradner pursuant to the provisions of the Children of Unmarried Parents Act, alleging that a child was born to her out of wedlock and that he was the father of the child. Argued in Chambers at Vancouver on the 7th and 9th of February, 1934. The facts are sufficiently set out in the judgment of the learned judge below.

Carmichael, for appellant.

D. J. McAlpine, for respondent.

12th February, 1934.

MCDONALD, J.: This is a case stated by *George R. McQueen*, Esquire, deputy police magistrate for the City of Vancouver, arising under the Children of Unmarried Parents Act, R.S.B.C. 1924, Cap. 34.

The complaint was laid in June, 1933, in respect of a child born to the respondent on the 29th of August, 1929, and the magistrate made an order requiring the appellant to pay $5 per week toward the maintenance of the child.

MCDONALD, J.

It is contended in the first place that the magistrate had no jurisdiction by reason of the fact that (one year having elapsed since the birth of the child) the putative father had not within one year prior to the laying of the complaint done "any act which affords evidence of acknowledgment of paternity." The "acts" relied upon are these: That the appellant on or about the 6th of June, 1933, upon receipt of a letter from respondent's solicitors charging him with being the father of the child and suggesting an interview, telephoned the respondent and arranged to meet her. At this meeting the magistrate finds that the following took place:

The respondent told the appellant that she really could not meet the bills and that the child had to have an operation. The appellant said he was willing to pay for these things; that he would pay for the operation for

the child and any other small amounts in connection with it; that he did not see why he should be dragged into Court; that he did not see why, after all these years, it should be made public. The appellant offered to pay her expenses East and he wanted (as the respondent says he always wanted) to have the child adopted.

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The appellant did not offer any evidence. Does what the appellant did and said as recited above constitute "any act which affords evidence of acknowledgment of paternity"? Are his conduct and words, resulting from the solicitors' letter, merely colourless and as consistent with innocent friendship as with guilt? Or do they afford evidence of acknowledgment of paternity? Upon a prior hearing of the matter I was of opinion that they did not afford such evidence but upon hearing further argument and upon further consideration I think I was wrong in that view. The charge having been made against him, I think that what he did and said afforded the evidence required.

The further contention, and the one very strongly pressed, is that the mother's evidence as to the paternity of her child is not "corroborated by some other material evidence." This question is one of very great difficulty. The leading case now upon the subject appears to be *Thomas* v. *Jones* (1920), 90 L.J., K.B. 49; (1921), 1 K.B. 22, in some of its aspects similar to the present case. The only corroborative evidence is this: That the respondent's sister states that prior to April, 1929, when she, with the respondent, was about to go to Seattle, on the appellant's suggestion, there was a conversation among them during which the appellant stated he had made arrangements for the respondent to go to Seattle and that the appellant during that conversation gave the respondent the money to go to Seattle "to get rid of the baby." The strong point made by counsel for the appellant is that this evidence as to the payment of money cannot be looked at as evidence corroborating the evidence of the respondent for the reason that the respondent herself denied both in examination-in-chief and in cross-examination that she had at any time received any money from the appellant. Upon consideration and although I appreciate the danger of making an order in such a case as this, and that the appellant must be given the benefit of the doubt, yet I think that even though the

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case may be put as strongly as it is put nevertheless the magistrate might hold that he could not for some reason known to himself accept the evidence of the respondent as to the payment of money but could accept the evidence of her sister upon that question. That evidence of the sister, if accepted, I think would constitute material evidence corroborating the mother's evidence as to the paternity of her child. The question submitted by the magistrate I would, therefore, answer in the affirmative.

From this decision the defendant appealed. The appeal was argued at Vancouver on the 8th and 9th of March, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Carmichael, for appellant: Section 8 of Cap. 9, B.C. Stats. 1926-27, requires that the mother's evidence as to the paternity of the child be corroborated by some other material evidence. His meeting the complainant in the B.C. Electric station is not corroboration: see *Bartley* v. *Gall* (1925), 3 D.L.R. 585; *Munro* v. *Krause* (1931), 4 D.L.R. 120. The most recent case on the question is *Jones* v. *Thomas* (1934), 1 K.B. 323. The child was born in August, 1929, and these proceedings were commenced in June, 1933. There was no evidence of any act on the part of the appellant affording evidence of acknowledgment of paternity during this period, and under section 8 (*b*) of the Act no affiliation order should be made.

Argument

D. J. McAlpine, for respondent: The magistrate made a finding of fact. The evidence of the sister is corroboration, and further acts of intimacy may be taken as corroboration: see *Cole* v. *Manning* (1877), 46 L.J., M.C. 175; *Hill* v. *Denmark* (1895), 59 J.P. 345; *Reffell* v. *Morton* (1906), 70 J.P. 347; *Harvey* v. *Anning* (1902), 67 J.P. 73; *Mash* v. *Darley* (1914), 3 K.B. 1226 at p. 1230; *Thomas* v. *Jones* (1921), 1 K.B. 22; *Re Yeo and Benner* (1926), 29 O.W.N. 486; *Chadwick* v. *McCrie* (1924), 56 O.L.R. 143; *Bartley* v. *Gall* (1925), 2 W.W.R. 669. He acknowledged paternity within one year prior to these proceedings.

J. W. deB. Farris, K.C., in reply, referred to *Steele* v.

Regem (1924), 4 D.L.R. 175; *Munro* v. *Krause* (1931), 4 D.L.R. 120 at p. 125, and *Rex* v. *Lovell* (1923), 17 Cr. App. R. 163 at p. 168.

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MACDONALD, C.J.B.C.: I think the magistrate and the learned trial judge came to the right conclusion.

There was ample corroboration in the Seattle incident witnessed by respondent's sister on the street and deposed to by her; and in the interview of appellant with respondent at the B.C. Electric depot after receipt of a solicitor's letter accusing him; and the incident at the hospital in Vancouver, when he promised her sister to see about the hospital bills incurred by the respondent on her confinement there. These incidents, particularly the Seattle and the hospital ones above mentioned, bring the case within chapter 34 of the Revised Statutes of this Province and are sufficient to justify the finding of the magistrate that by his acts the appellant acknowledged the paternity of the child within the time limited by said Act.

I would therefore dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: Two questions were raised on this appeal from the judgment of Mr. Justice D. A. McDONALD dismissing, on a case stated under section 13 of the Children of Unmarried Parents Act, Cap. 34, R.S.B.C. 1924, an appeal from an affiliation order made, under sections 7-9 thereof, by a deputy police magistrate against the appellant.

The first objection is that there was no corroboration of the complainant's evidence as to paternity by "some other material evidence" as required by section 14. Many cases were cited on the point, including *Cole* v. *Manning* (1877), 46 L.J., M.C. 175; *Hill* v. *Denmark* (1895), 59 J.P. 345; *Harvey* v. *Anning* (1902), 67 J.P. 73; *Reffell* v. *Morton* (1906), 70 J.P. 347; *Mash* v. *Darley* (1914), 3 K.B. 1226; *Thomas* v. *Jones* (1921), 1 K.B. 22; *Steele* v. *Regem* (1924), 4 D.L.R. 175, 180; *Chadwick* v. *McCrie* (1924), 56 O.L.R. 143; *Bartley* v. *Gall* (1925), 2 W.W.R. 669; *Re Wicks and Armstrong* (1928), 2 D.L.R. 210; *Munro* v. *Krause* (1931), 4 D.L.R. 120; and

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Jones v. *Thomas* (1933), 103 L.J., K.B. 113; (1934), 1 K.B. 323; and it is not necessary to say more than that, after a careful consideration of them there is, to my mind, no doubt that, apart from anything else, the conversation deposed to by the complainant's sister, Mary Nichols, as taking place between the appellant and herself at the Belleview Hospital when the complainant was an inmate thereof shortly after the birth of her child, whereat the appellant said he "would see about" paying the bills for her confinement there, sufficiently under the circumstances supplies "some other material evidence" as required by said section. Such being the case, then, as Lord Justice Scrutton said in *Thomas* v. *Jones, supra,* p. 39:

> The question therefore is not what opinion we should have come to if we had heard that evidence. That is quite immaterial. The question is, was there any evidence on which the justices could reasonably come to the conclusion that there was corroboration? If there was such evidence, they are the persons to say whether they are satisfied, and the fact that we should not have been satisfied is immaterial, because we are not the persons to be satisfied; it is the justices with their local knowledge who are to be satisfied.

MARTIN, J.A.

That truly learned Lord Justice differed on the facts in that case, but not upon that statement of the law, which he went on to say was not disputed, and added, pp. 39-40:

> If there is evidence on which the justices could have come to that view, it does not matter that the Court would have come to a different view. It is similar to the question as to when there is evidence for the jury; if there is evidence it is for the jury to decide, and not for the judge.

The second question arises on section 8 (*b*) requiring the complaint to be made

> Within one year after the doing of any act on the part of the putative father which affords evidence of acknowledgment of paternity.

It was submitted that no "act" was "done" to save the statute and that the facts that after complainant's threat, by lawyer's letter of legal proceedings, he invited her to meet him and promised to pay her expenses occasioned by her child, and for an operation for it, and for its adoption, and for the complainant's journey to the East to arrange for such adoption, were not sufficient evidence of "acts" to satisfy the statute. But this objection cannot prevail, because as Lord Moulton said in the House of Lords in a case of posthumous illegitimate paternity, *Lloyd* v. *Powell Duffryn Steam Coal Company, Limited* (1914), A.C. 733 at 751-2:

It was urged at the Bar that although the acts of the deceased might be put in evidence, his words might not. I fail to understand the distinction. Speaking is as much an act as doing.

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It follows that the appeal should be dismissed.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: I am of the opinion that Mr. Justice D. A. McDONALD arrived at a proper conclusion in sustaining the decision of the magistrate. In my view upon the facts and the law applicable thereto the appellant failed to displace the finding of the magistrate of liability upon him, under the provisions of the Children of Unmarried Parents Act (R.S.B.C. 1924, Cap. 34). I am in complete agreement with the learned judge that the evidence of the sister of the complainant establishes corroborative testimony, but, in my opinion, over and above that, the history of the case as set forth in the case stated, is so conclusive that it is plain to demonstration that parentage has been established and hence it follows that there is liability under the provisions of the statute. I would dismiss the appeal, upholding the decision of the magistrate as set forth in the case stated and affirming the judgment of the learned judge who answered the question submitted by the magistrate by an affirmative.

The appeal therefore, in my view, should be dismissed.

MACDONALD, J.A.

MACDONALD, J.A.: Appeal on a case stated by the magistrate from an order under the Children of Unmarried Parents Act (R.S.B.C. 1924, Cap. 34, Sec. 8; B.C. Stats. 1926-27, Cap. 9, Sec. 9), affirmed by Mr. Justice D. A. McDONALD, for the payment by an alleged putative father of a weekly sum for the maintenance of a child born out of wedlock. Over one year elapsed (section 8 (*a*)) since the birth of the child and section 8 (*b*) provides that:

> No affiliation order shall be made under a complaint under this Act unless the complaint is made within the lifetime of the putative father and:—
>
> (b) Within one year after the doing of any act on the part of the putative father which affords evidence of acknowledgment of paternity.

The facts relied upon as "evidence of acknowledgment" by an "act" brings the appellant within the latter part of the section. He, upon receipt of a solicitor's letter charging him with being the father of the child, of his own volition, arranged to

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meet the respondent; expressed willingness to pay bills for an operation on the child; offered to pay the mother's travelling expenses East and expressed a desire to have the child adopted by some one, all proof of an "act" or acts affording "evidence of acknowledgment of paternity."

A further question arises as to corroboration. Section 8 of Cap. 9, B.C. Stats. 1926-27 provides that:

> No affiliation order shall be made upon the complaint of the mother unless her evidence as to the paternity of her child is corroborated by some other material evidence.

The alleged corroborative evidence was given by respondent's sister. It is summarized as follows:

> (a) That she is the sister of the respondent and that she and the respondent were living with their mother in the year 1928, and that she saw the appellant very often during that time; that she had heard the respondent and the appellant speak of their engagement and that she had seen them frequently together; that their conduct towards each other was very intimate, and she saw them frequently kissing each other;
>
> (b) That she knew in April, 1929, that her sister, the respondent, was pregnant; that she went with her sister to Seattle on the occasion referred to in the respondent's evidence; that just before they went to Seattle there was a conversation on the street between herself, the respondent and the appellant; that they were speaking about the trip to Seattle and the appellant then and there gave the respondent the money with which to go to Seattle; that the object of the trip was, she states, to get rid of the baby;
>
> (c) That there was no operation performed on the respondent in Seattle; that she knew the respondent gave birth to a child in the Belleview Hospital and that one day while the respondent was in the hospital the appellant wanted the witness to meet him and go to the hospital to see the respondent; the witness told the appellant that the baby had been born and again before the respondent left the hospital the witness spoke to the appellant and told him that the respondent was leaving the hospital shortly and that the bills would have to be paid; that the respondent replied that he would see about that.

Parts of this, viewed independently, is not material. Hearing them speak of their engagement and intimate conduct incidental thereto is of no value. It is referable to the engagement. Conversation with appellant about the trip to Seattle and the fact that he gave respondent money does not afford corroborative evidence of paternity unless one part of it was assented to by appellant, *viz.*, that the object of the trip was to procure an operation. The sister puts it thus—"the object of the trip, she [*i.e.*, the mother] states was to get rid of the baby." It is not

shewn that this was known by or communicated to the appellant. The direct corroborative evidence is found in the second paragraph, *viz.*, that appellant, after the child was born, was told by respondent's sister "that the bills would have to be paid" and he replied he would see about that. He did not in fact do so as far as the case stated shews but the reasonable interpretation is that he promised to assume the obligation. It might of course be merely the expression of an act of benevolence. We must, however, view the evidence as a whole. Isolated facts insufficient in themselves may in relation to others become significant. In another part of the case, not outlined above, it is shewn by the sister's evidence that when respondent and the sister went to Seattle they found "that arrangements had been made by the appellant" at the hospital.

We are seeking corroboration of the respondent's evidence on the question of paternity (not proof) and the magistrate had a right, particularly in the absence of any explanation from appellant, to find that these isolated acts, viewed as a whole, were more probably consistent with the fact that appellant was responsible for respondent's condition rather than with disinterested or benevolent motives on his part. I do not think he is precluded from making reasonable deductions from appellant's general conduct including failure to testify although I do not think it necessary to rely on the latter feature. If compelled to do so I would say that conduct is material and failure to explain where the necessity to do so arises is conduct.

Principles may be deduced from *Thomas* v. *Jones* (1921), 1 K.B. 22, a case of the same character. Bankes, L.J., quoting from the leading case of *Rex* v. *Baskerville* (1916), 2 K.B. 658, said at pp. 32-3:

"We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute. The language of the statute, 'implicates the accused,' compendiously incorporates the test applicable at common law in the rule of practice. The nature of the corroboration will necessarily vary according

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to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shews or tends to shew that the story of the accomplice that the accused committed the crime is true, not merely that the crime had been committed, but that it was committed by the accused. The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime."

He speaks of what is not corroborative evidence at p. 33:

First of all, statements which are equally consistent with the story of the appellant as with the story of the respondent cannot properly be accepted as corroborative evidence.

The phrase is "equally consistent" and the qualifying word is important. The facts outlined might point in an innocent direction but that possibility has not equal weight with the other probability.

Speaking of the cumulative effect of evidence, to which I alluded, he said at p. 34:

MACDONALD, J.A.

Mr. Artemus Jones complains that the Lord Chief Justice treated the cumulative effect of the evidence as something which he was entitled to consider, and he says that the notion that justices may add together a number of immaterial circumstances, and in the result arrive at the conclusion that those circumstances may together amount to sufficient corroboration, is very dangerous. The Lord Chief Justice does not suggest that this is permissible. What I understand him to refer to is this, that a single fact taken by itself may be colourless, but that fact when looked at in connection with other facts in the case may be highly significant; and he says that, taking each of the above facts by itself, he might have come to the conclusion that it was colourless, yet taking all these facts together, one in relation to the other in his opinion they bear the significance which each would not do if it were a single isolated fact apart from the others.

This is applicable to the facts outlined. While Scrutton, L.J. wrote a dissenting judgment he differed in his view of the facts rather than as to the law applicable. The following extract from his judgment, at p. 39, is applicable to cases of this character:

The question therefore is not what opinion we should have come to if we had heard that evidence. That is quite immaterial. The question is, was there any evidence on which the justices could reasonably come to the conclusion that there was corroboration? If there was such evidence, they are the persons to say whether they are satisfied, and the fact that we should not have been satisfied is immaterial, because we are not the persons to be satisfied; it is the justices with their local knowledge who are to be satisfied.

That being the law, and I do not think there is any dispute as to it, the next question is, What is meant by "corroboration in some material particular," that is, in a material fact? The vital fact to be proved in a bastardy case is that a child had been born to the applicant as the result of sexual connection with the man. From the nature of the case it is almost inevitable that there never will be any direct corroboration of sexual connection. The evidence in corroboration must always be circumstantial evidence of the main fact, that is to say, evidence from which it may be inferred that the main fact happened. For instance, the fact that the man has had connection with the woman and a child has resulted is sometimes inferred from evidence of previous affection, that they had been seen together showing affection to each other. Sometimes it is inferred from the fact of subsequent affection—that the man and woman are seen together showing signs of affection. Sometimes it is inferred from the fact that the man has done acts which may be treated as recognizing responsibility for the child as his child, statements that he will provide for the child, payments for the child, all facts from which as a matter of inference and probability it is more probable that the intercourse did take place than not. I quite agree with what Bankes L.J. has said, that if the fact is such that the probabilities are equal one way or the other, an inference cannot legitimately be drawn from it one way or the other. It must shew, even only slightly, more probability that intercourse took place than not, and if there is that balance of probability it is not for the Court to say that it is so slight that it would not have acted upon it.

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And Atkin, L.J. at p. 45, after properly pointing out the need for caution:

It must be evidence which tends to prove that the man is the father of the complainant's child; in other words, it must be evidence implicating the man, evidence which makes it more probable than not that the respondent to the summons is the father of the child.

In *Mash* v. *Darley* (1914), 3 K.B. 1226 at 1231 Buckley, L.J. said:

Corroborative evidence, I conceive, may be found either in admissions by the man or inferences properly drawn from the conduct of the man.

And again, agreeing with Scrutton, L.J.:

It is not for us to say what weight ought to be given to that evidence. All that we have to look at is to see whether there was evidence. If there was evidence, it is not for us but for the justices to determine whether or not that was evidence which satisfied them.

Of course if the evidence cannot reasonably be regarded as materially corroborative an error of the justices in so regarding it would be corrected.

Cole v. *Manning* (1877), 46 L.J., M.C. 175 where the case was remitted to the magistrate to consider whether or not certain conduct afforded evidence of corroboration and *Hill* v.

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Denmark (1895), 59 J.P. 345 may be referred to as going far in this direction.

Applying the principles referred to in *Thomas* v. *Jones*, *supra*, I have no doubt that the finding of the magistrate on this point should not be disturbed.

I would dismiss the appeal.

MCQUARRIE, J.A.: I would dismiss the appeal. In my opinion there was corroboration of the respondent's evidence and I think the appellant by his conduct and the promises made by him brought himself within the Act on which the proceedings were based and that there was a clear acknowledgment by the appellant of the paternity of the child.

Appeal dismissed.

Solicitors for appellant: *Craig, Ladner & Co.*

Solicitors for respondent: *McAlpine & McAlpine.*

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THE ROYAL TRUST CO. v. CORPORATION OF OAK BAY

THE ROYAL TRUST COMPANY v. THE CORPORATION OF THE DISTRICT OF OAK BAY.

Corporation — Debentures — British Columbia municipality—Payable at various places at maturity in Canadian money or sterling equivalent at certain rate—English money at premium at date of payment—Right to demand payment in English money.

The plaintiff was the holder of twenty debentures of the defendant corporation of $500 each. The debentures provided, *inter alia*, that "The Corporation of the District of Oak Bay hereby promises to pay to the holder of this debenture the sum of $500 of lawful money of the Dominion of Canada, or £102 14s. 10d., its sterling equivalent, at the rate of $4.86 2/3 to the one pound sterling, on the 13th day of November, 1933, at any branch of the Bank of British North America, either at Victoria, B.C., Toronto, Montreal, the City of New York, U.S.A., or London, England, at the holder's option." On the due date the plaintiff presented the debentures for payment at the Bank of Montreal in Victoria (successors of the Bank of British North America) and demanded payment in English money of £102 14s. 10d. in respect of each debenture, or its equivalent in Canadian money at the rate of exchange prevailing on the date of maturity of the debentures. This was refused and the bank's offer to pay $500 in Canadian money in respect of each debenture was refused. In an action claiming said sum in English money or its equivalent at the rate of exchange at the due

date of the debentures, the defendant paid into Court with the statement of defence $500 for each debenture.

Held, that the purpose of inserting the words "its sterling equivalent at the rate of $4.86 2/3 to the one pound sterling" was to definitely fix the rate of exchange, and the plaintiff was entitled to judgment for $10,000 only with costs up to the time of payment into Court, and the defendant was entitled to costs thereafter.

ACTION to recover the sum due at maturity of twenty $500 debentures of the defendant corporation in English money or its equivalent at the rate of exchange at the due date of the debentures. Tried by ROBERTSON, J. at Victoria on the 16th of January, 1934.

Statement

C. L. Harrison, for plaintiff.

Lawson, K.C., for defendant.

17th February, 1934.

ROBERTSON, J.: The plaintiff is the holder of twenty debentures of the defendant which, with the exception of the serial numbers, are the same, as follows:

No. 51. BRITISH COLUMBIA $500.00 or
THE CORPORATION OF THE DISTRICT OF £102 14s. 10d.
OAK BAY
DEBENTURE
Local Improvement
Loan $68,002.80.

Issued under the provisions of the "Oak Bay Act, 1910," "The Oak Bay Act, 1910, Amendment Act, 1911," and "Local Improvement By-Law No. 49" of the Corporation of the District of Oak Bay.

Judgment

The Corporation of the District of Oak Bay hereby promises to pay to the holder of this debenture the sum of FIVE HUNDRED DOLLARS ($500) of lawful money of the Dominion of Canada, or £102 14s. 10d., its sterling equivalent, at the rate of $4.86 2/3 to the one pound sterling, on the 13th day of November, 1933, at any branch of the Bank of British North America, either at Victoria, B.C., Toronto, Montreal, the City of New York, U.S.A., or London, England, at the holder's option.

This Debenture shall bear interest at the rate of Six per centum per annum from the date hereof, payable half-yearly at the Bank of British North America at any of the places aforesaid, on the 13th day of May and the 13th day of November, in each year, until repayment of the principal sum, on presentation and surrender of the interest coupons hereto annexed as they respectively mature.

The Corporation of the District of Oak Bay hereby guarantees to the holder of this Debenture the payment of the above principal and interest moneys at the times and in the manner hereinbefore stipulated.

In Witness Whereof the Corporation of the District of Oak Bay has caused these presents to be signed by the Reeve and Clerk of the Corpora-

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tion and sealed with the Corporate Seal of the Corporation of the District of Oak Bay, this 13th day of November, 1913.

(Seal—Municipality of Oak Bay)

F. M. Rattenbury,
Reeve of the Corporation of the District of Oak Bay.
F. M. Clayton,
Clerk of the Corporation of the District of Oak Bay.

The plaintiff duly presented the said debentures for payment on their due date, *viz.*, 13th November, 1933, at the Bank of Montreal, Victoria, B.C. (the successor to the Bank of British North America), and demanded payment in English money of £102 14s. 10d. in respect of each debenture or, in all the sum of £2,054 16s. 8d., or its equivalent in Canadian money at the rate of exchange on the due date, which demand was refused by the bank; but at the same time the bank offered to pay plaintiff $500 in Canadian money in respect of each debenture which, in turn, the plaintiff refused. Of course, the reason the plaintiff adopted this course was that on the due date English money was at a premium.

Judgment

On the 22nd of November, 1933, the plaintiff issued a writ claiming the said sum in English money, or its equivalent, at the rate of exchange at the date the writ was issued, but at the trial, plaintiff's counsel conceded, as appears to be the law, that if the plaintiff's contentions were upheld it would only be entitled to payment at the rate of exchange at the due date of the debentures. See *In re British American Continental Bank, Ld.* (1922), 2 Ch. 589.

The defendant paid into Court, with the statement of defence, $10,000 in full of the principal of the said debentures, being $500 for each of the twenty debentures or the equivalent of £2,054 16s. 8d. at the rate of $4.86 2/3 mentioned in the debentures, and $24.64 being interest thereon from the due date, to the date of payment in, and submits that that pays the plaintiff in full, and, alternatively, if it be held that the said debentures contain a term to pay more than $500, the same were *ultra vires* or null and void to the extent of the said excess.

The plaintiff's counsel asked leave to lead evidence as to the meaning of the words, over which the difficulty arises, contained in the debentures. I allowed the plaintiff to adduce evidence to

shew that the words in the contract were used in a different sense to their ordinary meaning on the principle laid down in *Brown* v. *Byrne* (1854), 23 L.J., Q.B. 313 at p. 316, where it is said:

> Neither in the construction of a contract among merchants, tradesmen, or others will the evidence be excluded, because the words are in their ordinary meaning unambiguous; for the principle of admission is, that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. What words more plain than "a thousand," "a week," "a day"? Yet the cases are familiar in which "a thousand" has been held to mean twelve hundred;—"a week," a week only during the theatrical season—"a day," a working day. In such cases, the evidence neither adds to, nor qualifies, nor contradicts the written contract—it only ascertains it by expounding the language.

The evidence of the plaintiff's only witness on this point was of no value as he admitted the question I have to decide here had never arisen, to his knowledge, until after the presentation of the debentures in question and therefore he only gave his interpretation of the meaning of the words which is not admissible. See *Lewis* v. *Marshall* (1844), 7 Man. & G. 729 at 744; and *Tucker* v. *Linger* (1882), 21 Ch. D. 18 at 34.

The plaintiff's counsel, in support of his argument, referred to the words in the upper right hand corner of the debenture, *viz.*, "$500 or £102 14s. 10d." and defendant's counsel, in support of his argument, refers to the words "Local improvement loan $68,002.80 issued under the provisions of the 'Oak Bay Act, 1910,' 'The Oak Bay Act, 1910, Amendment Act, 1911' and 'Local Improvement Bill No. 49 of the Corporation of the District of Oak Bay.'" I can only consider these "descriptive words" if the provisions of the contract are open to more than one construction, for, Lord Russell of Killowen in his speech in *Feist* v. *Societe Intercommunale Belge D'Electricite* (1933), 50 T.L.R. 143 at 145, dealing with a similar argument in that case, said:

Judgment

> But upon the document itself are to be found certain figures and words of description to which attention must be called. The letterpress on the front of the document is enclosed in an ornamental rectangular border, and in each of the two top corners are to be found the symbol and figures "£100." Inside the border and above clause 1 of the bond are the following words, figures, and symbols:—
>
> "Thirty-Five Year Sinking Fund 5½% Sterling Bond.
> Due September 1st, 1963." . . .
>
> I mention these details because in the Courts below, upon the question

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of construction, some reliance was placed upon the fact that they were to be found inscribed upon the face of the document. It must, however, be borne in mind that they form no part of the contractual provisions of the bond; they merely purport to be descriptive of the bonds. If upon a consideration of the contractual provisions, those provisions are open to more than one construction, descriptive words appearing elsewhere in the document may well assist in deciding which of the alternative constructions represents the intention of the parties; indeed they may be decisive; but if the contractual provisions reveal only one construction, outside descriptive words will not be competent to alter that construction. If they cannot be reconciled with it they become misdescriptive.

The plaintiff submits that the true construction of the contract is that he was to have the option of receiving either $500 or £102 14s. 10d. in respect of each debenture, and that the words "at the rate of $4.86 2/3 to the one pound sterling" is "a method of ascertaining how many pounds the dollars represent on the face of the document," and that there is nothing in the debentures which fixes any rate. The defendant's submission is that the words and figures "£102 14s. 10d., its sterling equivalent," were inserted "for the purpose of shewing how much $500 would amount to in English money at the rate of $4.86 2/3 to the pound" and the words "at the rate $4.86 2/3 to the one pound sterling" were inserted to "fix once for all and regulate the obligation of the defendant to the amount authorized by the by-law," and that "the essential term of the contract was that, at all times the fixed rate of exchange was $4.86 2/3." It further submits that the plaintiff had the option to require payment at any one of the places mentioned therein, and when it demanded payment at Victoria, it had exercised its option to take payment in British Columbia and thereupon its only right was to payment in Canadian currency.

Judgment

Dealing with the last point, it will be noticed that the debentures are payable at various places in Canada, New York, U.S.A., or London, England, at the holder's option and the obligation is to pay in lawful money of the Dominion of Canada, that is Canadian dollars, or pounds sterling, that is English pounds.

While, then, the plaintiff's right was to demand payment at any one of the said places, either in Canadian dollars, or in English pounds, and while the defendant might satisfy the demand by delivering the exact amount in Canadian dollars or

English pounds, as the case might be, yet the defendant was not bound to do this but was entitled to pay in the currency of the country where payment was demanded, *e.g.*, if the plaintiff had demanded payment in English pounds in any one of the places for payments in Canada, or in New York, the defendant was entitled to satisfy such demand by the payment, if demanded in Canada, of an amount in Canadian dollars, or if demanded in New York of an amount in American dollars, which at the rate of exchange at the due date would have bought the number of English pounds to which the plaintiff was entitled under the terms of the contract, and the existing circumstances with regard to the rate of exchange on the due date.

In *Broken Hill Proprietary Co.* v. *Latham* (1933), Ch. 373 at 391, Maugham, J. said:

> A contract to pay so many pounds, whether a British or Australian contract, was not in 1920, and still less is now, a contract to pay in gold, but is *prima facie* a contract to pay money according to the currency of the country where payment has to be made.

Maugham, J.'s decision was reversed by the Court of Appeal (*idem*, p. 393). The *Broken Hill* case, *supra*, was overruled by the House of Lords in *Adelaide Electric Supply Company, Limited* v. *Prudential Assurance Company, Limited* (1933), 50 T.L.R. 147, in which, in his speech, Lord Wright, with whom Lord Atkin agreed, said at p. 156, that the law as laid down by Maugham, J., *supra*, was correctly stated. In the same case Lord Russell of Killowen said at p. 153:

Judgment

> If this be the correct view, this problem would resolve itself into a case of the company becoming indebted from time to time in amounts payable in Australia, and expressed in terms of units of account common to Australia and England. The question then is, How can the company discharge that indebtedness? The answer can, I think, only be in whatever currency is legal tender in the place in which the indebtedness is dischargeable. It is not a question what amount of coins or other currency the debtor has contracted to pay. A debt is not incurred in terms of currency, but in terms of units of account. It is a question of discharging a debt incurred in terms of units of account common to more than one country, in the currency which is legal tender in the particular country in which the debt has to be paid.

See also *Anderson* v. *Equitable Assurance Society of the United States* (1926), 134 L.T. 557, at pp. 558-562, and 566.

If it is necessary to sue in such a case, no matter in what foreign currency an obligation is payable in Canada, any judg-

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ment obtained in our Courts must be for an amount in the currency of this country. See the judgment of Vaughan Williams, L.J., in *Manners* v. *Pearson & Son* (1898), 1 Ch. 581 at p. 592, where he says:

> Now I will first consider the question irrespective of the form of action. It seems clear that, in an action in whatever form in the English Courts for the recovery of a debt payable in foreign currency, the amount of the English judgment or order must be expressed in English currency, and that, unless the relative values of the respective currencies are fixed by statute or some authority binding the English Courts or by the agreement of the litigants, the amount of the English judgment or order must be based on the quantity of English sterling which one would have to pay here to obtain in the market the amount of the debt payable in foreign currency delivered at the appointed place of payment—*i.e.*, the amount payable according to the rate of exchange.

See also *Di Ferdinando* v. *Simon Smits & Co.* (1920), 3 K.B. 409 at p. 415, where Scrutton, L.J. said:

> An English Court however cannot give judgment in foreign currency, there being no power to enforce such a judgment.

Judgment

Turning now to the other points, and assuming for the moment that the plaintiff had the option to demand, and be paid, the same number of pounds as mentioned in the debenture, it is difficult to see any reason for adding the words "its sterling equivalent at the rate of $4.86 2/3 to the one pound," for in such a case the rate of exchange would have no bearing upon the matter. The defendant's obligation would be to deliver the pounds or sufficient Canadian currency to purchase the said number of pounds at the rate of exchange on the due date and it would make no difference to the plaintiff what the rate of exchange was.

Again the words "its sterling equivalent" indicate that the amount of English money was to be of the same value as the amount in Canadian dollars and the addition of the words and figures "at the rate of $4.86 2/3" makes it clearer that the intention was that the English money should be the equivalent of 500 Canadian dollars. If the words and figures had been "£102 14s. 10d., its sterling equivalent," without more, it would have followed that the rate was $4.86 2/3 because £102 14s. 10d. at $4.86 2/3 to the pound equals $500 and, further, because the par value of the English pound in Canadian currency is $4.86 2/3.

Now at the due date of the debentures, the amount required, in Canadian dollars, to buy £102 14s. 10d. was considerably greater than $500, so that if the plaintiff's contention were correct, it would not be receiving the equivalent of $500 but a larger sum. These words cannot be disregarded for the rule is clear that, generally speaking, in construing written contracts effect should be given to the ordinary and natural meaning of every word therein, unless it appears that such words have been left in by mistake. See Halsbury's Laws of England, Vol. 7, 2nd Ed., p. 328, sec. 475.

The defendant would have to make banking arrangements, before the due date, at all the places where the debentures were payable for the payment of the same. It could not know beforehand where the debentures would be presented, and, further, how much would be required at any one place of payment but if it knew the total of the indebtedness to be met it would be easy for the defendant to pay the amount to the Bank of Montreal which would then arrange for payment at its various branches mentioned in the debentures. If the rate of exchange is not fixed in the debentures difficulties might arise on the due date by reason of fluctuations in exchange. In the case at Bar the plaintiff claimed $705.68 in addition to the face value of his debentures in Canadian dollars, *viz.*, $10,000, and as his holdings were just over a seventh of the total of the debenture issue, if all the debentures had been presented and payment demanded in English pounds on the due date, the defendant would have had to pay, on the assumption that the plaintiff's claim is correct, nearly $5,000 more than the face value of all the debentures. This appreciation in exchange might only take place after the defendant had made its banking arrangements and perhaps just before, or on the due date. It can be easily seen what a difficult financial problem would arise in such a case, especially where the borrower is a municipal corporation as is the defendant.

Judgment

The reason for making London one of the places of payment, and the debentures payable in English pounds, was to make the same attractive to English investors and for their convenience.

ROBERTSON, J.

1934

Feb. 17.

THE ROYAL TRUST CO. v. CORPORATION OF OAK BAY

Lord Hanworth, M.R. says at p. 398 in the *Broken Hill* case, *supra*:

It seems to me that this debenture is intended to be a commercial document, and to be understood by, and to be attractive to, commercial men, and thus the option of payment in London was inserted, in addition to the opening of a London registry, in order to attract investors upon the London market. . . .

But there is another consideration which has weight with me, and is in accord with the observations of Bowen, L.J. made in *Jacobs* v. *Credit Lyonnais* [(1884)], 12 Q.B.D. 589, 601 in reference to a contract that is partly to be performed in one place and partly in another. He says: "In such a case the only certain guide is to be found in applying sound ideas of business, convenience, and sense to the language of the contract itself, with a view to discovering from it the true intention of the parties."

Judgment

Now, in view of what I have said, and applying this "guide" to the case at Bar, I have come to the conclusion that the purpose of inserting the words under discussion was to fix the rate of exchange. Under these circumstances the English investor would never be in doubt as to what sum he would get on the maturity of the debentures, namely, the exact sum he loaned, and the defendant would know exactly what he had to pay, namely, the exact sum it borrowed.

The plaintiff is entitled to judgment for $10,000, together with costs up to the time of payment into Court and the defendant is entitled to costs thereafter.

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COX v. WHIELDON

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Land—Agreement for sale—Vendor's failure to register title—Rescission of agreement—Return of payments made—R.S.B.C. 1924, Cap. 127, Sec. 27.

Under agreement for sale the defendant purchased a farm from the plaintiff in the District of New Westminster on the 29th of November, 1930. The defendant took his cattle and effects on to the farm in March, 1931, and remained in possession until September, 1932. During this time he paid $1,300 on account of the purchase price of $15,000. He had two full crop years, made improvements in levelling land, filling ravines with roadway improvement and fencing. From time to time the defendant applied to the plaintiff to register his title so that he could register the agreement for sale but the plaintiff put him off with excuses for not registering, and finally the defendant left the premises on the 1st of September, 1932, and gave written notice of rescission on the 20th of September following. The plaintiff brought action for

$1,937 interest due under the agreement for sale on September 3rd, 1932, and the defendant counterclaimed for rescission of the agreement, for repayment of the $1,300, costs of moving on and off the farm, and cost of improvements in levelling lands and fencing. The plaintiff counterclaimed to the counterclaim for use and occupation. The plaintiff's action was dismissed, the agreement was rescinded, and the plaintiff was ordered to repay the $1,300 paid on account of the purchase price and the defendant's expenses going in and out of possession, with cost of improvements.

Held, on appeal, varying the decision of MORRISON, C.J.S.C. (MACDONALD, J.A. would allow the appeal), that the judgment for rescission and return of purchase-money and interest be sustained, but that the judgment for cost of going in and out of possession and for improvements be set aside.

Held, further, that as the defendant was admitted to possession and after repeated demands was refused that to which he was entitled by law, he is not liable for use and occupation.

APPEAL by plaintiff from the decisions of MORRISON, C.J.S.C. of the 12th of September and 21st of December, 1933, in an action to recover interest due by virtue of an agreement for sale and purchase of the north-west quarter of section 36 in township 20 of the District of New Westminster, dated the 27th of November, 1930. The defendant took his cattle and effects on to the farm in March, 1931, and remained there until September, 1932. During this time he paid $1,300 on account of the purchase price. He had two full crop years and he made certain improvements in levelling land and filling ravines, roadway improvement and new fencing. The defendant, by letter of his solicitor of the 20th of September, 1932, repudiated and rescinded the said agreement for sale of the 29th of November, 1930, and demanded the return of the $1,300 paid on account of the purchase price, on the ground that although the purchaser demanded that the vendor shew and register a good title in the vendor to the lands he had failed to shew or register any title whatever, and was unable to do so. The defendant counterclaimed for the return of the $1,300, for the expense in going in and out of possession of the lands and for the value of the improvements made upon the land while in possession. The plaintiff counterclaimed as against the counterclaim for rental for use and occupation of said lands. The action was dismissed and judgment was given for the defendant for the return of

Statement

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$1,300 paid on the purchase price with interest, for $336.70 being expenses incurred in going in and out of possession of said lands, and $236 for improvements made upon the lands while in possession.

The appeal was argued at Vancouver on the 29th of March to the 4th of April, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Locke, for appellant: The learned judge improperly rescinded the agreement for sale. The defendant should not have received the purchase-money back. He is not entitled to expenses of moving on and off the premises or payment for improvements. We are not opposing the judgment dismissing the plaintiff's action for interest. The plaintiff's failure to comply with section 27 of the Land Registry Act gives no right to rescind or receive back purchase-money. The defendant got two years' crops while in possession. He abandoned the property on September 3rd, 1932, and on September 20th following he notified plaintiff's solicitors of repudiation. He had no right to rescind. It is not a case of defective title but a case of failure to register his title: see *Frost* v. *Welch* (1923), 32 B.C. 535; *Clergue* v. *Vivian & Co.* (1909), 41 S.C.R. 607 at p. 616; *Yates* v. *Gardiner* (1851), 20 L.J., Ex. 327. If he has no right to rescind he cannot recover the purchase-money. He took the property and raised and sold crops before repudiating: see *Rogerson & Moss* v. *Cosh* (1917), 24 B.C. 367; *Wallace* v. *Hesslein* (1898), 29 S.C.R. 171. He was in default in interest and in payment of taxes and waived the right to rescind when he abandoned the property: see *Cornwall* v. *Henson* (1899), 68 L.J., Ch. 749, and on appeal (1900), 69 L.J., Ch. 581; *Sanderson* v. *Morton* (1923), 54 O.L.R. 479. If found he has a right to rescind it would only be on terms, and he should pay occupation rent. Improvements cannot be recovered in any case. On the rights of the parties in the event of rescission see *Erlanger* v. *New Sombrero Phosphate Company* (1878), 3 App. Cas. 1218; *Simmers* v. *Erb* (1874), 21 Gr. 289; *Kilborn* v. *Workman* (1862), 9 Gr. 255. We are entitled to two full crop years, and occupation rent.

Argument

J. A. MacInnes (*C. F. MacLean,* with him), for respondent:

We have the statutory provisions here and the circumstances are different from England, so the English authorities do not apply. Registration is a prime essential, otherwise no legal title. It is the duty of a vendor to register on the sale of land by instalments. The vendor never had a registrable title up to the time of the action. Cox refused to give title in September, 1932; the purchaser then had the right to repudiate. Affirmation of the repudiation was made: see Dart on Vendors and Purchasers, 8th Ed., Vol. I., p. 434. That the defendant is entitled to rescission through defect in title see Halsbury's Laws of England, Vol. 25, p. 402, sec. 690; Williams on Vendor and Purchaser, 3rd Ed., Vol. I., p. 156 (n.). He was induced to move in by the undertaking that Cox would give title: see *Engell* v. *Fitch* (1869), L.R. 4 Q.B. 659; *Flureau* v. *Thornhill* (1776), 2 W. Bl. 1078. The defect was still in existence at the time of the trial: see *Bagley* v. *B.C. Southern Ry. Co.* (1917), 24 B.C. 400. The vendor is not entitled to occupation rent: see Dart on Vendors and Purchasers, 8th Ed., Vol. II., p. 852; Williams on Vendor and Purchaser, 3rd Ed., Vol. II., p. 1018; McCaul on Vendors and Purchasers, 2nd Ed., pp. 16, 60 and 124. The purchaser has not precluded himself from insisting on good title by conduct: see *Knatchbull* v. *Grueber* (1815), 1 Madd. 153 at p. 170; (1817), 3 Mer. 124; *Wright* v. *Colls* (1849), 8 C.B. 150.

Argument

Locke, in reply, referred to *Thompson* v. *McDonald and Wilson* (1914), 20 B.C. 223; *McDonnell* v. *McClymont* (1915), 22 B.C. 1; *Halkett* v. *Dudley (Earl)*, (1907), 1 Ch. 590.

Cur. adv. vult.

5th June, 1934.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The plaintiff sued for instalments of purchase-money on a sale made by him to the defendant of a farm. The defendant paid $1,300 on account and agreed to pay the balance in instalments. He entered upon the farm with the plaintiff's assent and remained there one and one-half years, taking off two crops. He frequently applied to the plaintiff to register his title so that he (the defendant) might register his agreement to purchase, which he could not register until the

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plaintiff's title had been registered. Plaintiff was required to do this under the Land Registry Act under a section passed for the protection of purchasers. The defendant was put off from time to time with promises to register and with excuses for not registering, when, finally abandoning all hope of obtaining what he was entitled to, he left the place and gave notice of rescission. This notice was given shortly after the action was commenced.

The defendant counterclaimed for the rescission of the agreement; for the repayment of the $1,300 and interest, and for the costs of moving on and off the farm and for certain other items mentioned in the counterclaim. He also in reply to plaintiff's counterclaim against the defendant's counterclaim set up other items. It was argued and not denied that plaintiff's counterclaim against defendant's counterclaim was justifiable pleading. A claim for these should have been in his counterclaim. The plaintiff did not move to rectify the pleading and the trial proceeded with it on the record without objection. It must therefore be confined to a reply merely.

There was a reference and the registrar made his finding and a motion for judgment came on before the trial judge who ordered that the agreement should be set aside; that the $1,300 should be repaid with interest and that certain items mentioned in defendant's counterclaim and in the said reply to plaintiff's counterclaim be in the main allowed as found by the registrar. He, however, refused to allow the plaintiff's counterclaim for use and occupation which the registrar had fixed at $1,275.

MACDONALD, C.J.B.C.

The judgment for rescission and return of purchase-money and interest should be sustained and the rest set aside. The defendant having been admitted to possession and having been refused after repeated demands that to which he was entitled by law, and having made due efforts to obtain redress from the plaintiff and failed, is not liable for use and occupation. *Winterbottom* v. *Ingham* (1845), 7 Q.B. 611; Dart on Vendors & Purchasers, 8th Ed., Vol. I., p. 852.

I would vary the judgment accordingly.

MARTIN, J.A.: This is an action (raising important questions) to recover various payments of interest due on the balance

MARTIN, J.A.

of the principal sum owing on the sale of a farm by the plaintiff-appellant to defendant-respondent on the 29th of November, 1930, by agreement for sale of that date, for $15,000 payable by instalments, whereunder the purchaser, defendant, was entitled to possession of the farm which he took in the following March and retained till the 3rd of September the next year, 1932, on which day this writ was issued, and on the 20th of September the defendant by letter "repudiated and rescinded" the contract and demanded the return of the principal moneys that he had paid thereunder amounting to $1,300, which demand the plaintiff refused to comply with. When the case came on for trial, on the 12th of September, 1933, the plaintiff's counsel formally admitted that he could not sustain the action saying to the Court (after correcting obvious reporter's errors):

Read: If your Lordship pleases, the plaintiff's claim is for interest [due on] an agreement for sale of certain lands on Nicomen Island and I am satisfied, in view of the fact that the plaintiff did not have a registered title, although he had the documents of title in his possession which he could have registered, the plaintiff cannot succeed in obtaining that interest, although if he had registered them he could have a claim, and I would ask your Lordship to defer the question of costs and that they be reserved until the counterclaim has been settled.

MARTIN, J.A.

Fleishman: No assent. [*Quære*, "dissent"?] Then I am going to proceed on the counterclaim now.

This was done, and after hearing much evidence in support of the counterclaim a reference to the registrar was directed and judgment finally given on 21st December, 1933, dismissing the action, rescinding the contract, and ordering plaintiff to repay the said principal payments of $1,300, with interest thereon amounting to $188.26, and also to pay two sums of $336.70, and $236 as damages for expenses in moving in and out of possession and for the value of improvements made upon the farm during its occupation.

In the notice of appeal the whole judgment is appealed from but no argument was even submitted against its primary direction that the plaintiff's action should be dismissed, and so to that extent it stands in any event.

Then as regards the first direction given on the counterclaim, that the contract be rescinded, it should, in my opinion, also stand under the circumstances, because to put it briefly, it

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appears beyond question that both before and after the defendant had taken possession he repeatedly requested the plaintiff to register his title pursuant to section 27 of the Land Registry Act, Cap. 127, R.S.B.C. 1924, which the plaintiff neglected or refused to do as indeed he admits in his letter of the 15th of July, 1932, about six weeks before the defendant vacated. That section declares that:

> 27. It shall be the duty of any person selling or conveying land, or who enters into an agreement, sub-agreement, or assignment of an agreement for the sale of land, whereby the purchase price is payable by instalments or at a future time, to register his own title, in order that any person to whom the land or any part thereof is conveyed, and any person claiming under the agreement, sub-agreement, or assignment, may be able to register his title; and so long as the failure of any person to comply with this section continues, no action shall be brought by the person so failing to register upon any covenant in such agreement or sub-agreement.

This section, but without the final clause, first appeared substantially in the Land Registry Act Amendment Act, 1914, Cap. 43, Sec. 28 (4), and after being amended in 1916, Cap. 32, Sec. 17 (5), was recast in its present form substantially, and with the final clause identically, by section 31 of the Land Registry Act of 1921, Cap. 26. It is a matter of common knowledge that the object of the original section was to remedy the many notorious frauds and injustices that had been perpetrated upon innocent purchasers of land by dishonest or impecunious vendors selling on time by agreement for sale whereby the purchase price was payable by instalments, the result frequently being that the purchaser after duly paying the instalments and interest found that the vendor could not give a clear or any title to the property, and so the new and salutary statutory duty was imposed upon the vendor, for the present and future protection of the purchaser, of registering his title, which under our present land registry system means that the vendor must and can only acquire an indefeasible title which fully safeguards all concerned. The enactment is remedial in its nature and is peculiarly one, which by section 23 (6) of the Interpretation Act, Cap. 1, R.S.B.C. 1924, should receive "such fair, large and liberal interpretation as will best ensure the attainment of the object of the Act."

MARTIN, J.A.

The learned judge below took the view, as I understand his observations, that the section empowered the purchaser (defendant) to call immediately upon the vendor to register his title and thereby obtain an indefeasible one, and that if he neglected within a reasonable time to do so then that breach of statutory duty entitled the purchaser to repudiate and rescind, and after a careful study of the section, and of section 25 which should be read with it, I am of the same opinion. It is to be remembered, as already noted, that the duty to register the title was alone originally declared, and from it the purchaser acquired the right of repudiation and rescission only, which he could exercise at his option, but by the addition of the final clause in 1921 he was afforded another and distinct protection in that the vendor was prohibited from bringing any action while in default of his duty to register, and it was, doubtless, because of this prohibition, though not so stated, that the plaintiff's counsel admitted, as aforesaid, that he could not sustain this action.

MARTIN, J.A.

In the present case it was proved, as found by the trial judge, that repeated requests were made, as already noted, to the plaintiff to complete his title and he made repeated promises to do so, which he failed to keep, thus putting the defendant off from his earlier exercise of his said statutory right to such registration, and the plaintiff must be taken to have known that his persistent disregard of his statutory duty after several reasonable opportunities to comply with it would eventually expose him to that notice of repudiation and rescission which he finally received, after his definite refusal on the 15th of July, 1932, and the title still stands unregistered though the plaintiff admitted in said letter that the reason for not doing so was because of "taxes outstanding," a considerable portion of which were payable before the contract, and continued thereafter to be the subject of negotiation for reduction between the plaintiff and other owners and the Government, for dyking assessments. There is nothing in the section which requires a purchaser to take any particular form of action to assert his right to registration and "he is entitled to take advantage of such rights of repudiation as the law gives him"—*Armstrong* v. *Sparling and*

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Kennedy (1925), 19 Sask. L.R. 227, 230, and here he took the usual and simplest course by repudiating and rescinding the contract for defective title, so far as he could, and later asking the Court for a declaration of the validity of the rescission—*Lee* v. *Soames* (1888), 36 W.R. 884—as in the ordinary case of a vendor having it in his power to make a good title and yet refusing to do so. So long ago as 1899 I held in *Townend* v. *Graham*, 6 B.C. 539, based on leading Canadian authorities therein cited, that in an open contract payable by instalments, as Chancellor Boyd said in *Cameron* v. *Carter* (1885), 9 Ont. 426, 431,

> the rule has often been recognized in this Court, that when the price is payable by instalments the purchaser has a right to have a reference as to title, and to have title manifested before he makes a single payment.

And the Court of Appeal in Alberta has pronounced the same rule, *e.g.*, *The Universal Land Security Co., Ltd.* v. *Jackson et al.* (1917), 11 Alta. L.R. 483.

The difference between the formalities of conducting contracts of sale in England and Canada must be borne in mind in construing and applying the English cases, as was emphasized at p. 542, and this was recognized in *Wallace* v. *Hesslein* (1898), 29 S.C.R. 171, by the Supreme Court of Canada, *per* Sir Henry Strong, C.J., at p. 174:

MARTIN, J.A.

> It was well observed by the learned counsel for the respondents that in this country sales of lands are not in practice carried out in the formal way in which such contracts are completed in England.

In *Rogerson & Cosh* v. *Moss* (1917), 24 B.C. 367, we held that if the title were "capable of being perfected" (p. 372) the right of repudiation was conditional upon the giving of a reasonable time to cure the defect in title, and our brother MCPHILLIPS, GALLIHER, J.A. concurring, said, p. 373:

> In general statement the law may be said to be that all that the vendor of land must shew is that he can give a good title at the time fixed for completion (see *Boehm* v. *Wood* (1820), 1 J. & W. 419, 421), but it being demonstrated before that time that the vendor is devoid of title or not enabled to effectuate title that then the purchaser may repudiate.

It is to be noted that the former section 17 of 1916 corresponding to present section 27 was not in question.

Now in the case at Bar it was "demonstrated," and repeatedly, that the vendor was "not enabled to effectuate title" in

accordance with his statutory duty, which imposes an unconditional obligation to register his title, and therefore the reason for his default in doing so is immaterial, and consequently the purchaser could rightfully repudiate. The nature and effect of that repudiation are correctly stated in Halsbury's Laws of England, Vol. 25, p. 404, sec. 694, thus:

> Rightful repudiation by the purchaser is available as a defence to an action by the vendor for specific performance, and in this aspect it depends on the doctrine of mutuality in the contract; but it appears also to operate as a rescission of the contract at law, so as to entitle the purchaser to maintain an action for a declaration of rescission and the return of the deposit, and to be available as a defence to the vendor's action for breach of contract on non-completion at the proper time.

That this repudiation is equivalent to rescission is supported by the leading case of *Hartt* v. *Wishard Langan Co., Ltd.* (1908), 18 Man. L.R. 376, C.A., wherein a very strong Court considered several important questions upon rescission for want of title, and while different opinions were expressed on some of them, yet, as is correctly said in McCaul's Remedies of Vendors and Purchasers, 2nd Ed., 170:

> It will be observed that all the learned judges seem agreed that if, after abstract or its equivalent has been delivered, the purchaser discovers real or material defects in the title, that he has an immediate right, not merely to repudiate, but to rescind the contract.

See pp. 381, 383, 391-2, 398, 405 and 408 of the report which justify that statement: that view indeed is in accordance with the earlier unanimous judgment of the Full Court of that Province in *Clark* v. *Everett* (1884), 1 Man. L.R. 229 wherein it was said, p. 230:

> It is a well settled doctrine that when a purchaser finds that the vendor has no title, he can at once rescind the contract, and is not bound to wait until the vendor has acquired the title to a property not belonging to him.

In my opinion the plaintiff after his failure to register his title upon request, after reasonable notice, finally put himself under our land registration system in no better position as regards the purchaser than if he had no title at all, and thereupon he was brought within the scope of the decision of the Supreme Court of Canada in *Harris* v. *Robinson* (1892), 21 S.C.R. 390 at p. 402, where it was said:

> The authorities, however, are clear that when the vendor has no title whatever to the property he assumes to sell when he enters into the agree-

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ment, as distinguished from cases in which he has some, though an imperfect, title, that the purchaser may in the first case peremptorily put an end to the bargain and is not bound to give that reasonable notice which it is considered proper to require from him when the title is merely imperfect.

And after approving the judgment of Kekewich, J., in *Lee* v. *Soames, supra,* it proceeds (403):

> It is further to be remarked that, as appears from the judgment of Mr. Justice Kekewich in the case just quoted from, it is only in cases where there has been no unreasonable delay in making out a title that a vendor is entitled to reasonable notice of rescission. It is impossible to say that the respondent here has shewn that he is free from the imputation of unreasonable delay, for down to the time of bringing his action he had wholly failed in taking any active steps to remove the defect in the title, or even to produce the contract (if he had any) which constituted his own title.

This recognizes the purchaser's right of rescission, and on the facts is most appropriate to the present case wherein the vendor's conduct has been very dilatory, he seemingly taking the mistaken view that he could indefinitely put off his statutory duty to register his title because of negotiations he had with the Government to obtain a reduction of the taxes, or because the purchaser would not fulfil his obligations to him, and there is no statement in plaintiff's evidence that he could not raise the money to pay the taxes himself, or even that he had attempted to do so, which however, if it be the fact, would be no answer to the statute which aims at the prompt clarifying, for the purchaser's protection, of just such complications. It was said by the Supreme Court in *Ball* v. *Gutschenritter* (1925), S.C.R. 68, 75, that "the rights of parties to dealings in lands must be determined on the footing that . . . knowledge [of statutes and orders in council affecting land titles] exists."

MARTIN, J.A.

That the Court may itself rescind, or affirm a rescission already made, upon due application by the purchaser after rightful repudiation (which puts an end to the contract, *per* Lamont, J., in *Gunne* v. *Consolidated Land, Etc., Co.* (1916), 33 W.L.R. 716) is to my mind beyond question, and it has been repeatedly and unanimously so held, *e.g.*, by the Full Court of New Brunswick in *Scott* v. *Garnett* (1853), 7 N.B.R. 624, 628; by the Appellate Court of Alberta in *Innis* v. *Costello et al.* (1916), 11 Alta. L.R. 109, 118-9: (1917), 1 W.W.R. 1135; *The Uni-*

versal Land Security Co., Ltd. v. *Jackson et al.* (1917), 11 Alta. L.R. 483; 1 W.W.R. 1352 (a counterclaim for rescission, p. 489); *Smith* v. *Gilbert* (1921), 17 Alta. L.R. 129; 3 W.W.R. 849; *Armstrong* v. *Sparling and Kennedy* (1925), 19 Sask. L.R. (C.A.) 227, 231, 235, 238; and *Schellenberger* v. *McPherson* (1908), 12 O.W.R. 26, 30; and it is to be noted that the Court declined in the *Innis* case, p. 119, to follow the decision of a single judge in England, Pickford, J., in *Halkett* v. *Dudley (Earl)* (1907), 1 Ch. 590, which is, as pointed out in McCaul's Remedies, *supra,* p. 170, in conflict with *Hartt's* case, *supra,* and has been the occasion of much criticism, not only as an *obiter dictum,* which it is, but as an unwarranted departure from earlier authorities—*vide* Williams on Vendor and Purchaser, 3rd Ed., *supra,* Vol. I., pp. 156-7; Vol. II., pp. 1012-3; and Halsbury's Laws of England, Vol. 25, p. 404, note (*s*), cited at said p. 119 of *Innis's* case, and I agree that we should follow the express decisions of the Appellate Courts of this country upon the question, and the more so because the *Halkett* case has not yet been considered on this point by the Court of Appeal in England.

MARTIN, J.A.

In arriving at this view I have in mind the observations of my brother McPhillips on one aspect of *Halkett's* case in our said judgment in *Rogerson's* case at p. 373, but I did not participate in them because the question of the nature or extent of repudiation did not arise, and we were all agreed that the learned judge below had properly found that whatever the purchaser's right of repudiation might have been, he had waived it by his dilatory and other conduct, and so to that extent we applied *Halkett's* case as being beyond question, which accounts for the fact that most of the existing authorities on repudiation and rescission were not even cited, and there have been many since then.

By way of precaution, I add that it has not been necessary to consider the effect, upon the statutory duty to register, of the clause in the contract that "time is to be considered the essence of this agreement" because the parties "did not insist on a literal compliance with this term of the contract"—*Harris's* case,

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supra, 398, and *cf. Berenik* v. *Sheldon Farms, Ltd.* (1925), 20 Sask. L.R. 86, 94.

In coming to this conclusion I have not overlooked our decision in *Frost* v. *Welch* (1923), 32 B.C. 535, but no real assistance can be derived therefrom because it was decided on its particular involved facts, and the trial judge, whose conclusion merely was affirmed by this Court, did not proceed upon or even mention any provisions of the Land Registry Act but founded his judgment, as I understand it, upon the crucial fact (p. 537) that the vendor

> should have been afforded an opportunity of making title, and a reasonable time afforded for that purpose.

And he concludes (p. 538):

> In 1922, when this action was commenced, the plaintiffs could not simply bring an action and seek to recover the moneys paid under the facts existing in connection with this transaction.

And our Chief Justice, who alone thought it necessary to refer to the former similar section 28 (5) of 1914, said, p. 540:

> They [plaintiffs] are not claiming this [rescission] on the ground that the defendant had failed to register his title, but on the ground that he had no title at all.

MARTIN, J.A.

That excludes the present question.

As to *McDonnell* v. *McClymont* (1915), 22 B.C. 1, a decision of a single judge, W. A. MACDONALD, J., on the original section 28 of 1914, I am, with all due respect, unable to adopt its reasoning which overlooks, I think, what are, in my opinion, the clear objects of the section and the additional statutory right it confers upon purchasers apart from the contract, though like any other similar right it may be waived—Williams on Vendor and Purchaser, *supra*, 177, which, however, has, beyond question, not occurred in the facts at Bar—*cf.* also *Knatchbull* v. *Grueber* (1815), 1 Madd. 153, 170; affirmed (1817), 3 Mer. 124, 146-7; *Harris* v. *Robinson* (1892), 21 S.C.R. 390; *Wallace* v. *Hesslein* (1898), 29 S.C.R. 171; *Townend* v. *Graham* (1899), 6 B.C. 539; *Rankin* v. *Sterling* (1902), 3 O.L.R. 646; *Halkett* v. *Dudley* (*Earl*) (1907), 1 Ch. 590; *Rogerson & Moss* v. *Cosh* (1917), 24 B.C. 367; *Armstrong* v. *Sparling and Kennedy* (1925), 19 Sask. L.R. 227; *Lobel* v. *Williams* (1915), 25 Man. L.R. 161; *McKay* v. *Prohar and Paine* (1925), 20

Sask. L.R. 8; and Armour on Titles, 4th Ed., 130-1 and cases there cited.

It follows that the directions in the judgment ordering rescission and repayment with interest should stand, which leaves the question of damages for consideration, as to which it need only be said that no case, under present circumstances, was cited to support such a claim where the purchaser elects to rescind, as was held by our old Full Court in *Smith et al.* v. *Mitchell* (1894), 3 B.C. 450, wherein the cases are reviewed and the conclusion unanimously reached that, as McCreight, J. said, pp. 461-2, "the judgment [is] wrong in giving both damages and rescission"; and *cf.* Crease and Drake, JJ. at pp. 458 and 464; and also Dart on Vendors and Purchasers, 8th Ed., 97, and Williams on Vendor and Purchaser, 3rd Ed., Vol. II., pp. 1013, 1019, and 1035: the cases on rescission must be kept clear from those on specific performance, or for damages purely, whether based on inability to complete title, or on fraudulent or wilful or dilatory conduct respecting the same—*cf. Kilborn* v. *Workman* (1862), 9 Gr. 255; *Jones* v. *Gardiner* (1902), 1 Ch. 191; *Rankin* v. *Sterling, supra; Lobel* v. *Williams, supra; O'Neill* v. *Drinkle* (1908), 1 Sask. L.R. 402; and particularly *Kelly* v. *Duffy* (1922), 1 I.R. 62, which contains an illuminating exposition of the leading cases, including, *cf., Bain* v. *Fothergill* (1874), L.R. 7 H.L. 158, 176; and *Day* v. *Singleton* (1899), 2 Ch. 320; by the Master of the Rolls, O'Connor, L.J.

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Finally, it was submitted that the plaintiff should be allowed a sum for use and occupation against the defendant, particularly because he took two crops off the farm before leaving it, and because also he claimed and got judgment for interest upon the payments he made on account of principal, and the registrar reported in favour of allowing $1,275 on this head, based on the rental value of the farm for one and a half years.

It is true that according to *Winterbottom* v. *Ingham* (1845), 7 Q.B. 611, this claim cannot, at law, be supported for it was said that (p. 619):

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The defendant certainly was considered both by himself and the plaintiff as purchaser, not as tenant: and the plaintiff cannot convert him into an occupier, liable to pay for his occupation, by his own wrongful act in not completing the contract for sale.

And this view is supported by the unanimous decision of the Irish Court of Exchequer, *per* Chief Baron Palles, in *Markey* v. *Coote* (1876), Ir. R. 10 C.L. 149. But in the former case the Court was careful to point out, p. 619, that:

> A Court of equity may have means for doing justice in this respect between the parties: our Courts have none.

In support of such a "means" in equity, it is said in Williams on Vendor and Purchaser, *supra*, Vol. II., p. 1018:

> It is also conceived that a purchaser, who had been so let into possession and elected to rescind for the vendor's breach of contract, would in equity be similarly liable to deliver up possession of the land and to account for the rents and profits received by him and entitled to recover any sums paid on account of the purchase-money. In these cases the purchaser would not be liable at law for the use and occupation of the premises prior to rescission of the contract. But if he held over after the rescission, he would be so liable.

See also, even where fraud is present, Kerr on Fraud and Mistake, 6th Ed., 474-5.

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This equitable view was given effect to by Blake, V.C., in *Simmers* v. *Erb* (1874), 21 Gr. 289, wherein he held that if a purchaser who has been in possession obtains rescission with the return of his purchase-money and also insists upon interest thereon he must submit to account for the rents and profits, saying, p. 293:

> The present is an *a fortiori* case, for here there is no fraud, merely mistake; and the purchaser need not have taken possession till the title had been investigated. As the purchaser cannot have both the rent and interest, and he has elected to take the interest, the occupation rent, or rents and profits, must, in my opinion, be allowed to the vendor.

And in *Erlanger* v. *New Sombrero Phosphate Company* (1878), 3 App. Cas. 1218, at pp. 1278-9, Lord Blackburn said on rescission and *restitutio in integrum*:

> It would be obviously unjust that a person who has been in possession of property under the contract which he seeks to repudiate should be allowed to throw that back on the other party's hands without accounting for any benefit he may have derived from the use of the property, or if the property, though not destroyed, has been in the interval deteriorated, without making compensation for that deterioration. But as a Court of law has no machinery at its command for taking an account of such matters, the defrauded party, if he sought his remedy at law, must in such

cases keep the property and sue in an action for deceit, in which the jury, if properly directed, can do complete justice by giving as damages a full indemnity for all that the party has lost: see *Clarke* v. *Dickson* [(1858)], El. Bl. & El. 148, and the cases there cited.

But a Court of equity could not give damages, and, unless it can rescind the contract, can give no relief. And, on the other hand, it can take accounts of profits, and make allowance for deterioration. And I think the practice has always been for a Court of equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract.

See also the cases cited in Kerr on Fraud and Mistake, 6th Ed., 471 on the practical application of this principle.

Upon the facts of this case it is a very strong one for the allowance of use and occupation, because not only did the purchaser take two crops from the farm before he left it, but at that time he had not paid any of the interest due on the balance of the price, nor had he paid the taxes for 1931 and 1932 pursuant to his agreement, though they amounted, we are informed, to approximately $2,000 when he vacated, and moreover it had been in his power from the very day of the sale to insist upon his right to an indefeasible title under the statute and to rescission in default of getting it within a reasonable time, so if he deliberately refrained for whatever reason, from exercising that right for almost two years during which he continued to farm and crop the land, the only reasonable inference, under such circumstances, is that he did so, in part at least, because he was obtaining some undue advantage at the expense of his vendor, which unfair conduct the Court should not permit him to profit by in effectuating restitution because to do so would not be "practically just," to adopt Lord Blackburn's expression. But as a general rule an allowance of this kind will not be made—*Hutchings* v. *Humphreys* (1885), 54 L.J., Ch. 650.

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It is only desirable to add that I have not dealt with the question of the result of the alleged sale by the vendor, about a year after the defendant vacated, of more than half the farm to one Worth, because that matter was not raised by the pleadings nor sufficiently gone into on the evidence to consider it properly; moreover, if my view as to the right of rescission under the statute be correct, this subsequent sale is of no consequence.

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It follows that the appeal should be allowed in part and the judgment varied by setting aside that part of it which directs payment of the two said sums for damages, and also directing that the plaintiff be allowed the sum of $1,275 for use and occupation as aforesaid.

MCPHILLIPS, J.A.: The action was commenced by the appellant to enforce payment of the moneys provided to be paid under an agreement for sale of the lands, in amount $1,937, being default of payment of interest from 15th December, 1930, to the 1st of September, 1932. The defence made was that no title was shewn to be in the appellant for the lands so agreed to be sold and by reason of that default the respondent repudiated and rescinded the agreement for sale and so notified the appellant in writing and later went out of possession of the lands and the respondent further counterclaimed for damages for cost of going into possession, and cost of going out of possession and for a declaration that the agreement for sale be rescinded and damages in all $1,802.70. It may be stated at the outset that no covenant for title to the lands was ever entered into by the respondent, and as at present advised I do not consider that sections 25 to 27 and sections 34, 36, 37, 39 and 40 and 42 of the Land Registry Act (Cap. 127, R.S.B.C. 1924) give a cause of action to the respondent. There may well be some other form of remedy which it is unnecessary for me to consider by reason of the decision which I have come to herein. Here there was admittedly grave default upon the part of the respondent in the payment of the interest upon the principal sum ($15,000) as provided in the agreement for sale. It would appear that the respondent paid to the appellant under the agreement for sale in all some $1,300, and makes the additional claim sounding in damages for $502.70. It was shewn that the respondent remained in possession of the lands and cropped the same and otherwise used the lands from November, 1930, to November, 1932. It was disclosed at the trial that the appellant had conveyed a large portion of the lands to one Worth following the repudiation of the agreement by the respondent. This I consider must be held to have been an election on the part of the

appellant to accept the repudiation of the respondent and it cannot be further contended that there is no right of rescission. Upon the hearing of the appeal counsel for the appellant submitted that in view of the facts and the law applicable thereto that if the agreement must be declared rescinded that then the most that the respondent would be entitled to would be a return of all moneys paid under the agreement for sale with interest thereon which would be legal interest, and that is my conclusion. Had it not been that the appellant made the sale above referred to thereby adopting the repudiation of the respondent many considerations would be necessary with no certainty at all that the result would be the rescinding of the agreement. There was default upon the part of the respondent and if he had made his payments as provided for in the agreement for sale the question of registration of title would have been a simple matter. If the respondent is to have sustained the order of rescission, it can only have added thereto the direction that he be repaid all moneys paid under the provisions of the agreement to the appellant with legal interest added thereto. That is, in effect, that the amounts allowed in respect of damages in the judgment under appeal of $336.70 and $236 as set forth in the judgment in clauses 4 and 5 thereof should be disallowed.

MCPHILLIPS, J.A.

The respondent having elected to repudiate the contract, *i.e.*, the agreement for sale, cannot recover damages as well especially as in this case and in a Court of Equity he must be found to have been in default upon his part in making the payments called for in the agreement for sale. *Smith et al.* v. *Mitchell* (1894), 3 B.C. 450 is an early case in this Province where it was decided by the then Full Court "that a party to a contract cannot be decreed, *uno flatu*, both specific performance and rescission, and where he obtains rescission he cannot have damages, which are given as in lieu of specific performance." The case of *Henty* v. *Schroder* (1878), 48 L.J., Ch. 792, 793, was relied on in *Smith et al.* v. *Mitchell, supra,* by the Full Court. There Jessel, M.R. said

> that he did not see how the Court could rescind an agreement and at the same time give damages for its breach, and he declined to make an order similar to those in the cases cited. The only order he could make would

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be to direct the contract to be rescinded, and the defendant to pay the costs of the action.

Here we have the respondent by counterclaim asking for rescission and the learned trial judge has granted rescission but has also given damages. With great respect to the learned trial judge, that, I think, he cannot do. In this connection I would refer to Dart on Vendors and Purchasers, 8th Ed., Vol. I., p. 97, where we find this stated:

> And, in a suit by a purchaser for rescission, the Court will direct the deposit to be returned, and declare a lien for it on the property (*Torrance* v. *Bolton* (1872), 8 Chy. App. 118; 42 L.J., Ch. 177); but it cannot award damages by way of compensation to the plaintiff under its general jurisdiction (*Gwillim* v. *Stone* (1807), 14 Ves. 128; *Sainsbury* v. *Jones* (1839), 5 Myl. & Cr. 1). Nor did Lord Cairns' Act apply to a case where the suit was not for the specific performance, but for the rescission, of the contract; and since the Judicature Acts, though the Courts have power to administer all kinds of relief (see *Manners* v. *Mew* (1885), 29 Ch. D. 725; 54 L.J., Ch. 909), there appears to be no substantive right to damages, where there was none before the Acts.

MCPHILLIPS, J.A.

In my opinion the appellant is entitled to succeed in this appeal to the extent that the damages allowed under the judgment should be disallowed, the judgment ordering the rescinding of the agreement and the return of the purchase-money and the legal rate of interest thereon to stand.

I would, therefore, allow the appeal to the extent stated.

MACDONALD, J.A.: The respondent on November 9th, 1930, purchased a farm from appellant by agreement for sale for $15,000 payable in instalments together with interest and taxes. The agreement provided that upon payment of all sums due under the agreement

> the vendor does covenant with the purchaser, to convey and assure, or cause to be conveyed and assured, to the purchaser, by a good and sufficient deed in fee simple,

MACDONALD, J.A.

the property in question. It also provided that

> the purchaser shall examine the title at his own expense [and] the vendor shall not be bound to furnish any abstract of title, or produce any deeds, declarations or other evidences of title, except those in the possession or control of the vendor, and copies of the title deeds in the possession of the vendor will only be furnished at the expense of the purchaser.

Respondent after being in possession of the farm for two crop years with taxes unpaid, gave notice to appellant repudiating and rescinding the agreement and demanding repayment of

the sum of $1,300 paid by him on the ground that appellant failed to make, assure and register a good title to the property. He notified appellant, through his solicitor, that he had

> gone out of possession of the said lands and, so far as he is concerned, Mr. Cox is at liberty to repossess them.

His right, if any, to repudiate cannot arise under the agreement as the "good and sufficient deed" was to be given only after all payments were made. The fee was not registered in appellant's name although he had all necessary conveyances to enable him to do so. Title was registered in the name of Lockwood, who acquired it by conveyance from one Robb, and Lockwood, by deed dated June 17th, 1921, conveyed it to appellant. No difficulty, therefore, except possibly payment of taxes, stood in appellant's way in procuring indefeasible title. Difficulty in arriving at a settlement of a controversy in respect to dyking taxes caused appellant to defer registration of his own title but nothing vital turns on that point. The sole question is—and if settled adversely to respondent other points need not be considered—can respondent, notwithstanding the terms of the agreement, repudiate and rescind because for any reason his vendor fails before full payment to register documents in his possession which would pass the fee to him and enable him to comply with a call for title at the time specified?

MACDONALD, J.A.

Respondent bases his right to repudiate on section 27 of the Land Registry Act (R.S.B.C. 1924, Cap. 127), reading as follows:

> 27. It shall be the duty of any person selling or conveying land, or who enters into an agreement, sub-agreement, or assignment of an agreement for the sale of land, whereby the purchase price is payable by instalments or at a future time, to register his own title, in order that any person to whom the land or any part thereof is conveyed, and any person claiming under the agreement, sub-agreement, or assignment, may be able to register his title; and so long as the failure of any person to comply with this section continues, no action shall be brought by the person so failing to register upon any covenant in such agreement or sub-agreement.

Apart from this section clearly the respondent must pay the instalments of the purchase price before he is entitled to a conveyance (*Clergue* v. *Vivian & Co.* (1909), 41 S.C.R. 607 at 616) and, I would hold, before the vendor is called upon to register his own title. He agreed to pay in advance of receipt

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of title. The failure on appellant's part to register his title therefore does not, apart from this section, entitle the respondent to rescind. It is not shewn as a ground of repudiation that appellant is devoid of, and unable to obtain title.

There is no doubt a statutory duty imposed on the vendor by section 27 "to register his own title." Does breach only entitle the purchaser to compel registration by appropriate proceedings or to recover such damages as he may suffer thereby? So long as default continues no action can be brought by the vendor on any of the covenants but does it follow that the agreement of purchase specifically providing for deferred registration is voidable and that the purchaser may rescind?

In section 28 (5) of Cap. 43, B.C. Stats. 1914, a section similar in character except for the omission of the last four lines was, although not wholly in point, considered in *Frost* v. *Welch* (1923), 32 B.C. 535. It reads as follows:

It shall be the duty of any person having sold or hereafter selling land, or who has heretofore entered into or hereafter enters into an agreement for sale, sub-agreement, or assignment, as in the preceding subsection mentioned, to register his own title, in order that any person so buying said land or any interest therein may be able to register his title or interest therein.

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The action by purchasers who failed to make or tender the last payment was for rescission of the agreement and a return of the purchase-money on the ground of lack of title. The complaint, unlike the case at Bar, was that the vendor had no title at all. The trial judge does not refer to section 28 (5), but it is clear from the argument on appeal that the point was taken that (p. 538) "Section 28 (5) of the Land Registry Act Amendment Act, 1914, imposes an affirmative duty on the vendor." The Chief Justice said at p. 540:

The plaintiffs under the agreement were not entitled to a conveyance of the land until they had paid all of the purchase-money.

It is not of course suggested that Cox should convey to the respondent until after the last payment but it is asserted that he should have registered his own title and because he failed to do so the respondent was entitled to rescind and to recover payments made. That was inferentially negatived in *Frost* v. *Welch* because if sound, although the complaint was lack of any title at all, the purchasers should have recovered moneys paid

because of the vendor's non-compliance with section 28 (5). We are not concerned with the additional clause in the present section as it merely imposes restrictions on the person "so failing to register" his own title without conferring any new rights on the purchaser. It does not follow because the purchaser may *mandamus* the vendor or recover damages (if suffered) for breach of a statutory duty that a right to rescind is given. That right, if not given by the ordinary rules of law, could only be given by statute. To do so additional words would be necessary.

The only possible basis upon which respondent might rescind would be upon appellant's failure to register his title after reasonable notice or demand to comply with the provisions of section 27. I express no opinion on the point. I only say that this course was not followed. The respondent did not call upon his vendor to register his title within a reasonable time after notice, failing which he would rescind. The formal notice (Exhibit 3) simply advised appellant of the respondent's repudiation. Nor does the oral evidence disclose a definite notice or intimation to appellant that if he did not register within a stipulated time rescission would follow. He should in any event have been given time to consider whether or not he would persist in his refusal. The vendor was not only in a position to convey at the time stipulated in the contract but could also register his title at any time if a definite demand had been made.

However, I rest my decision on the view that the terms of the agreement for sale are not displaced or altered nor the law governing rescission of contracts changed by section 27 of the Act. It simply restricts the vendor's rights and exposes him to action for breach of a statutory duty.

Reference was made to an alleged sale by appellant of part of the property in question about a year after this action was commenced and it was suggested that this disclosed assent to rescission. Apart from the date of the alleged sale and the fact that the point was not pleaded it was shewn in evidence at the trial that it was "not consummated."

I would allow the appeal.

Appeal allowed in part.

Solicitors for appellant: *Hamilton Read & Paterson.*
Solicitors for respondent: *Fleishman & MacLean.*

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ATTORNEY-GENERAL OF CANADA v. REGISTRAR OF TITLES OF VANCOUVER LAND REGISTRATION DISTRICT.

ATTORNEY-GENERAL OF CANADA v. REGISTRAR OF TITLES

Land titles—Property acquired by Crown (Dominion)—Registration—Ad valorem fees — B.N.A. Act, Sec. 125 — Whether Crown (Dominion) exempt—R.S.B.C. 1924, Cap. 127, Sec. 254.

Under section 125 of the B.N.A. Act, "No lands or property belonging to Canada or any Province shall be liable to taxation."

Section 254 of the Land Registry Act provides that on application for registration of title there shall be paid to the registrar of titles in respect of the several matters mentioned in the Second Schedule, the respective fees therein specified, and Item 5 of the Scale of Fees in said Second Schedule provides that "one-fifth of one per cent. on the market value of the land (including improvements) at the time of making the application for registration, where such value amounts to or is under $5,000, and one-tenth of one per cent. on the additional value where such value exceeds $5,000."

The Crown (Dominion) expropriated land required for a post-office site in the City of Vancouver, under section 9 of the Expropriation Act (R.S.C. 1927, Cap. 64) and after certain proceedings in the Exchequer Court obtained a conveyance from the owner of the lands in question, and applied for registration and for a certificate of indefeasible title. The registrar of land titles refused to register the deed without payment of the *ad valorem* fees set out in said Item 5. A petition by the Attorney-General of Canada to the Supreme Court for an order reversing the refusal of the registrar to register the deed upon the ground that the imposition of the said *ad valorem* fees savours of taxation, and is contrary to the provisions of section 125 of the British North America Act, was refused.

Held, on appeal, affirming the decision of FISHER, J., that under the relevant provisions of the Expropriation Act, the Crown (Dominion) acquired a perfect title without the necessity of registration. One of the essential features of a tax is the compulsory nature of the charge or levy sought to be imposed. Here there was no compulsion. The Crown (Dominion) was applying for a special service, namely the issuance of an unnecessary certificate of indefeasible title for which the registrar was entitled to make a charge: That in any event the *ad valorem* fees demanded by the registrar, if considered a tax at all, is a tax not on lands or property belonging to Canada, within the meaning of section 125 of the British North America Act, but on the acquisition of a special form of title.

Statement

APPEAL by the Attorney-General of Canada from the decision of FISHER, J. of the 5th of January, 1934, dismissing the appellant's petition for an order reversing the refusal of the

registrar of the Land Registry office at Vancouver to register His Majesty the King, as represented by the Government of Canada, as owner in fee simple of lots 1 and 2, block 15, district lot 541, group 1, New Westminster District, plan 210, City of Vancouver, and directing that the registrar make registration accordingly without payment of *ad valorem* fees. Under the Expropriation Act, His Majesty in the right of His Dominion of Canada, expropriated said property on the 12th of November, 1931, by depositing on record a true copy of a plan and description of said property taken possession of as a site for a proposed post-office building in the City of Vancouver. The registered owner of the lands, Victor Spencer, refused to accept the offer of $200,000 for the property, and an action was brought in the Exchequer Court of Canada for a declaration that said lands are vested in His Majesty and that $200,000 is sufficient compensation to the former owner for the same. Subsequently, Spencer agreed to accept the $200,000 and judgment was entered that the said property had been vested in His Majesty, and that upon Spencer delivering a good title free from encumbrances, he was entitled to payment of said sum in full as compensation for said lands. Subsequently on the 26th of June, 1933, an application to register His Majesty as represented by the Government of the Dominion of Canada as owner in fee simple of said lands with tender of the appropriate registration fees, namely, $13.50, being the fees required under the Land Registry Act and other than the *ad valorem* fees, on the market value of said lands (*i.e.*, the sum of $205), the registrar refused registration in accordance with the application on the ground that the *ad valorem* fees had not been paid. It was held that the said *ad valorem* fees under the circumstances cannot be characterized as taxes upon land or property belonging to Canada, and the order was refused.

Statement

The appeal was argued at Vancouver on the 9th and 12th of March, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

O'Brian, K.C., for appellant: This land was expropriated for Dominion purposes. Section 125 of the B.N.A. Act relieves

Argument

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us from payment of the *ad valorem* fees. The fees are based on the value of the property and are included in the word "taxes" in said section. The ordinary registration includes, first, the fee for registering. Second, insurance fees. Third, charge based on value of property registered. That the *ad valorem* fees are "taxes" see *M. D. Donald Ltd.* v. *Brown* (1933), S.C.R. 411 at p. 416; *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction* (1931), S.C.R. 357 at p. 362; *Les Ecclesiastiques de St. Sulpice de Montreal* v. *The City of Montreal* (1889), 16 S.C.R. 399; *Nova Scotia Car Works* v. *City of Halifax* (1913), 47 S.C.R. 406 at p. 423; (1914), A.C. 992 at p. 998; *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ltd.* (1931), 44 B.C. 508 and on appeal (1932), 45 B.C. 191; (1933), A.C. 168. The cases arising from The Unearned Increment Tax Act of Alberta are *Bredin* v. *Canadian Northern Town Properties Ltd.* (1918), 1 W.W.R. 542; *Dahm* v. *Stinn* (1925), 1 W.W.R. 755; *In re Wallbridge and Registrar of Land Titles* (1930), 2 W.W.R. 361 and on appeal (1930), 3 W.W.R. 259. This is on the valuation of the property and is a tax. The cases on Succession duty apply in the same way: see *Provincial Treasurer of Alberta* v. *Kerr* (1933), A.C. 710; *Rex* v. *Lovitt* (1912), A.C. 212 at p. 223; *Burland* v. *Regem* (1922), 1 A.C. 215; *Attorney-General of Alberta* v. *Pearce* (1932), 1 D.L.R. 587; *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (1927), A.C. 934; Hogg on Registration of Title to Land Throughout the Empire, 29.

Argument

Reid, K.C., for respondent: The same *ad valorem* fees were charged in 1871: see R.L.B.C. 1871, Cap. 143, Second Schedule, p. 490. Registration of a conveyance to the Crown is not necessary, but it may be registered if the minister deems it advisable. If registered the fees must be paid. On the interpretation of the Acts see Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., p. 321 *et seq.* The Crown cannot be placed under what he calls selected instances: see *Gauthier* v. *Regem* (1918), 56 S.C.R. 176 at p. 194. Section 21 of the Expropriation Act is the only enactment giving the Crown Dominion the right of registration. This charge goes towards the services of the Land

Registry office. Registration is neither compulsory nor imposed by a superior authority: see *The Attorney-General of Canada* v. *The City of Toronto* (1893), 23 S.C.R. 514; *Dorrell* v. *Campbell* (1916), 23 B.C. 500. There is no reason to distinguish between specific fees and *ad valorem* fees; the fees are for services rendered. The rule as to the imposition of taxes is in *Munro* v. *Commissioner of Stamp Duties* (1934), A.C. 61, in which it states (p. 68) "It is not always sufficiently appreciated that it is for the taxing authority to bring each case within the taxing Act, and that the subject ought not to be taxed upon refinements or otherwise than by clear words." See also *In re Income Tax Act, 1932. In re Saskatchewan Co-Operative Elevator Co. Ltd.* (1933), 3 W.W.R. 669, and *Cox* v. *Rabbits* (1878), 3 App. Cas. 473 at 478.

Argument

O'Brian, replied.

Cur. adv. vult.

5th June, 1934.

MACDONALD, C.J.B.C.: The question in this appeal is—Is the *ad valorem* fee imposed upon the person desiring to register his title under the Land Registry Act of the Province a tax applicable to the Crown Dominion, which holds a title in fee of the land in this Province? It was argued that that fee if a tax is contrary to section 125 of the B.N.A. Act which prohibits taxation of the Dominion by the Province.

The definition of a tax includes, *inter alia,* the imposition of it by competent authority. It must be imposed in clear and unambiguous language, and requires compulsory payment. There can be no option on the part of the taxpayer to pay or not to pay a tax. Assuming a tax, the question here is—Is it imposed upon the Crown compulsorily, or is it on the contrary left to the option of the Crown whether to pay it or not? Under the Land Registry Act of this Province it is declared that no conveyance, etc., shall pass any title to the land described in it either at law or in equity until registered. It might be said, though I do not say so, that there is constructive compulsion upon a holder of a conveyance, who has not already got title, to register it in order to obtain the fruits of it but there is no such

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compulsion in the case of the Crown here since it has title already by virtue of the proceedings under the Expropriation Act and the judgment of the Exchequer Court in *The King* v. *Spencer* (1933), not reported. His Majesty the King obtained a good and satisfactory title as declared by the said Court to the lands described in the conveyance in question and therefore has no need of the assistance of the Land Registry Act. Moreover section 21 of the Expropriation Act declares that registration under local laws need not be had unless the minister deems it desirable.

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The minister of finance desires to register the said deed but is not compelled to do so and therefore it cannot be said that the Government of this Province imposes a tax upon the Crown Dominion.

The judgment appealed from is, I think, not open to complaint and is very well supported by the reasons given for it by the trial judge.

I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: On the petition of the Attorney-General of Canada Mr. Justice FISHER affirmed the action of the registrar of titles of Vancouver Land Registration District in requiring payment by the National Government of all the ordinary fees payable by applicants to register title under the Land Registry Act of this Province, Cap. 127, R.S.B.C. 1924, and this appeal is taken by the National Government from that decision in so far as it requires it to pay the fees, amounting to $205, which relate to the *ad valorem* percentage of the land under item 5 of the Scale of Fees, but it admitted and still admits its liability to pay the general fees for registration amounting to $13.50.

The claim for exemption is based upon section 125 of the B.N.A. Act, *viz.*:

> No lands or property belonging to Canada or any Province shall be liable to taxation.

And it is submitted that the fees objected to are "taxes" within the meaning of that section.

The case is a novel one because by the proceedings which were duly taken under the Expropriation Act, Sec. 9, Cap. 64, R.S.C.

1927, on behalf of the National Government to acquire the land in question for post-office purposes in Vancouver, the Crown National has already acquired the highest possible kind of title thereto, *viz.*, one by Act of Parliament, which has declared in said section 9, that upon the plan "by metes and bounds" of the "land taken for the use of His Majesty" being

> deposited of record in the office of the registrar of deeds . . . in which the land is situate, . . . such land, by such deposit, shall thereupon become and remain vested in His Majesty.

In *Dorrell* v. *Campbell* (1916), 23 B.C. 500 at 507-9, I cited several classes of estates which were then outside our Land Registry Acts, and referred to some of them as being "unassailable," and the first of which would of course be, one derived directly from Parliament itself; and in the present case this element is accentuated because this expropriation is an admittedly lawful one by the National Parliament of lands for National purposes and therefore is a justifiable invasion of what would otherwise be the Provincial field of "property and civil rights in so far as is necessarily incidental to the exercise" of that National power, but no farther—*c.f. e.g., Canadian Pacific Railway* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1899), A.C. 367, 372-3; *Attorney-General for British Columbia* v. *Canadian Pacific Railway* (1906), A.C. 204, 212; *Toronto Corporation* v. *Canadian Pacific Railway* (1908), A.C. 54, 58; *City of Montreal* v. *Montreal Street Railway* (1912), A.C. 333; and *Canadian Electrical Association* v. *Canadian National Railways* (1934), 3 W.W.R. 12, 24 (P.C.).

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The result is, therefore, that the Crown National became and is the absolute owner of the land by the constitutional operation of a National statute quite apart from the operation of any Provincial Act or system of land registration, and is further specially protected in that special estate by two remarkable provisions of said Expropriation Act, Secs. 12 and 22, the former of which declares that the said plan and description, under section 9, "shall not be called in question except by the minister, or by some person acting for him or for the Crown" and the latter makes provision for the issuance, if need be, of a judge's warrant of possession by which the sheriff is directed to

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"put down such resistance and opposition, and shall put the minister, or some person acting for him, in possession" of the land so taken.

These exceptional provisions have no parallel in the British Columbia Land Registry Act, but they are useful and convenient and upon occasion necessary in the assertion of the paramount title of the Crown National and therefore are "necessarily incidental to the exercise" of the National power to achieve that end, as is also, doubtless, the provision in section 9 for the "deposit of record" in the Provincial registry of the said plan, by which notice of the change of title is given to the local registry concerned, and also to the public, but, for example, and *e contrario*, there seems nothing to justify the leave given by section 21 to register an "award" in such an office, because such a document has nothing to do with the title to the land but only the amount of compensation therefor as awarded by proceedings taken under the "Compensation" group of sections, 23 *et seq.*, the first of which shews this clearly and again declares that the land so "acquired or taken"

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> shall, by the fact of the taking possession thereof, or the filing of the plan and description, as the case may be, become and be absolutely vested in His Majesty.

The point of view that documents which do not affect title are not registrable was upheld by the Queen's Bench Division of Ontario in *Ontario Industrial Loan Co.* v. *Lindsey et al.* (1883), 3 Ont. 66, 75, 79, 81, and I only refer to it *ex abundanti* and to illustrate further the special position that the present statutory title occupies, and in this connexion I note that it is stated in paragraph 4 of the present petition that on an information filed by the Crown in the Exchequer Court of Canada, to fix the compensation for the land taken under said sections 23 *et seq.*, the Court did in its judgment (of 5th June, 1933)

> Declare that the lands and premises described in the Information herein are and have been vested in His Majesty the King from the 12th day of November, A.D. 1931, the date of the expropriation thereof.

But obviously, and with every respect, that Court had no power to make such a declaration as to title in the exercise of a jurisdiction solely conferred as to the compensation payable

after the title had been "absolutely vested" in His Majesty—section 23, as properly set out in paragraph 1 of the said petition, and so that judgment and declaration must be disregarded as irrelevantly introduced, because they have nothing to do with the registration of the title or the fees payable thereupon, and doubtless for that good reason said judgment was properly omitted by the Crown's solicitor from the "list of instruments" filed in support of the application to register the title, on 26th June, 1933.

Seeing that the title of the Crown to the land "taken" as aforesaid (which thereupon became a sort of National enclave) was in such an impregnable position superior to and wholly outside of the scope of the Provincial Land Registry Act, and free from all limitations or reservations whatsoever, it is not apparent why it should wish to bring it into the Provincial field and exchange it for one of a lower kind and subject to the long list of exceptions, reservations, etc., impressed upon certificates of indefeasible title issued pursuant to section 37 of that Act, and the more so because some of them operate "as against His Majesty" himself and others are entirely inappropriate to his existing title; but nevertheless if the Crown wishes to take such a course it is not for us to question or criticize it in any way but only to review the steps taken to that end if their legality is challenged, and as no objection to this application is taken except as to insufficiency of fees, therefore the only present effect of the proceeding is to emphasize the fact that it is a purely voluntary one to an exceptional degree and if it involves the payment of a tax then that burden of taxation is wholly unnecessarily and voluntarily assumed.

MARTIN, J.A.

That aspect of the matter is of importance because the learned judge below has properly given weight to it in support of his view that "compulsion is an essential feature of taxation," and he justifiably places much reliance upon said section 21, which declares that:

> No surrender, conveyance, agreement or award under this Act shall require registration or enrolment to preserve the rights of His Majesty under it, but the same may be registered in the registry of deeds for the place where the land lies, if the minister deems advisable.

Doubtless there is much to be said in favour of that view and

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many cases were cited throwing light upon it and also as to the meaning of "taxes" in said section 125, but none of them came close to the point, therefore since the argument I have continued the search for a surer guide, with the result that I have been fortunate enough to find a unanimous decision of the Court of Appeal of Ontario, composed of a very strong Bench, directly on the point in *County of Hastings* v. *Ponton* (1880), 5 A.R. 543, wherein it was expressly decided that the fees which were then paid to land registrars in Ontario, pursuant to statute, were not taxes, the Court, *per* Patterson, J.A., holding, after argument by distinguished counsel, p. 547:

> The contention is, that either the charge for registration is a tax on the person who has to pay it, or the demand upon the registrar to pay over the excess, beyond what is designated as his share of the fees and emoluments, is a tax upon him; and that in either case the tax is not one which the British North America Act permits the Provincial Legislature to impose.
>
> I think that it is a mistake to call it a tax at all. In the one case it is the charge made by legislative authority for a service actually done. In the other it is the appropriation of the money to the remuneration or reimbursement of the parties or bodies politic who take part in rendering the service.

MARTIN, J.A.

That language so precisely covers the present case that, to my mind, it disposes of the matter, because there can be no difference in principle between the case of part payment of fees for registration to the registrar and treasurer of the county jointly, and the case of payment of them to the registrar solely, or the case where all the fees received by the registrar are handed over by him to the Province which pays him a salary, as in the case in this Province, though as Robertson, J., said in *Gray* v. *Ingersoll* (1888), 16 Ont. 194, at 197:

> It must not be forgotten that before the passing of the Act of Ontario, 35 Vic. ch. 27, the registrars were entitled under the common law, to all the fees and emoluments in anywise appertaining to their said office, . . .

And this was formerly the case in Manitoba in 1882, to my knowledge.

The decision in *Hastings's* case has not only not been questioned, so far as I can find, but has been followed in another respect by the same Court in *Corporation of Bruce* v. *McLay* (1884), 11 A.R. 477, 481, and as it is so consistent with reason and there is nothing in our Act which detracts from its effect, I have no hesitation in adopting and following it, and its effect

is in no way lessened because the Court proceeded to say *ex abundanti*, in response to a second question which therein arose, but not herein, that even if "it can be properly called a tax it is clearly a direct tax."

I would therefore dismiss the appeal.

McPHILLIPS, J.A.: This appeal has relation to an important question in constitutional law, shortly, whether the registration fee—the *ad valorem* charge made under the Land Registry Act, Cap. 127, R.S.B.C. 1924—is permissible when the land sought to be registered is the property of Canada. As to the other fees charged for registration, save the *ad valorem* fee, the Attorney-General for Canada raises no objection. The claim for exemption from the named portion of the fees is based upon the British North America Act (30 & 31 Vict., c. 3) which reads as follows:

125. No lands or property belonging to Canada or any Province shall be liable to taxation.

The section in the Land Registry Act imposing the fees reads as follows:

254. There shall be paid to the registrar, in respect of the several matters mentioned in the Second Schedule the respective fees therein specified or such other fee as the Lieutenant-Governor in Council may from time to time by order establish. All fees received by the registrar shall be paid by him into the Provincial Treasury, and shall be accounted for as part of the Consolidated Revenue Fund. Payment of fees shall be made at the time an application is tendered to the registrar or an instrument is filed with him or a request is made for the performance by him of any act or duty, otherwise the application or instrument shall not be received or the request complied with. If an application is refused or withdrawn, the registrar shall refund the balance of fees over and above the amount properly payable.

The *ad valorem* fee which is set forth in the Second Schedule to the Land Registry Act in part reads as follows:

1. Application for registration or for certificate of indefeasible title $0.50
2. Every deposit of map or title deeds 1.00
3. Registration of any fee-simple (including registrar's search) ... 1.00
4. Every certificate of indefeasible title or new or provisional or interim certificate of title 1.00
5. And, excepting on registration under section 125, or of a tax-sale deed, or of a transfer of land from the representatives of a deceased person to a person beneficially entitled, one-fifth of one per cent. on the market value of the land (including improvements) at the time of making the application for registration, where such value amounts to or is under $5,000, and

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one-tenth of one per cent. on the additional value where such value exceeds $5,000.

6. In addition to the above, towards the Assurance Fund, to be charged on all registrations of the fee-simple, where the value of the land:—

Does not exceed $1,000, a fee of	$0.50
Exceeds $1,000 but does not exceed $2,500, a fee of	.75
Exceeds $2,500 but does not exceed $5,000, a fee of	1.00
Exceeds $5,000 but does not exceed $10,000, a fee of	1.50
Exceeds $10,000 but does not exceed $20,000, a fee of	2.00
And for each $10,000, or part thereof, over $20,000, an additional fee of	.50

It will be seen that there is an *ad valorem* charge which the Attorney-General for Canada objects to and by his counsel at this Bar the point is still further pressed in a very able argument by Mr. *O'Brian* and we have had as well the very able argument of Mr. *Reid* in reply in support of the judgment of Mr. Justice FISHER in the Court below who refused to make the order asked for by the Attorney-General of Canada which was, that the registration of indefeasible title should be effected without the payment of the *ad valorem* fee as it in effect is taxation imposed upon Canada and therefore an unconstitutional exac-

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tion. That submission was, of course, made in the Court below and repeated here.

The learned judge (FISHER, J.) in his judgment has canvassed the matter for determination so well that in my opinion little more can be usefully added. I would, however, advance some further considerations and refer to some other cases which would seem to me to accentuate the view that the learned judge arrived at a proper conclusion. It may be admitted—it is in fact conceded by the Attorney-General for Canada—that the Crown in the right of the Dominion of Canada is already vested with a good title to the lands sought to be registered. Therefore there is nothing compulsory in the Provincial law requiring further registration in the Land Registry office of the Province. The system of registration in the Province of British Columbia is the Torrens System having its origin in South Australia and was introduced into Vancouver Island before its entry into the Canadian Confederation. The history of its adoption is given by Mr. Justice CREASE (afterwards Sir Henry Crease) in *In re Shotbolt* (1888), 1 B.C. (Pt. 2) 337. The legislation, of

course, as years went on had many changes, advancing to the stage of indefeasible titles with an Assurance Fund. The short point it would seem to me in the present inquiry is this—Is the *ad valorem* fee taxation within the purview of section 125 of the British North America Act? If it is then the fee cannot be exacted. This is clear that the Province having the constitutional right to legislate as to property and civil rights (B.N.A. Act, Sec. 92, (13)) had full authority to pass the Land Registry Act. Now, the question is, Do any of its provisions contravene the powers granted to the Province? Undoubtedly if the imposition of the *ad valorem* fee be taxation then it is a demand that cannot be persisted in as against "lands . . . belonging to Canada" (section 125). In a general way it may be said taxation must be specific not uncertain and the incidence of taxation must be in its nature compulsory. Here we have the Attorney-General of Canada with admittedly a good title to the land in question in Canada in the right of the Dominion and under no compulsion whatever upon the part of the Provincial authority, and that authority conceding that title in Canada in the right of the Dominion, voluntarily coming forward and asking for an indefeasible title under the British Columbia Land Registry Act with the additional feature of a guaranteed title to the extent that such guarantee goes by reason of the Assurance Fund and denying the right in the Province to the *ad valorem* fee. The Province naturally imposes fees when entering into an obligation to compensate persons deprived of land through fraud in registration and by way of the protection of the *bona fide* purchaser and for errors of the registrar—all the fees collected go to ensure the carrying out of this obligation. It reasonably follows that where protection is given and services are rendered that it cannot be looked upon as taxation; further, there is no compulsion here and that element is absent which is an essential ingredient of a tax. It occurs to me that the *ratio decidendi* of the case of *The Attorney-General of Canada* v. *The City of Toronto* (1893), 23 S.C.R. 514 well indicates that the *ad valorem* fee, as well as all the fees chargeable, are, in their nature, a scale of fees commensurate with the obligation incurred —when an indefeasible title issues—and cannot be said to have

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the elements of a tax, and it is not imposed upon other than volunteers. If the indefeasible title is desired it is granted the statutory fees being paid. I would refer to what Lord Tomlin said in delivering the judgment of their Lordships in *Munro* v. *Commissioner of Stamp Duties* (1934), A.C. 61 at p. 68:

> In their Lordships' opinion it is the substance of the transactions which must be ascertained and if when so ascertained the substance does not fall within the words of the statute it cannot be brought within them merely because the forms employed did not give true effect to the substance. It is not always sufficiently appreciated that it is for the taxing authority to bring each case within the taxing Act, and that the subject ought not to be taxed upon refinements or otherwise than by clear words.

MCPHILLIPS, J.A.

It may well be said that the guiding principle is as so well laid down by Lord Cairns, L.C. in *Cox* v. *Rabbits* (1878), 3 App. Cas. 473 at p. 478:

> My Lords, a Taxing Act must be construed strictly; you must find words to impose the tax, and if words are not found which impose the tax, it is not to be imposed. Now, my Lords, it appears to me that, so far from there being words imposing a tax here, you have words which clearly declare that the tax is not to be imposed; . . .

I cannot see that I can add anything further to my view or usefully do so to accentuate my firm conclusion that the *ad valorem* fee is not a tax; to conclude otherwise could only be along some line of intractable reasoning which I must confess is not apparent to me. Therefore, I would affirm the judgment of the learned judge and dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: Appeal by the Honourable the Attorney-General of Canada from a judgment of FISHER, J. refusing to interfere with the decision of the registrar of land titles in declining to register as an indefeasible fee property acquired by the Crown Dominion for public purposes under and by virtue of the Expropriation Act and by deed from the vendor without payment of part of the registration charges known as *ad valorem* fees. The Second Schedule of the Land Registry Act (R.S.B.C. 1924, Cap. 127) provides a scale of fees for certain services at specified amounts (*e.g.*, application to register and deposit of map or title deeds, etc.) which appellant is willing to pay. The Attorney-General on behalf of His Majesty objects, however, to payment of fees under Item 5 calling for one-fifth of one per cent. on the market value of the land where the value is under

$5,000 and one-tenth of one per cent. on the additional value where it exceeds $5,000 on the ground that such an imposition is taxation of "lands or property belonging to Canada" not subject to taxation as provided by section 125 of the British North America Act, 1867.

The fees are payable under section 254 of the Act and as received are paid by the registrar of titles to the Provincial treasurer to form part of the Consolidated Revenue. The respondent's contention is that, as in the case of the other items in the schedule not contested, the *ad valorem* charge is not a tax on land but a charge for services rendered and facilities afforded measured in this instance by the value of the property on a sliding scale.

If the Attorney-General for Canada deems it advisable he may under section 9 of the Expropriation Act (R.S.C. 1927, Cap. 64) deposit a plan (for which an appropriate fee is provided by Item 48) duly authenticated together with a description of the land acquired, in the office of the registrar of deeds for the county in which it is situate and "such land by such deposit shall thereupon become and remain vested in His Majesty." This section is *intra vires* and notwithstanding section 34 of the Land Registry Act the estate passes to the Crown without further registration.

Section 21 of the same Act provides that:

> No surrender, conveyance, agreement or award under this Act shall require registration or enrolment to preserve the rights of His Majesty under it,

with, however, this option:

> but the same may be registered in the registry of deeds for the place where the land lies, if the minister deems advisable.

The Crown has a perfect title without registration. In fact the deed from the former owner was unnecessary; title was otherwise obtained. It follows that payment of the item in dispute is not compulsory. If the minister insists upon registration he is applying for a special service.

The essentials of a tax were discussed by Duff, J., now Chief Justice of Canada, in *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction* (1931), S.C.R. 357 at 362-3, referred to with approval by the Judicial Committee in *Lower*

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Mainland Dairy Products Sales Adjustment Committee v. *Crystal Dairy Ld.* (1933), A.C. 168 at 176. The tests are (1) it must be enforceable by law, (2) imposed by a public body under legislative authority and for a public purpose. In addition "compulsion is an essential feature" (*City of Halifax* v. *Nova Scotia Car Works, Limited* (1914), A.C. 992 at 998). Must the item in question forming part of the registration fees be regarded as an enforced contribution or tax on land exacted in pursuance of legislative authority for a public purpose? If imposed primarily—as I think it is, we have at least no proof to the contrary—to defray the cost of the registration system or for services rendered it is not levied for a public purpose. Nor is it material that for any one of a variety of reasons the fees are credited to Consolidated Revenue with the Provincial treasurer as custodian.

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Taxes—and taxation generally—is distinguishable from various other imposts levied for special purposes. One can conceive of a registration system where the registrar or public officer might be paid by registration fees. Fees paid to a public officer are not taxes. It would not become a tax on a change of policy, placing the registrar on a salary basis and applying the fees to payment of the cost of the system. I would add too that even if fees received exceeded the cost of maintaining a registration system incidentally providing a surplus for general revenue it should not, viewing it fairly, be regarded as a tax imposed for a public purpose. We should regard the main and substantial purpose in view. These fees are not like ordinary taxes imposed primarily to provide a revenue for public purposes.

If however the fee demanded, based upon the value of the property, is a tax at all it is a tax, not on land within the meaning of section 125 of the B.N.A. Act but on the acquisition of a special form of title. If the Attorney-General for Canada deems it advisable to register for some purpose—because it is not essential to vest the property—he must pay for a special service. Again no public body could compel registration involving payment; a tax cannot be evaded. Nor is it material that the fee is based upon the value of the land. If the Legislature wishes

to impose a fee it may do so in any way within its constitutional powers and with any yardstick selected. One measure to determine the amount of the fee may be the number of documents filed; another the value of the property. There is no essential difference between the two methods. Both are arbitrary means of fixing the amount. Capriciously or otherwise many other ways might be selected to determine the amount of, or the basis upon which the fees should be imposed. What it is based upon—the measuring rod—merely relates to method of computation. If for example Item 4 of the Schedule, the fee for the certificate of indefeasible title, was based on a sliding scale on the value of the land as in the case of the charge on all registrations for the maintenance of the assurance fund it would still be a fee for obtaining a document of title, not a tax on land. The Attorney-General for Canada does not object to the fee for the assurance fund although based on the value of the land because, as Mr. *O'Brian* conceded it is collected for a service rendered. That is true: the assurance fund provides a special service as distinguished from a general service for which all other fees, including the one in question, are imposed.

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It was suggested that this imposition is very similar in its incidence to a probate or succession duty. *Provincial Treasurer of Alberta* v. *Kerr* (1933), A.C. 710 was referred to. This, however, is not a tax on estates. Registration is convenient but not compulsory. As Duff, C.J. said in *M. D. Donald Ltd.* v. *Brown* (1933), S.C.R. 411 at 416:

> From the economic point of view, there can probably be little difference between the position of an unregistered grantee from an honest grantor, who has not registered his grant, and the position of a person who has registered his grant and has received a registered title.

It was called an indirect tax in the *Kerr* case because as the Judicial Committee held the executor was personally liable for the duties recoverable finally from the estate although, unlike *Cotton* v. *Regem* (1914), A.C. 176 at 194, no authority to sue was given and the executor might renounce. The decision was not intended to interfere with the true definition of a tax as defined by the board in other cases. We have in fact very little assistance from any cases on the point under consideration.

I regard this as something essentially different from the

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deliberate imposition of a tax on Dominion Crown lands. It is an ordinary charge for procuring commercial security and the advantages, if any, of land registration in this Province; a determination by competent authority to require the Crown Dominion to pay on the basis referred to for services and facilities furnished if it wishes to take advantage of them.

I would dismiss the appeal.

MCQUARRIE, J.A.: I have had some difficulty in coming to a conclusion in this case because of the recent decisions as to the meaning of "tax" which have gone very far indeed in the direction suggested by the appellant. However, I cannot see that in this case the respondent is endeavouring to collect a tax from the Dominion contrary to section 125 of the British North America Act. It is not imperative that the Dominion should register its title to the lands affected by this appeal and, if it exercises its undoubted option to do so, it appears to me that it thereby becomes responsible for the registration fees established by the Land Registry Act.

MCQUARRIE, J.A.

On the question of principle involved in this matter I cannot see any difference as a matter of legal obligation between the fees which the appellant is willing to pay and the fees which are objected to.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *C. M. O'Brian.*
Solicitor for respondent: *R. L. Reid.*

APPENDIX.

Cases reported in 47 B.C. and since the issue of that volume appealed to the Supreme Court of Canada or to the Judicial Committee of the Privy Council:

KING, THE v. CRABBS (p. 293).—Affirmed by Supreme Court of Canada, 10th May, 1934. See (1934), S.C.R. 523.

MCDANIEL v. THE VANCOUVER GENERAL HOSPITAL (p. 304).—Reversed by the Judicial Committee of the Privy Council, 27th July, 1934. See (1934), W.N. 171.

MCEWAN v. COSENS AND HEMSWORTH (p. 142).—Reversed by Supreme Court of Canada, 8th June, 1933. See (1933), 3 D.L.R. 794.

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holders in the plaintiff company. The company owned the furniture and furnishings of the Carlton Hotel and a beer licence. The hotel and the land belonged to Jack and Joe Tonelli. On the 8th of October, 1931, the three Tonellis agreed to sell all the shares in the company to the defendant for $16,500. Seven thousand dollars was paid in cash and the balance was to be paid at $200 per month. The agreement provided that Jack and Joe Tonelli should lease the hotel to the company for five years at $500 per month for 24 months and $550 per month for the balance of the period. One share in the plaintiff company was transferred to the defendant and he was appointed managing director and the agreement further provided that any profits made by the company during the period should belong to the defendant, to be used by him as he saw fit. The defendant carried on the business at his own expense for sixteen months, when owing to his being in default, he was turned out by Joe Tonelli and all rent and cash payments were forfeited. In an action by the plaintiff company for an accounting of all moneys coming into the hands of the defendant as managing director of the company, the plaintiff recovered judgment for $3,416. *Held*, on appeal, reversing the decision of McDonald, J. (McPhillips, J.A. dissenting), that the company is estopped from saying that the profits do not belong to the defendant. It by various acts implemented and affirmed the agreement between the Tonellis and the defendant and cannot in good conscience be heard to say that it is not bound even though without direct contractual relationship. The company was privy to the agreement that any profits made "during the period that Gardiner was managing director should belong to him to be used by him in any manner he saw fit" and it cannot maintain this action. Carlton Hotel Company Limited v. Gardiner. - - - - - - - - - - - - **441**

2.——*Incorporation—Certificate to commence business—Security Frauds Prevention Act—Application—"Person"—Scope of word—Mandamus—B.C. Stats. 1929, Cap. 11, Sec. 40 (3); 1930, Cap. 46, Sec. 4.*] Under the definition of the word "person" in section 2 of the Security Frauds Prevention Act, corporations are excluded from the operation of section 4 of said Act. The King v. Registrar of Companies. - **152**

3.——*In liquidation—Auditors — Duties as to examination of securities—Negligence—Misfeasance—B.C. Stats. 1929, Cap. 11, Sec. 107.*] The defendants were auditors of

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the Blue Band Navigation Company from its incorporation in 1920 until its bankruptcy in September, 1931. One Whittall was the first president of the company and general manager and continued as such until its bankruptcy. The trustee of the company brought action against the defendants for damages for misfeasance in respect to the audit of the books of the company, two audits only being in question, namely, for the fiscal years ending respectively on the 30th of June, 1929, and the 30th of June, 1930. When the defendants were engaged on the audit for the year ending June 30th, 1929, the books shewed that Whittall from time to time withdrew $41,607 from the company, and it appeared at the end of the fiscal year that Whittall was credited with $25,000 and a company known as the Western Trading Syndicate was debited with $25,000, the page containing a memo reading "Transfer as per Whittall's instructions," and the same page shewed the profit and loss account was credited with $12,000 described as "Extraneous" and the Western Trading Syndicate was further debited with $12,000, the result being, under Whittall's instructions, to reduce his debt to the company by $25,000 and to shew the company as being owed $37,000 by the Western Trading Syndicate. On being questioned by the auditor as to the Western Trading Syndicate debt Whittall intimated he did not wish to disclose anything as to the assets of the Western Trading Syndicate or the names of its members, they being matters of a confidential nature, and after further discussion the auditor pointing out the necessity of his having evidence of the collectability of the account, Whittal gave his written guarantee for the amount of the advance, Whittall's financial standing at the time being amply sufficient to cover the debt. The entry in the auditor's balance sheet shewed an item of $37,000 as a debt of the syndicate without any explanation or comment in connection therewith, and in the following December at a meeting of the shareholders it was drawn to the attention of the meeting that the debt was guaranteed by Whittall which was accepted without comment. The $12,000 item was subsequently paid to the company. The plaintiff recovered judgment on the trial for $25,000 on the ground that the entry on the balance sheet of the sum of $37,000 as a debt of the syndicate and as a good asset as such at its face value without any explanation or comment, was under the circumstances seriously misleading to the shareholders and unjustifiable. *Held*, on appeal, reversing

CRIMINAL LAW—*Advocacy of use of force to accomplish governmental, industrial or economic change — Evidence — Charge — Criminal Code, Sec. 98, Subsec. 8.*] On a charge under section 98, subsection 8 of the Criminal Code, the evidence disclosed that accused spoke at several meetings at one of which he said the object of the communist party was to overthrow the capitalist governments and replace them by proletarian controlled governments, and the change could not be made by the ballot box but only by force. At another meeting he said he did not advocate the destruction of property, but when it occurred it was due to the brutality of the police, that the workers would rather take the places over intact, and have them for their own use. Again he said that they would demonstrate for adequate relief from the State and if the State did not give it to them they would take over the blinking State and run it for themselves. On the trial the jury found the accused guilty and he was sentenced to one year's imprisonment. *Held*, on appeal, affirming the decision of MACDONALD, J., that if accused "in any manner" taught or advocated the use of force or "physical injury to person or property or threats of such injury" as a method of securing industrial, economic or governmental changes, an offence was committed. Properly interpreted in their setting with the aid of surrounding facts there is no doubt that the accused taught and advocated the use of force as a means of obtaining the changes referred to in the section. Even indirect language carefully selected in the hope of avoiding a breach of the Act may in their fair interpretation be regarded as an advocacy of force. REX v. EVANS. - - - **223**

2.——*Arrest without warrant—Charge of keeping common bawdy-house—Charge dismissed—Action for false arrest—Criminal Code, Secs. 30, 299, 646, 647 and 648.*] A rooming-house, of which the plaintiff's father was proprietor, had been watched by the police for some time because of the resort of known prostitutes thereto accompanied by men and on a certain night two detectives entered the premises when it was in charge of the plaintiff, looked over the transom into two rooms and in each room saw a man and woman in bed with their clothes off. The doors were not opened when detectives knocked, so they burst open the doors and arrested the occupants. They then arrested the plaintiff without a warrant and took him to the police station, where a charge was laid against him for unlawfully keeping a disorderly house, to wit, a common bawdy-house. The charge was dismissed by the magistrate. In an action for damages for false arrest and imprisonment the plaintiff recovered judgment. *Held*, on appeal, reversing the decision of MACDONALD, J. (MACDONALD, C.J.B.C. and MCQUARRIE, J.A. dissenting), that on the facts in this case the officers could arrest the accused without a warrant under section 648 of the Criminal Code, and assuming the facts did not warrant the conclusion that the offence was committed, the arrest can be justified under section 30 thereof. WHITWORTH v. DUNLOP *et al.* - - **161**

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3.——*Assault with intent to steal—Evidence—Doctor in attendance on accused when under arrest — Whether person in authority—Admissibility of confession—Inducement.*] The accused with a companion attempted to hold up a garage office with revolvers. One of the men in the office grappled with the accused and with the assistance of others who arrived quickly on the scene, beat him up so badly that the police, in answer to a call, after arresting him, took him to a hospital. The doctor, while treating him asked the accused "if he had been hungry that he had to do this: if he was so up against it that he had to do such a thing." Accused said "No, I wouldn't be here if my partner hadn't walked out on me" and he referred to his capture as "the biggest catch of the year." In saying "goodbye" to the doctor he said he would see him perhaps "in ten years' time." The doctor's evidence of the accused's statements was allowed in and accused was convicted on a charge of assault when armed with intent to steal. *Held*, on appeal, affirming the decision of MCDONALD, J., that the appeal should be dismissed. *Per* MACDONALD, J.A.: That in the circumstances the doctor cannot be regarded as a person in authority and his words to the accused cannot be interpreted as an exhortation, admonition, promise or threat amounting to an inducement. The words fairly interpreted would not induce a confession. The doctor's evidence of the confession was therefore admissible. REX v. ROADHOUSE. - - **10**

4.——*Carnally knowing girl between 14 and 16 years of age—Previous illicit connection — Conviction—Appeal—Criminal Code, Sec. 301 (2).*] The appellant was convicted for having carnal knowledge of a girl of

previous chaste character under the age of 16 and above the age of 14 years. The girl at the trial, admitted that she had had illicit connection with the appellant on one previous occasion saying that she was afraid of him and that he said "I would not have a home or anything if I did not give it to him." The complainant's mother was a widow and for many years lived with the accused, not being married to him. The girl lived with them. The accused stood *in loco parentis* to the girl. The home was at a remote point 24 miles north of Fort St. John in the Cariboo. *Held*, on appeal, affirming the decision of ROBERTSON, Co. J. (MACDONALD, C.J.B.C. and MCPHILLIPS, J.A. dissenting), that in view of the relationship and the facts referred to it was open to the trial judge to find the girl to be "of previous chaste character" within the meaning of section 301 (2) of the Criminal Code. REX v. STINSON. - - - - **92**

5.——*Club — Automatic slot-machine — Common gaming-house — Criminal Code, 226 and 229.*] The Club of the Loyal Order of Moose, duly incorporated with a membership of 1,100 and provided with all the facilities of a social club, was entered by three detectives under a search warrant and one of them played two slot-machines which they found on the premises. He played the machines five times, paying one nickel for each play and received back in all seven nickels. They then took the machines away. The accused was acting for the secretary in his absence and was in charge of the club. The secretary had the keys to the slot-machines and took the proceeds therefrom from time to time on behalf of the club. Accused was convicted of keeping a common gaming-house. *Held*, on appeal, that playing the slot-machines is a game of chance, the proceeds therefrom being taken for the benefit of the club, and the accused being in charge was properly found guilty. REX v. THOMAS. - - - - - - **76**

6.——*Dentistry Act—Incorporated company practising dentistry — Assisting corporation in so practising—Interpretation—R.S.B.C. 1924, Cap. 66, Sec. 71.*] The accused is a member of the College of Dental Surgeons of British Columbia, in the employ of one Doctor Coultas, a shareholder in the School of Mechanical Dentistry Limited, with dental office adjoining said School of Dentistry with door between. Three customers went to the School of Mechanical Dentistry to purchase plates of artificial teeth. When entering its place of business

they were advised by an employee to have an impression of the gums taken, and for this purpose the accused was called from the adjoining office. For his services in taking the impressions a charge of $2.50 each was made. The charges for the plates and the service of the dentist were paid to the School of Mechanical Dentistry, but the receipts for the $2.50 were signed by the accused. Accused was convicted on a charge of unlawfully assisting the School of Mechanical Dentistry Limited in carrying on the practice of the profession of dentistry contrary to section 71 of the Dentistry Act. *Held*, on appeal, affirming the decision of deputy police magistrate *McQueen*, that the School of Mechanical Dentistry Limited did, with the assistance and help of the accused, commit an act of the practice of dentistry, and as a participant in the operations of this company the accused brought himself within the provisions of said section. REX v. SIMMONS. - - - - - **398**

7.——*Incest—Evidence to prove previous similar acts—Corroboration—Criminal Code, Secs. 204 and 1014 (a).*] On a charge of incest on a certain date evidence of conduct at an earlier date tending to prove guilty relations and that a sexual passion existed is admissible. Corroborative evidence implicating the accused in some material particulars is not necessary unless the complainant is an accomplice. REX v. PEGELO. - **146**

8.——*In possession of morphine—Conviction—Habeas corpus with certiorari in aid—Application dismissed on preliminary objection—Costs—Can. Stats. 1929, Cap. 49, Sec. 4 (d).*] The accused were convicted of unlawfully having morphine in their possession, contrary to The Opium and Narcotic Drug Act, 1929. An application for a writ of *habeas corpus* with *certiorari* in aid was dismissed on the preliminary objection that the affidavit of the applicant did not "verify" the copy of the warrant of commitment. It was held that the Crown was entitled to the costs of the application. REX v. BERU. REX v. DITTO. REX v. SOHAN SINGH. - - - - - - - **286**

9.——*Libel — Private prosecution—Jury disagree—Subsequent entry of nolle prosequi by Attorney-General — Discharge on nolle prosequi a "judgment for defendant"—Liability of private prosecution for costs—Criminal Code, Secs. 956 and 1045.*] An accused was tried on a charge of criminal libel upon an indictment at the instance of a private prosecutor. The jury having disagreed a *nolle prosequi* was subsequently

CRIMINAL LAW—*Continued.*

entered by the Attorney-General and thereupon by order of the Court the accused was discharged. *Held*, that the discharge of the accused ordered by the Court following a stay constituted a "judgment" within the meaning of section 1045 of the Criminal Code and he is entitled to recover costs from the private prosecutor, including the costs of the trial in which the jury disagreed. YOUNG v. UCHIYAMA. - - - - **55**

10.——*Minimum Wage Act—Order of Minimum Wage Board—Maximum hours of work fixed—Employment for longer hours—Mens rea—R.S.B.C. 1924, Cap. 173, Secs. 8 (2) and 13.*] L. was employed to take charge of the kitchen in a restaurant, her duties including the buying of food, preparing the menus and culinary arrangements. Her hours of work were not fixed at the time of her employment, and there was no stipulation as to when she was to come to work or when she was to go, the hours of work within which she was to perform her duties being left to her own discretion. No record was kept by the employer of her hours of work nor was any authority exercised over her as regards her hours of work. In order to perform her duties L. found it necessary to work and did actually work for longer hours than the maximum number of hours fixed by the order of the Minimum Wage Board governing housekeeping occupation. The employer was convicted for an infraction of the Minimum Wage Act for employing L. for longer hours than the maximum fixed by the Minimum Wage Board. On appeal by way of case stated, mainly on the ground that the Crown did not prove that the appellant knew that L. worked for longer hours than the order allowed:—*Held*, that the offence charged comes under that portion of section 8 (2) of the Minimum Wage Act which provides "It shall be unlawful for any employer. . . to require or to permit employees to work for longer hours . . . contrary to the terms specified in the order." The mere working for longer hours is not made an offence, the offence being the requiring or permitting by the employer that the employees work for longer hours. This language can have no other meaning than that the employer knowingly requires or permits, etc. The doctrine of *mens rea* applies and the appeal should be allowed. REX v. BREARLEY. - - **458**

11.——*Trade union—Theatre—Emloyees—Wage dispute—Strike—Besetting and watching wrongfully and without lawful authority—Criminal Code, Sec. 501 (f)—R.S.B.C. 1924, Cap. 258, Secs. 2 and 3.*] By

CRIMINAL LAW—*Continued.*

section 501 (*f*) of the Criminal Code everyone is guilty of an offence who "wrongfully and without lawful authority with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain . . . besets or watches the house or other place where such other person resides or works or carries on business or happens to be." The accused, who were members of the Projectionists Union, affiliated with the New Westminster and Vancouver Trades and Labour Council, were employees on the technical staff of the Edison Theatre in New Westminster. Having a dispute with the threatre over the scale of wages, through their union they notified the theatre that they would stop work on a certain date unless their demands were complied with. The theatre then employed other licensed projectionists who were not members of said union. Later both accused appeared in front of the theatre at about 1.20 in the afternoon wearing yellow slickers on the backs of which the following words were printed: "The Edison Theatre does not employ Union Picture Projectionists affiliated with the New Westminster and Vancouver Trades and Labour Council" and they walked up and down in front of the theatre for about one hour when they were arrested. Evidence was adduced that the theatre suffered loss of business by the parade. Both accused were convicted by the magistrate. *Held*, on appeal, on an equal division of the Court, that the conviction by magistrate *Edmonds* be affirmed. *Per* MACDONALD, C.J.B.C. and MCPHILLIPS, J.A.: That the appellants beset and watched the theatre and whether it was done peacefully or not makes no difference. The offence falls within the very language of the section, and as they did these things without lawful authority they are guilty of the crime aimed at by the section. *Per* MARTIN, J.A.: That the acts of the appellants were within the limits of the British Columbia Trade-unions Act and therefore were done with the sanction of a "lawful authority" and this conviction should be quashed. *Per* MACDONALD, J.A.: That as the "watching and besetting" was carried on without creating a nuisance and without violation or intimidation, without considering the effect, if any, of the provisions of the Trade-unions Act, the appellants' acts were not "wrongful" at common law nor committed "without lawful authority" within the meaning of section 501 (*f*) of the Criminal Code, and the appeal should therefore be

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nomination-papers to the returning officer and the provisions of sections 53 (2) and 65 of the Provincial Elections Act were complied with. Shortly before the time fixed for nominations the applicant Hartley and one Smith came together to the place fixed for nominations and delivered their nomination-papers to the returning officer who first checked over Smith's papers, took the declaration under section 65 of the Act and gave Smith a receipt pursuant to section 53 (2) and an acknowledgment pursuant to section 65. The returning officer then proceeded to examine Hartley's papers, but had not finished at 12 o'clock, when pursuant to section 51 of the Act he read the proclamation, the writ of election and the three nomination-papers which he had received and for which he had given receipts, and then proceeded with the examination of Hartley's papers. After certain objections thereto were corrected he took Hartley's declaration pursuant to said section 65, accepted the nomination-paper and gave Hartley a receipt pursuant to section 53 (2) and an acknowledgment pursuant to section 65, and then read Hartley's nomination-paper pursuant to section 51. The returning officer then commenced to check over the four nomination-papers, and just before 1 o'clock one of the candidates, Murray, handed him written objections to Hartley's nomination-paper. The returning officer disallowed all the objections except one, namely, that four of the assentors on Hartley's nomination-paper were also on Smith's nomination-paper contrary to section 52 (2) of the Act. Smith's nomination-paper having been received first the returning officer declared Hartley's nomination-paper was invalid. On an application by Hartley for a writ of *mandamus* to restore his name as a candidate on the grounds (1) That after giving the receipt provided for by section 53 (2) the returning officer could no longer enquire into the validity of the nomination-papers, and (2) the returning officer should have taken evidence or enquired so as to ascertain when the four assenting voters actually signed Hartley's and Smith's nomination-papers. *Held*, that notwithstanding the receipt, a candidate's nomination-paper may be reconsidered after nominations are closed. It is his duty to see that the nomination-paper is in order and if he fails in this it may be rejected. *Held*, further, that the returning officer was right in holding that the four assenting voters, being already on Smith's nomination-paper, could not be considered as assentors on Hartley's nomination-paper, and as without these four

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assenting voters Hartley would only have nine assenting voters, while the Act requires ten, his nomination-paper was not valid. *In re* PROVINCIAL ELECTIONS ACT. *In re* HARTLEY. - - - - - - **15**

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3.——*Doctor in attendance on accused when under arrest — Whether person in authority—Admissibility of confession—Inducement.* - - - - - - **10**
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2.——*Judgment against trustee of estate personally—Mortgage to estate with interest overdue — Whether payable to the trustee personally—Issue as to.*] The plaintiff Hall obtained judgment against *A. D. Macintyre*, sole trustee of the estate of Lewis Campbell, deceased, for $632, and costs for work and labour performed on the Campbell estate. Hall, as judgment creditor, then obtained a garnishee order for $960 against Pastore A. Sartorio, administratrix of the estate of Herman Beckman, deceased. About three years previously Pastore A. Sartorio, as administratrix of the Beckman estate, gave a mortgage to the Campbell estate upon which $960 is now overdue as interest. Upon the application of the judgment creditor an issue was directed to determine the liability, if any, of the garnishee to the defendant. Upon the trial of the issue it was ordered that the garnishee do pay to the judgment creditor $960. *Held*, affirming the decision of SWANSON, Co. J. (MARTIN and MACDONALD, JJ.A. dissenting), that the appeal should be dismissed. *Per* MACDONALD, C.J.B.C. and MCQUARRIE, J.A.: That the trustee is personally liable to the plaintiff Hall, and in like manner the mortgage money is payable to the trustee personally by the garnishee. The words in the judgment "trustee of the Campbell estate" are words of description only, and the money in fact is payable to the judgment debtor. The judgment should therefore stand in favour of the plaintiff as against the garnishee. *Per* MCPHILLIPS, J.A.: *A. D. Macintyre* is sued in his representative capacity as sole trustee of the Campbell estate and judgment has been given against him in his representative capacity. The mortgage debt of the Beckman estate, here attacked, is owing and payable to *A. D. Macintyre* in his representative capacity. Judgment was therefore properly given in favour of the plaintiff as against the garnishee. HALL v. MACINTYRE: SARTORIO, GARNISHEE. - - - - - **306**

HUSBAND AND WIFE — *Alimony — Order for — Means of husband to pay—Right of examination as to—R.S.B.C. 1924, Cap. 51, Sec. 58—Divorce rule 79 (a).*] An application under section 58 of the Supreme Court Act, for an order that a husband, against whom the wife had obtained an order for payment of alimony, do attend for examination on oath as to his means of making payment was dismissed. BARBOUR v. BARBOUR. - - - - - - - **321**

ILLEGAL DISTRESS — *Damages — Chattel mortgage — Fixtures — Machinery—Injunction — Mortgagors' and Purchasers' Relief Act, 1932—R.S.B.C. 1924, Cap. 22, Sec. 4—B.C. Stats. 1932, Cap. 35, Sec. 4.*] In 1927 Sam Sick Hong erected a laundry on a premises he owned in Vancouver, and during construction installed certain laundry machinery. He then borrowed $3,500 from one Dawson and gave as security two mortgages, one on the real estate, the other a chattel mortgage on the chattels and fixtures, each expressed to be collateral to the other and to secure the same advance. In April, 1933, Dawson assigned the chattel mortgage to Mah Pon when $2,453.88 was owing. On the 6th of May following, bailiffs under instructions from Mah Pon seized and took possession of all the effects and machinery mentioned in the chattel mortgage, including the boiler, steam-mangles, washers, extractors, and electric motors, to recover said $2,453.88, and remained in possession for six weeks. Mah Pon did not obtain leave under the Mortgagors' and Purchasers' Relief Act to take proceedings. In an action for damages and for illegal seizure and an injunction to restrain a sale until the trial, it was held that the chattel mortgage in question is one affecting lands, so as to fall within the provisions of the Mortgagors' and Purchasers' Relief Act, 1932, and as no order was obtained by the defendant under said Act the plaintiff was entitled to an

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would be otherwise prejudiced in his defence. *Held*, that a stay should be granted in a case such as this where the identical facts and the identical persons are involved in both proceedings and where the defendant has done nothing to delay or frustrate the criminal proceedings. ILLINGWORTH v. COYLE. - - - - - - - **81**

3.——*Contributory negligence — Driving with light out—Duty of police constable—Motor-cycle—Duty to keep car under control.*] The defendant, a police constable, was standing 65 feet north of Robson Street on Burrard Street (a wide street) in Vancouver at about 5.30 in the afternoon. The defendant on a motor-cycle, going south, was waiting to cross the intersection with three rows of cars on the north side of Robson Street on Burrard Street, he having the third position in the middle row. There was an automatic stop signal at the intersection, and on the green light appearing the cars started across. The front car in the middle row had one light out, and when it came opposite to where the policeman was standing he stepped out on to the street and signalled the car to stop which it did. The car behind it stopped abruptly, but the plaintiff going at about 15 miles an hour was too close to the second car, and in order to avoid a collision he swerved to the left, but in doing so he swiped the left rear fender of the car in front, his right leg being caught between the motor-cycle and the fender and badly injured. The jury found the policeman was negligent in stepping out on the street instead of blowing a whistle and signalling the car to pull to the curb, and that the plaintiff was negligent in being too close to the car ahead and in the wrong position to see signals of the driver ahead. The degree of fault was found at defendant 60 per cent. and plaintiff 40 per cent. *Held*, on appeal, reversing the decision of MORRISON, C.J.S.C., that there was no obligation either in the regulations or as a duty for the policeman to blow a whistle. To travel without both head-lights lit is a danger to others on the street and the policeman was right in stopping the traffic as he had a right to assume the other cars would be kept under control and meet traffic regulations. The plaintiff not keeping the motor-cycle under control was solely responsible. DANGERFIELD v. SMITH. - **125**

4.——*Contributory — Steamboat — Discharge of passenger at floating wharf—Injury to passenger jumping from boat—Damages.*] The defendant's small steamer "Scenic" approached a floating wharf at Frame's Landing in Burrard Inlet. The plaintiff was the only passenger to get off. When the boat reached the float the mate jumped off, his right hand holding the guard of the boat and with his left hand he was about to take down the step from the deck when the plaintiff, who was behind him, jumped to the float about two and one-half feet down. Her right foot doubled under her and was sprained. She stated the captain told her to jump, but this is denied by both captain and mate. When she jumped the mate turned and said "What did you do that for?" to which she did not reply. He then asked her if she was hurt and she replied she was all right. In an action for damages the jury answered questions finding that the defendant's negligence was "Lack of proper care and warning in preventing plaintiff from disembarking in the proper manner" and that the plaintiff's negligence was "Over-anxiety to disembark." The proportion of fault was decided, plaintiff one-quarter, the defendant three-quarters. *Held*, affirming the decision of MACDONALD, J., on an equal division of the Court, that the appeal should be dismissed. *Per* MARTIN and MACDONALD, JJ.A.: That there was no evidence to support the finding that the defendant company was negligent in "lack of proper care and warning in preventing plaintiff from disembarking in the proper manner." Negligence never in fact arose because the plaintiff prematurely jumped from the deck without giving the defendant any opportunity to warn or prevent her from so doing, and the appeal should be allowed. *Per* MCPHILLIPS and MCQUARRIE, JJ.A.: That the verdict of the jury is complete in form, the essential findings in no way vague, and judgment was properly entered for the plaintiff. BONIFACE v. HARBOUR NAVIGATION COMPANY LIMITED. **136**

5.——*Damages—Automobiles — Collision at intersection—Right of way—Priority of entry on intersection—R.S.B.C. 1924, Cap. 85.*] The plaintiff's daughter, with the plaintiff as a passenger, drove her Ford coupe south on Blenheim Street in Vancouver on the afternoon of October 1st, 1932. She had nearly crossed the intersection of 33rd Avenue when the rear right side of her car was struck by an Oldsmobile car coming from the west on 33rd Avenue driven by the defendant Lawson and owned by the defendant Givins who was in the car. The Ford car was shoved to the south-east corner of the intersection where it fell over the curb. Both occupants fell out, the plaintiff falling clear of the car but the car fell on the daughter and she was killed. In an action

for negligence the jury found that the defendant was solely responsible for the accident and assessed special damages at $3,129.05, general damages at $2,000 and damages for the death of the daughter at $3,000. Judgment was entered accordingly. *Held*, on appeal, affirming the decision of MORRISON, C.J.S.C., that the Court would not be justified in disturbing the verdict. *Per* MACDONALD, J.A.: The defendants were some distance from the intersection when the deceased "reasonably and substantially" occupied it and had a right to cross in front of them. The driver at the right must drive at such a reasonable speed and have his car under such control in approaching an intersection that when he perceives it is properly occupied by another, he can stop, or at least reduce his speed to enable the other to cross safely. It was because of inability through excessive speed to do this that the accident occurred. REED v. LAWSON AND GIVINS. - - - - - - - - - - **103**

6.——*Damages—Farm labour—Knee injured when carrying bale of hay—Hay-hooks not provided—Effect of—"Industry"—Definition—Workmen's Compensation Act, Part II.—R.S.B.C. 1924, Cap. 278.*] The plaintiff, a farm hand, while engaged in carrying bales of hay into the defendant's barn and piling them in tiers, slipped while climbing from tier to tier and falling injured his knee. In an action for damages for negligence he claimed his vision was obscured by being compelled to carry the bale in front of him and that the defendant should have provided hay-hooks, as by carrying bales at one side with a hay-hook he could have seen where he was stepping. *Held*, that the defendant was negligent in not supplying hay-hooks, but as it appears from the evidence that he could see where he was going quite as well without a hay-hook as with one, his action fails. *Held*, further, that farming is an "industry" within the meaning of section 2 (1) of the Workmen's Compensation Act. The defendant company might, therefore, have brought itself within the provisions of Part I. thereof, but not having done so the plaintiff, if he had made out a case, would have been able to succeed under Part II. of the Act and would not have had to meet the defences of "*Volenti non fit injuria*" and "common employment." HINDLEY v. BURNS. - - - - - **73**

7.——*Damages—Independent contractors—Obstruction of sidewalk in carrying on work—Liability.*] The defendant company operating a moving-picture theatre on the east side of Granville Street in Vancouver

contracted with A. V. Lewis Ltd., to remove the old paint and repaint the ceiling of a canopy projecting over the sidewalk in front of the vestibule. A. V. Lewis Ltd., employed one Scoble to do the work and left it entirely to him to carry out. When carrying out the contract ladders and scaffolding blocked the sidewalk for substantially the whole of its width. On the morning of 27th February, 1933, when the work was in progress snow fell and drifted on to the terrazzo floor in the vestibule of the theatre. At about 11 o'clock in the forenoon the plaintiff walking northerly along Granville Street found the sidewalk blocked in front of the theatre and on turning to his right into the vestibule in order to pass, he lost his footing on the vestibule floor and falling fractured his thigh. *Held*, that under the contract the defendant retained no power of controlling the work. Scoble in charge of the work was a servant of A. V. Lewis Ltd., who were independent contractors and the action was dismissed. BALCOVSKE v. STANLEY THEATRE COMPANY LIMITED. - - - - - - - **433**

8.——*Damages—Notice within sixty days—Reasonable excuse for non-compliance—Prejudice to defendant—B.C. Stats. 1921 (Second Session), Cap. 55, Sec. 320—B.C. Stats. 1928, Cap. 58, Sec. 38.*] Section 320 of the Vancouver Incorporation Act (as amended in 1928) provides, *inter alia*, as follows: "(1) Every public street, road, . . . in the city shall, save as aforesaid, be kept in reasonable repair by the city. (2) The city shall not be liable in any action for damages arising under subsection (1) hereof, unless notice in writing, setting forth the time, place, and manner in which such damage has been sustained, shall be left and filed with the city clerk within sixty (60) days from and after the date on which such damage was first sustained; . . . The want or insufficiency of the notice required by this subsection shall not be a bar to the maintenance of any action if the Court . . . is of opinion that there was reasonable excuse for such want or insufficiency, and that the defendant has not been prejudiced in its defence." The plaintiff fell on the street and broke her leg in two places. In an action against the city to recover damages for injuries sustained by reason of non-repair of a highway, the notice required under the above section was not given, but the plaintiff claimed reasonable excuse for want of notice in that her pain, suffering and worry were so great that she had no opportunity of thinking of send-

PRACTICE—*Continued.*

other defendants, namely M. and N. to break certain contracts. The defendants M. and N. were not charged as parties to the conspiracy but only with breach of contract. On the examination of N. for discovery he admitted the breach but refused to answer questions as to his reasons for breaking the contract. At the instance of the plaintiffs an order was made that N. must answer the questions. *Held*, on appeal, reversing the decision of MCDONALD, J., that discovery is limited to that which is relevant to the matters in question between the applicant and the party examined, and does not extend to discovery relevant to matters in question between the applicant and other parties to the action. WHIELDON *et al.* v. MORRISON *et al.* - - - - **492**

10.——*Examination for discovery—Scope of—Breach of contract—Disclosure of reasons for—Right to compel.*] In an action based upon an allegation that the defendants Morrison and Norrish, being under contract with the plaintiffs, broke such contract by reason of inducements by threats or otherwise of the other defendants, the defendants Morrison and Norrish on examination for discovery admitted the breach, but when asked the reason for breach, declined to answer. Later in the examination they gave as a reason that the plaintiffs had not carried out their part of the contract. This reason was not pleaded in the defence. *Held*, that the defendants must answer the questions put to them, if for no other reason than to test their credibility, or to put it in another way, to press them by way of cross-examination with a view to ascertaining whether or not the reasons which they have given for the breach are true. *Hopper* v. *Dunsmuir* (1903), 10 B.C. 23, applied. WHIELDON *et al.* v. FRASER VALLEY MILK PRODUCERS ASSOCIATION *et al.* - - - **317**

11.——*Examination for discovery—Amendment of pleadings—Right to second examination—Limitation of.*] When pleadings have been amended raising new issues after examination for discovery, an order may be made allowing a second examination of the same party limited to the matters raised in the amendment. FLETCHER, TURNER & HANBURY LIMITED v. COLQUHOUN, DEWOLF & COMPANY LIMITED. - **322**

12.——*Pleading—Action for breach of contract—Amendment of statement of claim—Substituting one plaintiff for another as party to contract—Costs.*] In an action for breach of contract the examination of the

PRACTICE—*Continued.*

defendants for discovery disclosed that the contract in question was entered into not by the plaintiff J. as set out in the statement of claim, but by the plaintiff M. The plaintiffs' application to amend the statement of claim by substituting M.'s name for J.'s name wherever it appeared in the statement of claim was granted with costs to the defendant in any event. JOHNSON *et al.* v. NORTHERN PACKING COMPANY LIMITED. - - - - - - **407**

13.——*Pleadings—No reasonable cause of action—Striking out statement of claim—Inherent jurisdiction of Court—Frivolous and vexatious—Rule 284.*] The defendant company, carrying on business in Vancouver, entered into an agreement with the plaintiff who resides in St. Louis, Missouri, U.S.A., to sell him 325 cases of merchantable Bourbon whisky for $13,000. The whisky was delivered to the plaintiff who paid the defendant company $13,000. The plaintiff later found the whisky was bad and unmerchantable. He then repudiated the purchase, notified the defendant, and the defendant took back delivery of the goods. The plaintiff brought action to recover the purchase price paid. On an application by the defendant that the statement of claim be struck out and that the action be dismissed on the grounds that the statement of claim disclosed no reasonable cause of action and that it is based upon an alleged contract not valid in law, the affidavit of one Sokol was allowed to be read in support of the application and an order was made that the defendant be at liberty to cross-examine Sokol on his affidavit, that all proceedings in the action be stayed until this application be disposed of and that the application stand over for further hearing. *Held*, on appeal, reversing the order of MCDONALD, J. (MCQUARRIE, J.A. dissenting), that the learned judge must be justified on the evidence before him, when he admitted the affidavit, in saying that the action could not possibly succeed, but it is admitted that the evidence does not cover all the factors that would enable him to come to that conclusion. He should not have made the order for admission of the affidavit nor should he have granted a stay. The application to strike out the pleading as disclosing no reasonable cause of action should be dismissed as there is no doubt that it does disclose a cause of action. EASTMAN v. PACIFIC FORWARDING COMPANY LIMITED. - - - - - - **197**

14.——*Statement of claim—Defendants public officials—Sued in official capacity—*